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Bipartisan Bail Reform: Three Pillars of Pretrial Justice

"The first measure taken by the magistrate is to exact security from the defendant, or, in case of refusal, to incarcerate him. It is evident that a legislation of this kind is hostile to the poor man, and favorable only to the rich. The explanation of the phenomenon is to be found in England; the laws of which I speak are English, and the Americans have retained them, however repugnant they may be to the tenor of their legislation and the mass of their ideas."

Alexis de Toqueville, 1835

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Acknowledgments

As always, I am grateful to far more people than I can list, including the numerous, invaluable persons to whom I cite throughout the document. An associated bibliography lists roughly 600-700 papers, which I either used or which otherwise influenced me in some way, and I thank each of those authors as well. There are also numerous people who simply answered my often arcane questions over the last year and a half (such as Anna Hall, Erin George, Levi Gonzalez (and others at the Bail Project), Kellen Funk, Sandy Mayson, Spurgeon Kennedy, Amber Widgery, Virginia Bersch, Matt Alsdorf, Alison Shames, Judge Martin Cronin, Spike Bradford (and all others at APPR), Bo Zeerip, Wendy Venvertloh, Aaron Johnson, Joel Bishop, Cris Moore, Alex Tsarkov, Truman Morrison, Salil Dudani, Carson White, Phil Telfeyan, Brandon Buskey, Malia Brink, Sharlyn Grace, Sharone Mitchell, Rebecca Wallace, Thomas Eberly, Aimee Wickman, Matthew DeMichele, Kristin Bechtel (and others at RTI)), and so I thank them for the answers, which often formed at least a part of the overall analysis. Forgive me if I have left anyone out. In particular, though, I would like to thank pretrial expert Ken Rose for his consistent insight, Dr. Michael R. Jones (Pinnacle Justice Consulting), who is and has been the brainchild behind everything I have ever written, and Claire Brooker (independent pretrial consultant), who, once again, kept me rooted in pretrial reality and objective truth.

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The paper is dedicated to Lori Eville (1963-2021).

Finally, this topic is complex enough that reasonable persons can (and do) disagree on many aspects, but each of the people listed above helped me enormously in coming to my own conclusions about the various issues. Nevertheless, substantive conclusions and any errors are entirely my own.

(A Very Brief) Executive Summary

Someone once asked me what I would do if I were engaged to help a jurisdiction attempt to achieve "pretrial justice." My answer was fairly simple. First, I would get everyone together in a group. Second, I would educate that group in bail and "no bail," while specifically clearing up confusion over various topics, such as using money for public safety, the nature of "true, historic bail reform" versus mere "pretrial improvements," and risk and prediction (with and without an assessment tool). And third, no matter what other pretrial improvements that jurisdiction might decide to implement after all of the education, I would specifically help it to design a system of intentional release and detention to replace the random, unfair, and unwise system of money-based release and detention for all of the reasons spelled out in this and other papers. I have called those three steps "three pillars" of pretrial justice, simply because they are fundamental to achieving pretrial justice, and the rest of the paper after the introduction (which I urge you to read in addition to this summary) analyzes and expands on these pillars.

Under pillar number one, collaboration, I have expanded both the number and types of groups typically involved in efforts to achieve pretrial justice as well as the expected pretrial justice roles for those groups, going far beyond most current lists of best practices. Under pillar number two, education, I have updated the six main subject matter areas I developed in the paper, *Fundamentals of Bail,* again using the law, the pretrial research, and various bail-related events to cover big changes over the last ten years. And finally, under pillar number three, crafting an intentional release and detain system, I go into some detail on the four main elements of such systems (moneyless, intentionality, release, and detention), explain the five major variables jurisdictions must balance when engaging in the project, and point out the two major mistakes that states are currently making (and have already made) when attempting to craft intentional systems. A single appendix explains what I think may be one of the most overlooked explanations for why America still clings to the traditional money-bail system, which I call "the excessive bail loophole." Examining that loophole in more detail also helps explain

why – in addition to money simply being arbitrary – the traditional money-bail system that allows money-based detention is destined to be replaced.

In the footnotes, I have included explanatory commentary, but I have also tried to curate and list the most important sources that I could find covering any relevant topic. When I post this document online, I will likely post my bibliography along with a document I wrote that articulates the "lists of pretrial improvements" advanced by various people and groups over the last 100 years (in case you miss the traditional "checklists" that this paper mostly avoids, and which are still useful and perhaps more interesting when considered in progression). Because certain topics – such as using money for public safety or various misapprehensions in dealing with risk and prediction – come up multiple times for a variety of reasons throughout the paper, the reader should follow the references to earlier and later footnotes with the realization that somewhere in the paper, I explain the topic in its greatest detail.

Note To Readers

On September 16, 2025, the President of the Professional Bail Agents of the United States sent a "news update" to its members titled, "URGENT: FROM THE OFFICE OF THE PRESIDENT," in which he wrote: "The American Bail Coalition has asked all of us to gather real-world examples from each and every state showing what judges are doing with release on recognizance, signature bonds, unsecured bonds and other forms of 'cashless' or minimal bonds. These examples are critical for us to present to lawmakers nationwide in response to the President's Executive Order directing federal action to end 'cashless bail.'"[1] More specifically, he wrote, he needed examples by September 18 of recent cases showing release on PR/OR Enville signature bonds, statutes, court rules, and orders concerning the issue, and outcome data so that lawmakers can hear from the "people who see these failures firsthand." Not just examples – failures.[2] The cases were to be sent to PBUS or the American Bail Coalition, the lobbying arm for the bail insurance companies.

The executive order mentioned in the request was referring to a late-August, 2025, United States Presidential executive order on "cashless bail." Nevertheless, the topic was already in the President's ear in July and early August of that year, when he either posted or spoke cryptically about the topic,[3] while making

[1] Found at https://www.multibriefs.com/briefs/pbus/PBUS091625.php, accessed on October 14, 2025.

[2] Calling the requested data "failures" necessarily means that he is asking only for examples of persons allowed out of jail on the various relevant forms of release (but certainly not surety bonds) and who have somehow failed, although the industry also presents cases in which persons facing serious charges are also released on PR bonds but have not failed in an clumsy attempt to shock the public into believing that a money bond would somehow have been more appropriate. These latter cases stand in opposition to a large literature showing that the seriousness of the underlying crime is a bad proxy for risk. The former cases are automatically aberrational given the national data showing the vast majority of persons accused of crimes succeed while on pretrial release, with an extraordinarily low number of persons charged with a new violent crime. In an odd end to the request, the PBUS President said that collecting the data will "make sure the lawmakers see the full picture and protect public safety." Unfortunately for the bail industry, the "full picture" for legislators must include the fact that in virtually every state with a bail industry presence, money on a bail bond cannot be forfeited for purposes of public safety (it may only be forfeited for failure to appear for court), thus making the use of money to protect the public irrational. As the reader will soon see, this has not stopped bail bondsmen from testifying under oath that money bail protects the public.

[3] According to AP News, the President's post on July 25 stated: "Crime in American Cities started to significantly rise when they went to CASHLESS BAIL. The WORST criminals are flooding our streets and endangering even our great

similarly conclusory statements alluding to "out of control" crime in various American cities. Soon after, however, a man with a long history of crimes (mostly misdemeanors but some serious crimes in 2014) and mental health issues (primarily schizophrenia), and who had been released on recognizance when charged with misuse of the 911 system, allegedly killed Iryna Zarutska, a Ukrainian refugee, while riding a light-rail train in Charlotte, North Carolina.[4] The crime became international news and, as all horrific crimes do, provided the fuel needed to spread a now increasingly political fire. Thus, on August 25, the President signed "Taking Steps to End Cashless Bail to Protect Americans," an executive order tying money to public safety and saying that "cashless" bail not only permits crime but also *encourages* persons to commit crimes.[5] It ordered the Attorney General to provide a list of jurisdictions that have "substantially eliminated cash bail as a potential condition of pretrial release" and to suspend or terminate federal funds, including grants or contracts currently provided to "cashless bail jurisdictions."[6]

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law enforcement officers. It is a complete disaster, and must be ended, IMMEDIATELY!" *See* at https://apnews.com/article/fact-check-trump-cashless-bail-crime-564a726523006acf00807c98338e1ce5?utm_source=chatgpt.com. AP was one of the first to quickly write a fact check, saying that "experts say it is incorrect to claim that there is an adverse connection" between "cashless" bail and crime.

[4] As an attorney interested in the presumption of innocence, I always use the term "alleged" when the crime has only been charged no matter how seemingly strong the evidence. Various news articles said that the accused was calling 911 to complain that some sort of material was controlling his brain. *See, e.g.,* Taylor Fishman, *Deadly Lightrail Stabbing Suspect Had 14 Prior Arrests, Diagnosed with Schizophrenia,* found at https://abc6onyourside.com/news/nation-world/who-is-decarlos-brown-jr-the-man-accused-of-murdering-ukrainian-refugee-lightrail-charlotte-north-carolina-career-criminal-arrested-first-degree-murder-armed-robbery.

[5] *See* Executive Order 14342, found at https://www.presidency.ucsb.edu/documents/executive-order-14342-taking-steps-end-cashless-bail-protect-americans?utm_source=chatgpt.com. Beyond the incorrect notions that (1) money somehow affects public safety at bail (unless set unlawfully) and (2) that the pending charge or criminal history can, without more, "demonstrate a clear ongoing risk to society," the wording of the executive order also shows some measure of ignorance about even more fundamental notions of bail in America. For example, it appears to equate so-called "cashless bail" (a sloppy term on its own) with "release without bail," even though the Department of Justice correctly defines "bail" as "a process of release" whether or not money is used as a condition. Such a definition makes being released without bail a logical impossibility. The executive order says that persons released "without bail" – again, incorrectly defining "bail" as money – are "encouraged" to further endanger persons "because they know our laws will not be enforced," a statement with so many flawed assumptions about both bail and the criminal process as to make it both false and virtually incoherent.

[6] Such an order would likely be unlawful for many reasons, but most simply because the federal government may not order a state to do something that is, itself, unlawful, and we have numerous court cases declaring "cash bail" to be unlawful when it results in detention (whether on purpose or not). The wording again shows sloppiness by not clearly defining "cash," meaning that a state could, theoretically, completely eliminate commercial surety bonds and not limit the use of "cash" at all and not suffer any consequences. Because a list of jurisdictions that have

North Carolina's reaction to the transit crime was more extreme, with officials blaming (and pledging to act against) a wide array of targets beyond cashless bail, including the magistrate who released the alleged murderer, magistrates generally, the "left," the previous Governor, a previous task force looking into racial equity in criminal justice,[7] all "soft on crime" policies, various "problematic" grants supplied to Charlotte and Mecklenburg County, and the current state of the death penalty.[8]

Soon after, a pairing of politics and ignorance was on full display when the federal House Judiciary Subcommittee on Oversight held a hearing titled, "Victims of Violent Crime," which was conducted in North Carolina on September 29, 2025.[9] The political tone of the event greatly overshadowed the testimony of family members of actual crime victims, who likely did not know that their strong, emotional testimony would simply be one part of a hearing substantively

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"substantially eliminated cash bail" would be highly subjective and nuanced, I presume that the Administration would rely on the opinion of the bail industry, raising other questions. For example, if a state added various charges to its constitutional "no bail" provision, would that "substantially eliminate" cash as a release condition, given that the amendment could, in all cases, avoid use of conditions altogether? The resulting list, when it is provided, will likely show themes indicating industry preference, focusing on states that have, in the past, been used to argue that cash bail – and most certainly "surety bail" – is unfair, unsafe, and arbitrary.

[7] In a fairly astonishing statement, Senate President Phil Berger said, "We can start by ensuring that Governor Stein and other members of the executive branch cannot establish any future task forces like the one [pervious Governor] Roy Cooper created that advanced weak-on-crime policies that kept Iryna's murderer on the streets." *See* Clayton Henkel, *NC Republican Leaders Pledge to Address "Soft on Crime Policies" After Charlotte Transit Stabbing* (Sept. 11, 2025), found at https://ncnewsline.com/2025/09/11/nc-republican-leaders-pledge-to-address-soft-on-crime-policies-after-charlotte-transit-stabbing/?utm_source=chatgpt.com. Of course, typical task forces in criminal justice are formed to look into difficult issues and do not generally know what policies might ultimately be recommended. Given the political and subjective cloud surrounding our government today, to ban any task force that could potentially advance "weak on crime" policies would likely mean banning all task forces attempting to examine the criminal system for any reason.

[8] There is a well known (but hard-to-attribute) quote that essentially distinguishes great minds (which discuss ideas) from average and small minds (which discuss events and people, respectively). The North Carolina reaction has largely been one of blaming people and avoiding the issue or idea, which is whether we could ever predict that someone charged with an obscure misdemeanor would likely commit a violent crime while on release. Because North Carolina and federal officials also brought up Charlie Kirk, the victim of another violent crime that was also unpredicted, a more intelligent response would be to carefully examine prediction and its limitations in a free society, with the two cases providing some basis for possible extrapolation likely based on differing criminal and/or mental health histories. The more important question given the misapprehension about "cashless" bail is how, if such violence could be predicted (and given the current law and pretrial research), money bail could ever have prevented it.

[9] *Victims of Violent Crime,* found at https://judiciary.house.gov/committee-activity/hearings/victims-violent-crime (Sept. 29, 2025).

neutered due not only to politics but also to confident incomprehension of even basic notions about bail. Indeed, there was mostly only one political party present, and the takeaway message seemed to be that members of that party were offended by the insinuation that the entire hearing was political theatre, despite an opening statement by the Chair mentioning "open borders," transgender issues, pronouns, drag queen shows, “illegals,” and the Second Amendment.

The ignorance (if not willful misrepresentations) came from both Subcommittee members and witnesses. A Subcommittee member, trying to show the value of money bail, praised a judge for raising the secured financial condition on a bail bond “so that [the defendant] would remain incarcerated,” a patently unlawful act if true. A bail bondsman/witness testified under oath that money bail provides “something to lose if [the accused] re-offends or absconds,” even though, in North Carolina and across the country, a bail bond can typically only be forfeited for failure to appear for court and *not* for new crimes. Accordingly, there is nothing to lose for new criminal activity or "re-offending." The accused might be re-arrested and his previous bond revoked. Moreover, he might then be detained or given a new bond (for which he may have to pay another non-refundable fee), but the bulk of the money from the first bail setting is not lost.[10] As discussed later in this paper, money cannot – and will not – keep anyone safe. Indeed, using money at bail makes people *less safe*.

These most recent events underscore the desperation triggered when an industry used to collecting billions of dollars per year on bail bonds suddenly realizes that money at bail is likely to go away. And the events also illustrate how the desperation will play out. Relying on ignorance, slogans, and aberrational cases to suit a particular political narrative, various state and federal officials – guided by

[10] As with all things in bail, the issue is more nuanced. It is only in the vast majority of states with a bail industry presence that the law typically prohibits forfeiture for new crimes. Moreover, the issue is complicated by the fact that in some states forbidding forfeiture for new crimes, a judge may nonetheless set a financial condition for purposes of public safety. This is primarily due to confusion over the lawfulness of money’s ability to detain, which will be discussed throughout this paper. In short, however, setting a money condition for public safety when it cannot be forfeited for public safety makes setting the condition an irrational act.

the bail industry and its generous political donations – will begin passing laws to simultaneously: (1) increase the ability to deny bail altogether; and (2) add money (secured financial conditions) to the bonds of persons charged with “bailable” offenses.

I began writing his paper to research the broad topic of "pretrial justice," to show how incredibly far this current era of bail reform has progressed, and to update some of my older papers with the latest information based on noteworthy events and additions to the literature. I did not expect to complete it for at least another year, and the fact that all of the new information I had gathered had confirmed my research from ten years ago gave me confidence that very little could interrupt that progress and thus disrupt my timeline.

In short, I did not foresee the perfect storm of ignorance, politics (at the highest level), and industry misrepresentations in any way overcoming what has become clear to virtually every person having even the smallest amount of bail education, which is that a system of release and detention based on money leads to random outcomes, is likely unlawful (especially when money leads to detention), and makes entire communities less safe. However, because I can now foresee hundreds of bad bail bills being introduced in the states next year, I sped up my writing of this paper to release it in advance of the 2026 legislative sessions. Doing so, I am only skipping certain editorial and proofing steps that have little to do with the overall substance or justifications for my conclusions, which you would likely make on your own if you had my experience and spent the last year researching pretrial justice and bail reform. Add a few health issues into all this, and you will perhaps see my desire to wrap up without, as I frequently say, "making the paper pretty."

Accordingly, if you see the occasional typo or misspelled word (or if, as happens in all papers, a cited document that exists but with a link in a citation that seemingly leads nowhere), you have been warned. I have all the documents cited, and can provide them to anyone upon request. Finally, if you think that this "note to readers" is overly harsh, realize that I believe it merely represents a natural

response to the situation in which someone (even a President) decides to enter the field of play with "solutions" that are not only wrong, but exceedingly harmful to millions of people.

As you read the paper and digest its substance, you will likely come to believe, as I have, that money leading to detention will inevitably disappear, meaning that an ever-increasing desperation on the part of persons desiring to keep the status quo is also inevitable. Moreover, you will likely come to believe that the only lawful and feasible alternative to money-based release and detention is what I and others call “intentional release and detention,” which is done a specific way and only after a great deal of bail education. Finally, you will likely come to believe that intentional release and detention is at least a bipartisan – if not a nonpartisan – solution to America’s most acute problem in bail, simply because the project of bail reform has been shown to be successful when every stakeholder is a part of the solution and comes to a compromise on both “bail,” or pretrial release, and “no bail,” or pretrial detention at the same time. While there may be disagreements, those disagreements can be (and have been) worked out through negotiated agreements focusing not on money – the primary source of partisan arguments – but on language concerning variables that are actually relevant to intentional release, intentional detention, safety, and court appearance, and with a full understanding of the legal guardrails within which we all must work.

This paper is designed to overcome both politics and ignorance. The overall message of the paper – and the reason for why I have rushed it – is to tell states thinking about changing their bail laws that, without deliberation and at least minimal bail education, they could easily pass a new law that actually increases danger to the public, decreases court appearance rates, and is likely to be overturned by some appellate court based on more fundamental legal principles that the states could and should have known. Accordingly, the main message is to slow down, read this paper, and then proceed in a deliberative way that underscores the importance of the subject of bail.

The paper can be read from beginning to end, or it can be used as a reference source due to its fairly comprehensive nature and my desire to update my previous papers to incorporate the latest research and events. To allow the document to serve as a general reference, some small amount of repetition became necessary, which the beginning-to-end reader will encounter, but which – in bail – can never hurt. Nevertheless, the preface and introduction (and especially a comparison of two states, one achieving "true, historic bail reform" and one failing to achieve it) will give the reader a good sense of the substance covered in the rest of the document.

Finally, my surmise of the kinds of likely unlawful bills the states will see in the upcoming legislative sessions seems confirmed by the recently passed (on the date of this paper's publication, by the House only) District of Columbia Cash Bail Reform Act of 2025. In addition to calling the bill a "reform" provision, which, as I write *infra*, is all too common and yet erroneous based on both history and objective pretrial standards, the bill appears to be doing the two things I predict will happen everywhere in the wake of the most recent wave of ignorance over "cashless" bail: (1) making intentional detention easier (in this case, mostly by mandating detention based on charge alone but also by adding charges to the detention net); and (2) requiring money bail ostensibly to protect the public, both of which are contrary to the law, the history of American bail, and the social science pretrial research. While entirely predictable, if left unchanged, the bill seems destined to be overturned if enacted as it represents the exact opposite of the kinds of laws that, as I explain in this paper, are likely to be ultimately upheld as "carefully limited" and lead to an end to this generation of bail reform.

Preface

This paper is an update to several other papers I have written about pretrial release ("bail") and detention ("no bail") over the past 18 years. The update is necessary due to the explosion of interest in America in the last decade concerning a vast number of issues associated with the pretrial phase of a criminal case.[11] It is also necessary due to the fact that we appear to be at a tipping point concerning what seem to be certain inevitable changes to the American bail system, and yet I see unnecessary fragmentation and confusion among groups and jurisdictions as they work through these changes.

Indeed, at the end of a comprehensive three-year study on the civil rights implications of "cash bail," the United States Commission on Civil Rights wrote, "While there are members of both parties who favor the current system, there is also bipartisan support that reform is needed; however, there are disagreements about what those reforms should look like and how they should be implemented."[12] Contrary to this conclusion, a major premise of this paper is that when people learn about the "current system" (that is, the traditional money-bail system), virtually no one favors it, making change both urgent and widespread.[13]

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[11] A comprehensive literature review preceded the drafting of this document, which is available upon request. The formal literature review lasted from roughly August of 2024 to early Spring of 2025. At that point, I stopped actively researching for relevant papers, but I nonetheless added several that I came across in the intervening months when they added to various points presented in the paper.

[12] USCCR, *The Civil Rights Implications of Cash Bail,* Briefing Report, (2022), found at USCCR-Bail-Reform-Report-01-20-22.pdf [hereinafter *USCCR*]. This study ended with the release of the 272-page report without findings or recommendations (based primarily on partisan disagreements), which is apparently rare and, in this case, quite remarkable given the study's focus. *See 60% of People Awaiting Trial Can't Afford Bail. A Civil Rights Commission Can't Agree on Reform,* USA Today (Jan. 20, 2022), found at Cash bail: Civil Rights Commission fails to make reform recommendation.

[13] As a part of my literature review for this paper, I conducted a 50-state survey that revealed virtually every American state and the federal system currently engaging in attempts (from relatively simple to extremely complex, and including lawsuits) to align their laws, policies, and practices to reflect various aspects of "pretrial justice." Other organizations completing national surveys of change have reported similar findings, albeit focusing on varying numbers of states. *See* The Bail Project, *Beyond Bail: A National Survey of Pretrial Justice Reform in the United States* (2025), found at CLIENT-Bail-Project-Beyond-Bail-Report-FINAL-3.1.25.pdf; 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* (Harv. Kennedy Sch., 2021), found at https://www.hks.harvard.edu/publications/current-state-bail-reform-united-states-results-landscape-analysis-bail-reforms-across.

In fact, after many years of denying the need for improvement, the bail industry itself now advocates for reforms that call for significant changes to the current system, which, in turn, would likely set in motion the need for further, more complex change, of which the industry seems unaware.[14] Another premise of this paper is that any disagreements among reformers as to the substance of reform is largely due to certain unnecessary but pervasive misconceptions surrounding bail.

This is reflected in the overall literature. In 1932, the United States Supreme Court called the pretrial period "perhaps the most critical period of the proceedings" against persons facing criminal charges,[15] and today's intense national focus on pretrial justice testifies to near-unanimous agreement with the Court's assessment. Nevertheless, if you were to read the hundreds of relevant papers published on topics associated with pretrial justice in just the last two years,[16] you would quickly learn that: (1) something very big is happening concerning bail in every state and the federal system and it is mostly due to American pretrial systems being perceived as egregiously "broken;"[17] but (2) despite universal interest in fixing those systems, people are simply not sure how to do it. This is reflected in the media ("States can't figure out what to do about cash bail"),[18] and by scholars ("Bail reform is an urgent topic in the United States, but what

[14] For example, the industry calls for states to stop using money bail to detain on purpose – arguably the only practical (albeit unlawful) purpose for keeping secured money bail in America. This reform, however, would immediately lead to states changing or attempting to change their constitutional right to bail provisions, a complex endeavor for any jurisdiction, and yet not specifically addressed by the industry. *See at* Recommending Pretrial Incarceration or Setting Bails with the Intent of Incarceration Should be Prohibited - American Bail Coalition. Other groups have been highly critical of the industry, with many adding their names to groups historically opposed to commercial bail, which includes the ABA in its Standards on Pretrial Release that have long called for the industry's abolition as a part of true reform. *See, e.g.,* Color of Change/ACLU, *Selling Off Our Freedom: How Insurance Corporations Have Taken Over Our Bail System* (2017), found at https://www.aclu.org/wp-content/uploads/publications/059_bail_report_2_1.pdf. While this paper addresses a relatively small percentage of unwise releases using money, it is mostly concerned with addressing money-based detention, which includes persons the industry is unwilling to help.

[15] *Powell v. Alabama,* 287 U.S. 45, 57 (1932).

[16] A bibliography of sources either used or cited while writing this paper accompanies my summary of the literature review and is also available upon request.

[17] I do not use the term "broken system" to avoid human condemnation, for we humans created the system, worked within the system, accepted the consequences of the system, and have avoided changing the system for nearly 200 years.

[18] Amanda Hernandez, *Cash Bail Policies Are Under Fresh Scrutiny* (Stateline, Nov. 20, 2023) found at https://stateline.org/2023/11/13/cash-bail-policies-are-under-fresh-scrutiny/.

constitutes reform and how to accomplish reform goals is contested").[19] Moreover, the notion is exacerbated by sometimes significant errors in the pretrial literature, such as equating "bail" with money, conflating pretrial crime with general crime rates (or un-convicted persons with convicted persons), applying general deterrence theory (a punishment theory) to bail, and quoting from discredited or biased documents in otherwise serious treatments of the topic.[20]

Thus, in this paper, my goal is to: (1) review and articulate certain bail fundamentals or "pillars" that support a clear path toward pretrial justice; and (2) while doing so, clear up any confusion that I believe has hindered progress by carefully expanding on and explaining pervasive misconceptions associated with any particular topic. The background information for fully understanding these two goals provides the rationale for pretrial changes that are, or at least should be, bipartisan due to those changes being firmly rooted in the law, the history of bail, the pretrial research, and common sense, so that any remaining disagreements about changing the current system will be focused on actual, relevant issues rather than political distractions. In the end, I strive for clarity while explaining procedural and substantive pillars that can help jurisdictions solve today's most pressing pretrial problems while managing the entirety of their criminal system for decades to come.

The Definition of "Bail"

I adhere to the definition of "bail" as originally defined and justified by the NIC paper, *Fundamentals of Bail*, which was written, in large part, to provide a national, legal and historical

[19] Brandon Garrett, *Models of Bail Reform,* 74 Fla. L. Rev. 879 (2022).

[20] For example, in a 2023 Illinois Supreme Court brief, certain authors cited to a 2004 paper interpreting the federal Bureau of Justice Statistics ("BJS") State Court Processing Statistics data to favor release on money bonds over release on recognizance, despite a clear warning in 2010 by BJS itself that such evaluative statements were inappropriate and "misleading." *See* NIC, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* [hereinafter *Fundamentals of Bail*], found at Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform | National Institute of Corrections; Kristin Bechtel, et al., *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research* (PJI, 2012), found at https://www.ncsc.org/__data/assets/pdf_file/0015/1662/dispelling-the-myths-what-policy-makers-need-to-know-about-pretrial-research.ashx.pdf.

definition of the word. Historically and legally, “bail” is a process of conditional release. Bail is not money; rather, money is a sub-condition of the return-to-court condition. Many states and the federal system have replaced the word bail with the word release, but if a jurisdiction still defines bail as money or security, then it must also know and understand that there is a legal and historical definition that makes better sense of things like certain Supreme Court opinions (such as *Stack v. Boyle,* 342 U.S. 1 (1951) (equating the right to bail to the right to release)), the national standards on pretrial release and detention, and other states’ laws. “No bail,” often articulated by courts as being either exceptions to the bail clause or as preventive detention provisions, is defined as a process of potential detention. The purpose of bail is to release people, and the purpose of “no bail” is to provide a safe and fair mechanism to detain people, within certain legal boundaries. Even though the term “bail reform” – on its face – only technically references the release side of the equation, it is “no bail,” or detention, that defines the scope of release; accordingly, “bail reform” today works mostly on limiting detention while lifting barriers to release in order to give life to the Supreme Court’s mandate that release and liberty be the American norm. And thus, this generation of bail reform seeks changes affecting both release and detention.

"Bail reform," itself, has a distinct meaning that is largely defined by history, something that this paper attempts to explain later. In sum, however, "true, historic bail reform" occurs whenever: (1) there exists an abuse leading to the "wrong" people being in and/or out of jail in a systemic fashion; (2) that abuse is known; and (3) the "fix" is either known or knowable. Today, Americans widely perceive the "wrong" people being both in *and* out of jail, the abuse is our casual use of secured financial conditions, and the "fix" is a complete switch from random money-based release and detention to intentional release and detention.

In the last ten years, my colleagues and I have been somewhat successful in getting those who still use the word “bail” as defined as money (for example, by calling for the “elimination of bail”) to instead use the terms “money bail” or “cash bail” so as to highlight the central evil of the money-bail system, which is the use of secured financial conditions, and to clearly distinguish money from bail (i.e., release), which is, in most states, a constitutional right. I primarily use “bail” to mean release, but I occasionally use it as a shorthand word to describe the entire release and detention system (that is, bail with its exceptions), such as when I speak of “the American bail system.” *See* further discussions of the appropriate use of words in the section of this paper on education, terms and phrases, *infra.*

Sources: NIC, *Fundamentals of Bail (2014), Money as a Criminal Justice Stakeholder,* found at http://www.clebp.org/home.html.

As the reader of this paper will quickly come to understand, the most pressing pretrial issue in American bail today is the gradual and yet inevitable switch in the states from a mostly random and accidental system in which money can lead to unwise release and unnecessary and often unlawful detention to an intentional release and detention system that is safe, fair, transparent, and – in legal parlance – "carefully limited."[21] Indeed, this issue is at the root of virtually every argument about bail reform today,[22] and it represents the English and American historical notion that anytime the "wrong" people are (or are perceived to be) in and/or out of jail, bail reform to fix the systemic cause and/or abuse – in this case, the use of secured money bonds – is inevitable.[23] For a variety of reasons spelled out in detail in this paper, I call this switch in models or systems "true, historic bail reform," simply because it has the markers of previous eras of bail reform found throughout the history of England and America. "True, historic bail reform" is fundamentally different from any other pretrial improvement mostly due to its inevitability. In sum, you may hope to pursue any number of objective pretrial improvements both now and in decades to come; true, historic bail reform, however – manifested today in the project of creating an intentional release and detention model – is the one improvement that will pursue you.

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[21] *United States v. Salerno,* 481 U.S. 739, 755 (1987). Although cases reveal that the issue is more complex, the phrase "carefully limited" is seemingly only semantically different from "narrowly tailored" or "narrowly focused," which are phrases used by courts engaging in higher or strict scrutiny analysis under various constitutional balancing tests, which, in turn, require the government to show that something leading to an absolute deprivation of liberty be "narrowly tailored" or "necessary" to achieve compelling state interests. *See generally Lopez-Valenzuela v. Arpaio,* 770 F.3d 772 (2014).

[22] For example, arguments in the wake of the tragic deaths caused by a person on pretrial release driving his car through a 2021 parade in Waukesha, Wisconsin, focused on how "low" his bail amount was. It is clear, however, that the persons advocating retrospectively for "higher bail" actually wanted intentional pretrial detention. *See Waukesha Parade Crash Suspect's Bail Raises Questions,* Nov. 23, 2021, found at Waukesha parade crash suspect's bail raises questions | FOX6 Milwaukee. Wisconsin has an intentional release/detain provision, but it is apparently rarely used. As demonstrated by its recent enactment of a flawed amendment to its constitution that allows money to be set for purposes of public safety, Wisconsin has not taken meaningful steps toward learning how to use its existing moneyless release/detain provision or toward crafting an adequate replacement. Since 2017, scholars have crafted intentional release/detain models, many of which would have given judges in that state two opportunities to detain the driver, albeit not based on a specific prediction of the parade rampage, which was likely unpredictable.

[23] *See* discussion in the history of bail in the section on education, *infra.* For longer discussions of the history of bail showing "markers" of inevitable bail reform, *see Fundamentals of Bail, supra* note 20; CLEBP, *"Model" Bail Laws*: *Re-Drawing the Line Between Pretrial Release and Detention,* at 99, (2017) [hereinafter *Model Bail Laws*], found at http://clebp.org/helpchangingbaillaws.html.

Dealing with this particular issue is critical: in the last two years alone, roughly 25% of all states having a constitutional right to bail (which also provides the necessary language for intentional detention with no conditions of release)[24] have either changed or attempted to change those provisions, a percentage that equals any previous wave of near-simultaneous constitutional change in the states.

Accordingly, the states are *already changing* to more intentional release and detention systems. Unfortunately, however, virtually all of these states, so far, are doing things halfway or have used model templates that are poorly worded and thus can result in higher unnecessary detention (or, more rarely, unwise release) than that associated with the money-bail system.[25] In sum, helping the states choose the correct wording for intentional detention provisions is the most important issue in bail. Indeed, if the states continue on their current path of crafting poorly worded intentional detention provisions, the end result will likely engulf and erase any other supposed "pretrial improvement," no matter how important it may seem. Even the most objectively agreeable advances toward pretrial justice, such as having defense counsel at first appearance or creating the most effective systems of supports for released persons (to the point of possibly not even needing to detain based on flight), would be rendered nearly useless if easy methods of intentional detention based on poor language are enshrined in state constitutions.

[24] Of course, intentional detention through a "no bail" provision does not mean that the defendant has no possibility of later release due to changed circumstances. Indeed, while jurisdictions have readily employed bail hearings to add more stringent conditions or even to revoke bail after the initial bail setting, those jurisdictions also have the ability – and, indeed, should be equally willing – to "ratchet back" conditions or to release a previously-detained individuals given certain circumstances.

[25] As the remainder of this paper emphasizes, unnecessary pretrial detention is the main catalyst for changes in bail laws, given that we are in a period of gross over-detention. There are states, however, which have crafted intentional detention provisions that make the process so difficult that officials have refused to remove money as an alternative, albeit likely unlawful, means to detain. Other states have come much closer to an ideal system, including Illinois, New Mexico, and New Jersey, although in this paper I caution jurisdictions generally not to copy other state laws verbatim without sufficient education on the various elements needed for an intentional release and detention system.

This paper should be read by anyone interested in an optimal criminal pretrial system that is safe, fair, transparent, and follows common sense. It should be seen as bipartisan simply because it re-iterates what has been true for the past twenty years; that is, that bail reform in the states is working to fix both “bail” and “no bail;” release and detention; in and out. There is no disagreement that both need to be addressed, and fortunately, the law largely tells us how to draw an intentional line between release and detention so that we can fix both the in and the out. In the end, the paper discusses what I call three "pillars" of pretrial justice, which I believe are truly necessary to achieve an optimal pretrial system or, indeed, to do anything meaningful at bail, from the simplest to the most complex of changes.

Two of these pillars are process focused: collaboration and education. Collaboration and education will undoubtedly lead jurisdictions to agree on any variety of substantive issues or projects upon which to work to achieve pretrial justice, and thus the paper spends some space discussing their benefits. There is another process pillar that I do not discuss for lack of time – implementation science and adaptive leadership, which provide the optimal way to implement whatever substantive improvement is deemed necessary. Thus, jurisdictions should know that there are optimal ways to actually implement new laws, policies, and practices so that they are successful and lasting.[26]

The third pillar in this paper, though, is a substantive issue/improvement that rises to a level of unique importance due to a variety of legal, historical, and research-based reasons showing that every jurisdiction will likely want or be forced to do it. That pillar is the creation of a moneyless (meaning neither money nor any other release condition can lead to detention), intentional release and detention system, what I have previously and briefly called “true, historic bail reform.” As I hope to show, that one likely inevitable improvement not only fixes a bail system

[26] In my home jurisdiction of Jefferson County, Colorado, while I collected an enormous amount of data showing a "better" way to do bail, I later reported that many improvements floundered due mostly to my own ignorance of implementation science. *See* Timothy Schnacke, Claire Brooker & Michael Jones, *The Jefferson County Bail Project: Lessons Learned from a Process of Pretrial Change at the Local Level* (PJI, 2014).

that has been broken for nearly 200 years but also eliminates the need for a large number of other money-specific "improvements" (such as largely ineffective bail review hearings) previously recommended as band aids designed to dull the sharp edges of the money-bail system.

Along the way, I will explain and attempt to clear up the current, pervasive misconceptions obscuring the path to pretrial justice, define terms such as "risk," "bail," "bail reform," and "pretrial justice," suggest concrete goals for the field, and fill out each of the three pillars with the latest research for relevant sub-topics, such as specific groups included in the collaborative process and their roles in pretrial justice. In short, this paper is an attempt to step back and view things "from the balcony" so as to present a broader perspective of American pretrial justice in 2025-26.

I do not pretend to know how this wave of American bail reform will end. Nevertheless, by (1) clearing up the main misconceptions tending to distract states and the federal system from moving toward pretrial justice, (2) providing a proven process for federal, state, and local jurisdictions to address both large and small pretrial issues, and (3) citing to the best research we have to date on certain particular topics, I hope to guide jurisdictions toward a satisfactory and individually tailored resolution that is not subject to persistent calls for additional reform.

Moreover, I do not attempt to fix everything. Accordingly, while I understand the interplay (and often great confusion) between bail and criminal punishment, with many arguments against bail reform being, instead, arguments for greater punishment,[27] I do not engage in that discussion except generally so as to clear up

[27] For example, arguments using the phrase "revolving door" at bail often reference situations in which persons commit crimes *after* the pretrial period, conflating general recidivism and pretrial crime, and thus suggesting the need for changes to sentencing and not bail. Likewise, use of the term "accountability" in bail often refers to making a person "accountable" for the alleged crime, another punishment concept. The only proper use of the word "accountability" at bail would be to make sure the accused appears for court, a general requirement reserved for the accused, but occasionally necessary for all system actors, including, in at least one study, witnesses, private attorneys, and police officers. *See* Lindsay Graef, Sandra Mayson, Aurelie Ouss & Megan Stevenson, *Systemic Failure*

the confusion. The same caveat exists for immigration, post-conviction, international, and juvenile bail, even though they contain elements often helpful to the adult, criminal bail discussion in America. In sum, I believe that as long as there is some period of time between arrest and disposition at trial[28] – the pretrial phase of an adult criminal case – it is enough to say merely that it is egregiously broken and that this paper is an attempt to fix it, with the understanding that if we cannot fix this, we might seem unable to fix anything.

Despite this, the current paper is one rooted in optimism. It is based on a firm belief that jurisdictions can come together, learn what they need to learn, and implement pragmatic changes that can improve or fix a system of bail that has been unfair and unsafe for far too long[29] -- and certainly ever since appellate courts agreed that money-based detention was not necessarily a constitutional violation under a strained interpretation of excessiveness.

Fixing bail is imperative simply because the money bail system is objectively broken, the public knows it, and we understand exactly how to fix it. In other words, fixing bail is imperative because we need only to muster the will to change. Indeed, when persons fail to summon the will to fix the most blatantly flawed part of the criminal system despite knowing the solution, the public will correctly accuse those persons with willful negligence and disregard for American notions of freedom and public safety. But that need not be the case. The known solution, as this paper will explain – indeed, the solution for which jurisdictions appear to be searching and occasionally trying to implement today – is to design and implement safe, fair, and transparent intentional release and detention systems so as to eliminate the central flaw in the American bail system, which is random or

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to Appear in Court, 172 Univ. Pa. L. Rev. 1, 2 (2023) (finding that, "Police officers, victims, other witnesses, and private attorneys each failed to appear at rates substantially higher than defendants.").

[28] I note that that the length of this period was the genesis of both bail and "no bail" in England and still drives the need for concern over what we do during that period. Obviously, pretrial improvements that greatly reduce the time between arrest and trial, albeit without sacrificing fairness, should be on any list of proposed reforms.

[29] The French philosopher Alexis de Tocqueville wrote in 1835 that America's bail laws had apparently evolved into a curious aristocratic relic "in the midst of a complete democracy," given that the bail system was "hostile to the poor man, and favorable only to the rich." Alexis de Tocqueville, *Democracy in America, at 63* (1831), found at https://www.gutenberg.org/files/815/815-h/815-h.htm.

accidental money-based release and detention. This paper instructs jurisdictions on exactly how that can be done.

Introduction: What Would You Do?

Consider this scenario. Assume that you have decided to design a system to be used to release most people from jail pretrial (the historic American legal tradition), while keeping the public safe and providing assurance that those who are released will return to court to face justice. You make several key assumptions, which you believe to be quite rational. First, you assume that the criminal charge itself indicates risk to flee or commit a new crime while on pretrial release; indeed, you believe that the more serious the charge, the higher the risk to flee and to commit the *same crime* if released. Thus, you reason, a person arrested on a kidnapping charge is likely "high risk" to continue kidnapping if let out of jail pretrial. That seems rational. Second, you assume that, just as money seemingly motivates people to work jobs to buy groceries and that the loss of money seemingly motivates various other personal economic decisions, money also motivates people to return to court and to stay arrest-free. At a glance, that seems rational, too.

Third, you simply do not question the American notion that unless a judge makes a record showing an unlawful purpose in setting bail, a secured money bond that leads to detention does not violate the constitution. That is, you believe, people do not have a right to bail "they can make." You are not exactly sure how the law creates this "constitutional pass" for money-based detention, but it is the one part of bail law that you take for granted. After all, there are hundreds of "bailable" persons in your local jail who are detained despite being ordered released.

Indeed, you come to believe, as you have been repeatedly told by a variety of system and non-system actors, that persons detained on an unaffordable bail bond are not actually in jail due to inability to pay the bond; rather, you believe that those persons are in jail because they and their family's inability to pay the amount demonstrates high risk. More particularly, you believe that if the accused's *own family* cannot come up with the money, it is not because they cannot come up with the money. Instead, it is because the family also believes

that their son or daughter (or mother or cousin or uncle) is obviously guilty and is such a high risk that he or she belongs in jail. As written to me in a personal email sent by a bail agent, "Defendants rarely self-bail. Family members decide who *deserves* release [emphasis added]." Or, put more artlessly by the former head of a bail industry lobbying group, "People are not in jail because they're poor. They're in there because they broke the dang law."[30] In the end, you come to assume that the right to bail is merely the right "to have bail set through a secured money bond."

You create a statute that reflects these assumptions, with the word "bail" used interchangeably with money, with 100% discretion to detain by placing no meaningful limits on the use of money bail, and by dedicating most of the statute to dealing with money, including provisions concerning setting the "amount of bail," forfeiture, a uniform money-bail schedule, exonerations, and unclaimed "bail deposits." You cobble together the rest of the statute mostly by using language found in the federal system's Bail Reform Acts of 1966 and 1984, albeit listing a comparatively staggering number of factors to be used in determining the amount of bail despite the lack of any predictive validity for those factors. You also create a long list of conditions of release, such as "supporting his or her dependents," with seemingly no justification or research to back up the assumption that they help with either court appearance or public safety, the only two constitutionally permissible purposes for limiting pretrial freedom.

In the end, you have a law that looks like the bail laws of virtually every other state. It includes provisions on intentional detention (that is, "no bail," including in the state constitution), but it is written so that those provisions may be ignored in favor of using money with its easy ability to detain. Money becomes a default condition on every bond, and if someone actually pays the money (typically being

[30] *See* at https://www.themarshallproject.org/2016/06/29/a-professional-bounty-hunter-who-likes-the-bail-system-just-the-way-it-is. In addition to inferring that the lack of money indicates high risk, this statement also conflates un-convicted persons (those merely accused of breaking the law) and convicted persons (those who "broke the dang law"), which shows extreme ignorance of hundreds of years of English and American bail history and law. Some industry advocates have gone so far as to say that tying risk to the resources of the family and not the defendant himself should not even be called a "money-bail" system.

the only *precondition* to actual release), they are released with a combination of financial and numerous non-financial conditions often set "just to make sure" that the accused comes back to court and stays out of trouble.[31] In sum, you have a law that – when followed – over-detains and over-supervises,[32] and yet allows you to believe that everyone in jail belongs in jail and that everyone out of jail belongs out of jail simply by not asking deeper questions about the law's irrational and random nature. The process is supported by well-meaning people who have been a part of the money-bail system for decades and who are simply unaware of anything different. It is also supported by less-than-genuine people who selfishly dismiss criticisms of the money-bail system out-of-hand and target groups or individuals seeking change with personal attacks to avoid meaningful scrutiny.[33] To still others, it provides the framework for a system that works exactly the way it is supposed to work, fed not by arresting dangerous and violent persons for felonies, but by arresting an overwhelming number of poor and other historically marginalized persons charged with misdemeanor offenses.[34]

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[31] The whole notion of setting conditions "to make sure" that a lawful purpose is met is a clear, albeit unenforced violation of excessive bail, which requires judges to set the least restrictive conditions, *and no more*, to help assure public safety and court appearance. *See United States v. Salerno,* 481 U.S. 739, 753 (1987) (bail is excessive when set "greater than necessary" to achieve the government's proper purpose). Professor David Ball has written that because counterfactuals that seemingly eliminate harm are easy to generate when someone is detained, and because our brains conflate ease of generation with real-world probability, judges are psychologically predisposed toward imposing detention or harmful supervision tactics "just to make sure" and that criminal systems should thus follow a number of suggested improvements to better align judicial decision-making with both reality and *Salerno's* admonition. *See* W. David Ball, *The Peter Parker Problem,* 95 N.Y.U. Law Rev. 879 (2020).

[32] I describe many studies later in this paper concluding, for example, that jurisdictions have reduced detention through the use of unsecured bonds or other intentional means while maintaining high court appearance and public safety rates, pointing to an obvious tendency to over-detain. In *Model Bail Laws, supra* note 23, at 13, I quoted Laurance Tribe, who commented on the built-in bias of the current system to over-detain. Tribe wrote: "The pretrial misconduct of [released] persons will seem to validate, and will indeed augment, the fear and insecurity that the system is calculated to appease. But when the system detains persons who could safely be released, its errors will be invisible." Laurence H. Tribe, *An Ounce of Prevention: Preventive Justice in the World of John Mitchell,* 56 Va. L. Rev. 371, 376 (1970).

[33] A number of groups have compiled "myths and facts" or "responses to claims" documents simply to rebut thoughtless, simplistic arguments triggered by any discussions over change. An early example is, *Responses to Claims About Money Bail for Criminal Justice Decision-Makers* (PJI, 2010), found at https://cdpsdocs.state.co.us/ccj/Committees/BailSub/Handouts/ResponsesToClaimsAboutMoneyBail-PJI_2010.pdf. Personal attacks have included those against authors, legislators, Governors, and even state Supreme Court Justices.

[34] Harvard Law Professor Alexandra Natapoff has written extensively about America's historical and current responses to misdemeanors, and her 2018 book, *Punishment Without Crime,* was adapted into a powerful documentary by Brave New Films titled *Racially Charged*, found at https://www.youtube.com/watch?v=Bm2PxE0HMr4. A recent study by the Prison Policy Initiative echoes the high

But then you learn a number of important things. First, and perhaps most importantly, you learn that across America, research shows that jurisdictions do not, in fact, have the "right" people in and/or out of jail; indeed, there are poor, lower-risk defendants in jail and wealthy, extremely high-risk defendants out of jail, and these problems are directly tied to the use of secured financial conditions.[35] Indeed, in-depth jail research as well as research leading to the creation of actuarial pretrial assessment tools shows that persons accused of crimes are, in fact: (1) minimally risky, even when the prediction is aimed at determining the risk of committing any crime, from traffic to murder, and for missing court for any reason; and (2) barely risky to willfully abscond or to commit a serious or violent crime during the pretrial phase (the two historical triggers for American intentional pretrial detention). Moreover, those two things – risk of willful flight and/or commission of serious or violent crimes – are extremely difficult to predict due to low base rates, and improbable, if not logically impossible, to successfully predict on an individual level by using statistical aggregates or subjective hunches.[36]

More research leads other assumptions to crumble. That research shows that criminal charge, by itself, is an incredibly inadequate proxy for risk and only a

numbers of misdemeanor arrests, but also notes that even looking at "top charge" of those in jail on any given day, "almost two-thirds . . . are facing a top charge that is not considered a violent offense." Emily Widra, *New National Data Help Fill 20-Year Data Gap: Offense Data for People in Local Jails* (PPI, 2025), found at https://www.prisonpolicy.org/blog/2025/04/17/jdi_jail_offenses/.

[35] This was essentially the conclusion of the New Jersey Joint Committee on Criminal Justice, which wrote recommendations leading to a massive bail overhaul in that state. *See Report of the Joint Committee on Criminal Justice* (N.J. Courts, 2014), at 2, found at https://www.njcourts.gov/sites/default/files/finalreport3202014.pdf. ("In short, the current system presents problems at both ends of the spectrum: defendants charged with less serious offenses, who pose little risk of flight or danger to the community, too often remain in jail before trial because they cannot post relatively modest amounts of bail, while other defendants who face more serious charges and have access to funds are released even if they pose a danger to the community or a substantial risk of flight.").

[36] *See Model Bail Laws, supra* note 23. *Model Bail Laws* uses the history of bail, the law, and the pretrial research (including risk research) to conclude that intentional detention cannot be based solely on an actuarial tool, and requires a far different and precise articulation of risk needed to detain than that found in virtually all state laws. The overall assessment of defendants being mostly "low risk" comes from a variety of indicators, including an understanding of what assessment tools measure as well as various associated matrices for tools, which often show very small raw numbers of "high" risk persons as well as the percentages of who might be expected to fail.

small part of risk even when used with other factors found on actuarial tools.[37] Indeed, when defendants do fail on release, it is typically for things like fraud, theft, and drugs, and not serious or violent crime, or for things like missing a bus and not willful flight.[38] It shows that unnecessary pretrial detention not only

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[37] *See Model Bail Laws, supra* note 23, at 96-98; *see also* discussion of how the history of bail warns of the inevitability of bail reform, *infra.* After an eighteen-month study of bail practices requested by the Minnesota Legislature, the Minnesota Justice Research Center wrote that. "Fortunately, pretrial crime is rare . . . [with] the vast majority of released defendants remain[ing] arrest-free during the pretrial period." MJRC, *Toward Safety, Liberty, and Equity: A Community-Centered Framework for Redesigning Minnesota's Pretrial System,* at 8 (citations omitted), found at https://www.mnjrc.org/_files/ugd/c9192e_1a8af5bd8528461abd63b9b3f3f62e0f.pdf.

[38] *See generally Model Bail Laws, supra* note 23, at 96 – 98. Author Lauryn Gouldin wrote an important paper calling for jurisdictions to distinguish between subcategories of missed court dates, such as mere nonappearance versus willful flight, with flight being the "narrowest of the subcategories." *See* Lauryn Gouldin, *Defining Flight Risk,* 85 Univ. of Chicago L. Rev. 677, 725 (2018). The Bail Project, a national nonprofit group that pays to help detained bailable persons get out of jail, reported in 2023 that the people for whom they paid the financial condition and obtained release – that is, under the faulty logic expressed earlier in the text, the people who are the highest risk as shown by their families not being willing to help with the bond – actually returned to court over 90% of the time, thus demonstrating that money does not motivate defendants to return to court and that family pressure (or "risk" based on family hunches) is unnecessary or non-existent. *See* Tara Watford, *Unlocking the Truth: A Closer Look at Cash Bail Data* (2023), found at https://bailproject.org/data/unlocking-the-truth/. Most recently, the Crime and Justice Institute surveyed persons in jail and determined that nearly 80% of those listing one reason for their failure to appear for court only listed unintentional reasons, such as forgetting the court date or lacking transportation. CJI, *What Really Prevents Court Appearance? Survey Findings From People Who Failed to Appear in Two Counties* (2025), found at https://www.cjinstitute.org/assets/sites/2/2025/02/What-Really-Prevents-Court-Appearance.pdf?utm_source=PJI+Audience&utm_campaign=0bfb90f5db-EMAIL_CAMPAIGN_2025_01_27_04_03_COPY_01&utm_medium=email&utm_term=0_-6a3815f252-138997392. As for new crimes committed while released, most experts agree that theft, fraud, and drug charges are correlated with any new offense (in addition to technical violations and FTA, when those things are made criminal offenses and when jurisdictions have not adopted more effective solutions to reduce them), a finding going back as far as the early 1980s in studies cited in support of the Bail Reform Act of 1984. *See* note 606, infra, and accompanying text. In a 2023 study of 15,000 New Mexico defendants, the researchers argue for disaggregating the types of crimes committed while on release as predicted in risk tools, concluding, "An NCA [new criminal activity] rate of 20% gives the false impression that a defendant accused of, say, a 2nd degree felony is likely to be rearrested for a crime of similar severity during the pretrial period if released. As we have seen, most pretrial rearrests are for less severe crimes, either 4th degree felonies [which, in New Mexico are made up of property crimes, drug crimes, and assault, which, unfortunately includes assault upon a police officer, a charge widely believed to be overcharged in America], misdemeanors, or petty misdemeanors. This is the case even for defendants accused of high-level felonies or violent felonies, and even when we focus on rearrest for violent charges." Cristopher Moore, Elise Ferguson & Paul Guerin, *How Much Risk, and Risk of What" A Closer Look at Pretrial Rearrest and Risk Assessment* (Santa Fe Inst./Univ. of New Mexico, 2023), found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4352036. In another study, the authors found that: (1) most individuals (76%) who are released pretrial are not arrested during the pretrial period; (2) for those arrested, they are more likely to be rearrested for a new misdemeanor charge, even if originally booked on a felony; (3) the patterns are more nuanced when looking at charge type; for example, persons booked on a violent charge are unlikely to commit a new crime, but when they do it is most commonly a property crime; and (4) persons arrested on an initial property charge are the most likely to be rearrested (with drug and public order offenses a close second); and (5) in general, those booked on a drug or property charge are more likely – when they fail at all pretrial – to be charged with another drug or property charge. *See* Christopher Inkpen, Ian Silver, Kristin Bechtel & Matthew DeMichele, *Examining the Patterns of Pretrial Rearrest in a Large Southeastern County,* 88 (2) Fed. Prob.

harms accused persons and their families, it harms entire communities by making them *less safe* both short and long-term.[39] In sum, despite the fact that America has so many persons detained pretrial, the research actually shows that very few defendants need to be detained and that unnecessary pretrial detention typically caused by the use of secured financial conditions leads to a slew of bad

43 (2024), found at https://openurl.ebsco.com/EPDB%3Agcd%3A6%3A34789190/detailv2?sid=ebsco%3Aplink%3Ascholar&id=ebsco%3Agcd%3A186177657&crl=c&link_origin=scholar.google.com. In Cook County, Illinois, the recently unveiled pretrial dashboard shows that from the effective date of the PFA to September, 2025, 84% of all defendants were not charged with any new offense, 94% were not charged with any new violent or person crimes, both misdemeanor and felony defendants, when they are charged with an offense on release were most likely to be charged with a property offense, except for DV defendants, which, although having an overall safety rate of 91%, are more likely to commit a "person" (rather than a violent) crime. As discussed in *Model Bail Laws, supra* note 23, there is evidence that while violent charges are not correlated with any new offense, it is slightly correlated with a new violent offense, which is the basis for using "violent charges" (so as to include DV cases for those states classifying them as misdemeanors) for my limited, charge-based intentional detention eligibility net. That, and our extreme difficulty with prediction, resulted in a wider net and "easier" risk finding for purposes of revocation. *See Cook County Pretrial Fairness Act (PFA) Weekly Dashboard* (September 18, 2023 – September 13, 2025, accessed on 10/4/2025), found at https://ocj-web-files.s3.us-east-2.amazonaws.com/documents/2025%2009%2013%20OCJ%20PFA%20Dashboard%20New%20Layout%2025.09.16%20FINAL.pdf?VersionId=8WCQ3QAzYl2I2aLFOnbzwbvSOCzuT5rA. The broad themes common among these data are bolstered by email correspondence with national pretrial researchers, which is on file with the author; nevertheless, when examining this "risk of what" research, it is important to know that the studies are still relatively rare, and that the researcher must carefully examine the data and local system mechanics to understand any seemingly significant differences, especially between counties.

[39] Laura and John Arnold Foundation, Criminal Justice Research (2013), found at https://www.whatcomcounty.us/DocumentCenter/View/25325/REFERENCED-Arnold-Foundation-LJAF-Pretrial-CJ-Research-brief_FNL. For recent research, *see, e.g.,* Matthew DeMichele, Ian Silver & Ryan Labrecque, *Locked Up and Awaiting Trial: Testing the Criminogenic and Punitive Effects of Spending a Week or More in Pretrial Detention,* 24 Criminology & Pub. Policy, 99 (2024) ("we found that longer time spent in pretrial detention is associated with greater likelihood for missed court appearances, new arrests, and new arrests for violent crimes"), found at https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9133.12685. As the reader will see, later, public safety and missing court are only two of the numerous harms to communities caused by the current money-bail system and unnecessary pretrial detention.

outcomes,[40] especially for Black and Latinx males.[41] Even the United States Supreme Court, which is seemingly otherwise reluctant to fully explain bail to the states, has occasionally listed the bad outcomes of pretrial detention, which include interfering with preparing a defense, inflicting punishment prior to conviction, and imperiling the person's job, source of income, and family relationships.[42]

By holding your system up to NIC's *Fundamentals of Bail,*[43] you see similar flaws. Studying the history of bail, you learn that "bail" is not defined as money, but rather as a process of release (just as "no bail" is a process of potential detention), that so-called "cash bail" (the use of secured financial conditions) is a relatively new mechanism, albeit causing virtually all current problems in bail, and that the right to bail historically meant (at least theoretically) a right to actual release

[40] The literature review for this paper revealed literally dozens (if not hundreds) of papers either directly testing or merely recounting an array of bad outcomes tied to unnecessary pretrial detention for both defendants and the broader community, ranging from forced guilty pleas to a reduction in filing tax returns; from more in-custody deaths to adverse impacts on labor markets; from the length of sentences for the current crime to increased pretrial crime and even recidivism years later; and from more FTAs to adverse impacts on children and household financial solvency. Just a few examples include the following: Stacie St. Louis, *The Pretrial Detention Penalty: A Systematic Review and Meta-Analysis of Pretrial Detention and Case Outcomes,* 41 Just. Quarterly, 347 (2024), found at https://www.tandfonline.com/doi/full/10.1080/07418825.2023.2193624; Crystal Yang, *Toward an Optimal Bail System,* 92 N.Y.U. L. Rev. 1399 (2017); Samantha Zottola, Sarah Clarke & Sarah Desmarais, *Bail Reform in the United States: The What, Why, and How of Third Wave Efforts,* Chapter 9, Handbook of Issues in Criminal Justice Reform in the United States (Springer, 2021), found at https://link.springer.com/chapter/10.1007/978-3-030-77565-0_9. Indeed, the list of papers in which this information may be found is so long that I can only point the reader to a few scholars (not necessarily including pretrial advocacy groups) who have spent much of their careers consistently publishing on this issue in the pretrial literature, including Shima Baradaran Baughman, Megan Stevenson, Sandra Mayson, Paul Heaton, Christina Scott-Hayward, Will Dobbie, Crystal Yang, Nick Peterson, Stacie St. Louis, Stephen Demuth, Wendy Sawyer, Heather M. Oullette, Matthew DeMichele, Ian Silver, Ryan Labrecque (and others at RTI), Samuel Wiseman, Samantha Zottola, Sarah Desmarais (and others at PRA), Chrisopher Lowenkamp, Marie VanNostrand, Alexander Holsinger, Jacob Goldin, Cynthia Jones, Leon Digard, Elizabeth Swavola (and others at Vera), Mary Phillips, Joshua Page, Stephanie Didwania, Sandra Susan Smith, Brandon Garrett (and others at Duke University and the Harris County monitor team), Catherine Kimbrell, Kristin Bechtel, and David Wilson, with sincere apologies to other persons, groups, or funders that I have left out.

[41] *USCCR, supra* note 12, at 33 ("Research consistently shows Black and Latinx individuals have higher rates of pretrial detention, are more likely to have financial conditions imposed and set at higher amounts, and lower rates of being released on recognizance bonds or other nonfinancial conditions compared to white defendants.") (citing Wendy Sawyer, *How Race Impacts Who is Detained Pretrial,* Prison Policy Initiative, Oct. 9, 2019, found at https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.).

[42] *Stack v. Boyle,* 342 U.S. 1, 4, 7-8 (1951); *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975).

[43] *See Fundamentals of Bail, supra* note 20. *Fundamentals* sets out the six main areas of study necessary to understand and thus meaningfully address issues at bail: (1) why we need pretrial justice; (2) the history of bail; (3) the legal foundations of bail; (4) the pretrial research; (5) the national standards on pretrial release and detention; and (6) terms and phrases used at bail.

through an intentional release and detention process.[44] Studying the legal foundations, you learn that America's first bail laws were designed to be intentional release and detention provisions, and that the way we administer bail now through mostly secured financial conditions is likely unlawful under a number of legal theories, including excessive bail (which forbids setting bail to intentionally detain),[45] equal protection, and due process (when ordering release on bail is applied irrationally, turns into de facto detention, or is done with procedural flaws). More importantly, you learn how far we have strayed from basic fundamental notions of American liberty and freedom, which forcefully remind us that we must accept the inherent risks of pretrial release, just as we accept the inherent risks of our substantive criminal law, which allows persons to remain free through reliance on the moral deterrence of clearly articulated laws to govern human behavior.[46]

[44] *See Stack v. Boyle,* 342 U.S. 1, 4 (1951) (equating the "right to bail" with the "right to freedom before conviction" and the "right to release before trial"). Of course, throughout the history of bail, there have always been exceptions in the sense that certain "bailable" people have occasionally fallen thought the cracks and been detained. Until the early to mid-1800s, however, these exceptions were not numerous enough to lead to any tipping point triggering the need for true, historic bail reform to fix the abuse of having so many bailable defendants in jail.

[45] This is discussed in greater detail, *infra,* as well as in *Appendix One,* and is one line of cases used to describe what I have labeled the "excessive bail loophole." The term is used because it is found in excessive bail jurisprudence, and it describes a loophole in which judges are allowed to detain persons who, throughout history, were not supposed to be detained – that is, "bailable" defendants (now typically found in state constitutions). The three lines of cases include opinions holding that: (1) judges have to set bail for "bailable" defendants; and (2) defendants do not have a right to bail they can "make;" but (3) judges cannot set bail with the express intention to detain a bailable defendant. The loophole props up the entire money bail-system, but is totally reliant upon money being able to detain and the judge making no record of intentional detention. What makes the loophole so important today is the notion that if jurisdictions either erode money's ability to detain or begin inserting elements of intentionality into bail-setting (such as using an assessment tool or having a "detention" hearing), appellate courts will likely reverse judges who show such intentionality but then use money to detain on purpose. Under excessive bail jurisprudence, it becomes an issue of setting bail "for an improper purpose," and when jurisdictions are not allowed to detain using money, they are forced to look to other means to legally detain without money, which are typically found in right to bail clauses in constitutions or statutes. Note that while using money set to detain on purpose is unlawful through excessive bail analysis in both the state and federal systems, money merely resulting in detention – with or without intent to detain – is likely unlawful under constitutional balancing tests for federal due process and equal protection.

[46] *See* 342 U.S. at 8 (Jackson, J., concurring) (articulating that the risk inherent in bail is a calculated risk that we assume "as the price of our system of justice"); *State v. Brown,* 338 P.3d 1276, 1293 (N.M. 2014) ("In every case, a defendant *may* commit an offense while out on bond, just as any person who has never committed a crime *may* commit one"). A discussion of risk, prediction, and American liberty is provided in this paper in the section on education, *infra.*

Finally, studying the pretrial research particularly focused on money bail, you learn that not only do secured financial conditions cause unnecessary and likely unlawful pretrial detention triggering numerous societal problems, they also simply do not work even to motivate *released* persons to come to court or remain law-abiding. Indeed, this new research goes to defeating the core underlying assumption of the money-bail system.[47] In one study, the authors concluded: "This setting provides a unique opportunity to evaluate the main justification for the use of monetary bail: that it helps ensure appearance and prevent crime among released defendants. We find no evidence to support this, and can reject even small increases in FTA and rearrest."[48] In another, the authors wrote: "Our study adds to this evidence and suggests that [money] bail does not incentivize court appearance and avoidance of rearrest as conventional wisdom assumes. The continued use of money bail is not supported by the available evidence."[49] This

[47] To date, the best overall and yet brief (albeit in continual need for updates) description of the money-bail research – along with other summaries of pretrial research – is found on the Advancing Pretrial Policy and Research Initiative website, the nation's preeminent initiative focused exclusively on pretrial justice, which is run by the Center for Effective Public Policy and funded by Arnold Ventures. *See, e.g., Financial Conditions of Release,* found at https://cdn.filestackcontent.com/security=policy:eyJleHBpcnkiOjQwNzg3NjQwMDAsImNhbGwiOlsicGljayIsInJlYWQiLCJ3cml0ZSIsIndyaXRlVXJsIiwic3RvcmUiLCJjb252ZXJ0IiwicmVtb3ZlIiwicnVuV29ya2Zsb3ciXX0=,signature:9df63ee50143fbd862145c8fb4ed2fcc17d068183103740b1212c4c9bc858f63/wI23qGd5Q0KEaUyQN7oc. Occasionally, a pretrial researcher will compile a longer and often more descriptive list of the research concerning "money bail" for use in litigation or academic publications.

[48] Aurelie Ouss & Megan Stevenson, *Does Cash Bail Deter Misconduct?* at 26 (2022, revised from 2019), found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138. Likewise, in 2022, Jake Monaghan, Eric Joseph van Holm & Chris Suprenant published a study of persons released between 2018 and 2019 in New Orleans Parrish and concluded that their analysis "adds to a growing body of evidence that cash bail does not reduce the likelihood a defendant misses their court date. As such, the central reasoning underlying the cash bail system continues to be challenged. In addition, we find evidence that cash bail has other, unequal and pernicious effects. Similar to [others], we find that race and gender have an impact on pretrial decisions and that cash bail increases the likelihood of being rearrested." *Get Jailed, Jump Bail? The Impacts of Cash Bail on Failure to Appear and Re-Arrest in Orleans Parrish* (2022), at 16-17 (internal citations omitted), found at https://www.pretrial.org/files/resources/getbailedjumpbailpreprint.pdf.

[49] Samantha Zottola, & Sarah Desmarais, *Comparing the Relationships Between Money Bail, Pretrial Risk Scores, and Pretrial Outcomes,* 46 L. & Hum. Beh. 277 (2022) [hereinafter *Zottola & Desmarais*], found at https://psycnet.apa.org/record/2022-69860-001. Most recently, The Bail Project released data on over 3,000 persons arrested and booked in Tulsa, Oklahoma, and concluded, among other important things, that "cash bail and bonds purchased from commercial bail bond agents are not associated with better court appearance rates," a conclusion that is supported by other studies, but which, "unfortunately, still hasn't penetrated public awareness." In other words, the authors write, "money, in the form of cash bail or a bail bond, is neither necessary nor an effective way to incentivize people to participate in the resolution of their court cases." *See The False Promise of Bail: An Analysis of Pretrial Release Mechanisms and Court Appearance in Tulsa, County, Oklahoma,* at 5, 15 (2025), found at https://bailproject.org/wp-content/uploads/2025/06/The-False-Promise-of-Bail-The-Bail-Project.pdf.

sort of research – research concluding that money bail simply does not work to motivate an accused person's behavior when that person is released – makes it difficult, if not impossible, to justify a money-bail system even under so-called rational basis scrutiny.

What Illinois Did: Substance

After learning all of these things, what would you do? To those in Illinois, the answer was clear: completely overhaul the law to replace its random, money-based system with one designed around safe and fair intentional release and detention. The overhaul – titled the Pretrial Fairness Act[50] – was historic for two important reasons. First, Illinois became the first state to completely eliminate the use of money bail altogether. Other states had reduced the use of money and had attempted to create intentional release and detention while still keeping money,[51] but Illinois recognized that money at bail was simply irrational, akin to requiring someone to do something as arbitrary as wearing a certain color of tennis shoes as a condition of release. According to Keith Grant, a member of the Illinois Supreme Court's Commission on Pretrial Practices, the Commission learned that, "[M]oney does not necessarily ensure safety – in fact, the studies that we looked at as a Commission indicate that it's irrelevant as to community safety or even return to court."[52] As an irrational (or irrelevant) practice, using money to achieve either court appearance or public safety would fail under even the most lenient of

[50] Public Act 101-652 (eff. Jan. 1, 2023) is known as the SAFE-T Act, with pretrial provisions in that larger bill commonly called the Pretrial Fairness Act. Public Act 102-1104, (eff. Jan. 1, 2023) has been called the "Follow-Up-Act" by the Illinois Supreme Court. *See Rowe v. Raoul,* 223 N.E. 3d 1010, 1013 (Ill. 2023) (writing that 101-652, the PFA, "along with Public Act 102-1104 (eff. Jan. 1, 2023) (Follow-Up Act), dismantled and rebuilt Illinois's statutory framework for the pretrial release of criminal defendants. See Pub. Act 101- 652, § 10-255, 102-1104, § 70 (eff. Jan. 1, 2023) (amending 725 ILCS 5/art. 110)").

[51] When states create intentional detention provisions with no meaningful limits on using money as an alternative, those states have historically ignored the intentional provisions. A jurisdiction can keep money bail (as was done in Washington D.C.) and yet significantly limit its use by providing that no amount may result in detention, which forces the jurisdiction to use the intentional detention process instead. Jurisdictions are reminded that it is mostly *money-based detention* that drives bail reform. Thus, states can create meaningful intentional release and detention systems that still allow for money, but those states would be forced to provide mechanisms to make the amount affordable so that release of bailable defendants is not thwarted.

[52] *Reimagining Law: The State of Cash Bail in Illinois*, found at Reimagining Law: The State of Cash Bail in Illinois - YouTube.

balancing tests used by courts to assess government action for various constitutional claims.[53] Accordingly, money bail through financial release conditions was completely eliminated in Illinois.

Using Other Jurisdictions' Legal Language as Templates for Change

It is common in America for one jurisdiction seeking change to look to other jurisdictions that have already changed for guidance with wording. I warn against that in bail, however, for a number of reasons. First, each jurisdiction has its own "mix" of sources of law underlying both "bail" and "no bail," and deep research into that other jurisdiction might show that its process simply cannot – or should not – be replicated in another jurisdiction. Second, current state processes for intentional release and detention in virtually all states (with the exception of Illinois) as well as the federal and D.C. systems are poorly worded, having been enacted far too long ago to have value today. Third, most of the current state language for intentional release and detention has also been untested due to the persistent use of money-based detention allowing states to ignore their current, intentional detention provisions.

This warning is especially true for states seeking to merely copy the so-called "federal model" or "federal process" (which is also found in the D.C. statute) into state law. While my early efforts at bail reform held up both the federal and D.C. pretrial systems as showing the possibility of replacing money's ability to detain with intentional release and detention, the structure of those models – that is, the precise wording of the detention provisions – is simply unacceptable for the states, and has the potential to lead to far more unnecessary and unsafe detention than that created by the money-bail system. I discuss this in detail in the section of this paper explaining the creation of an intentional release and detention process, *infra.*

Instead, we look at various federal and state "models" of release and detention as examples for a variety of useful but different reasons. For example, we look to the federal system for its historical significance. We look to D.C. and New Jersey for their excellent outcomes while

[53] Most recently, a federal judge in Oklahoma dismissed defendants' arguments to use the lenient "rational basis" test to assess money-bail practices, albeit saying, "[T]he court certainly does not assume that Tulsa County's secured bail system would pass muster on a rational basis review. By what reckoning does a bail system withstand rational basis review when, by design, a recidivist fentanyl dealer who has the money to make bond will, within hours of arrest, be put back on the street to resume plying his trade, while an indigent arrestee who has been accused of a much less serious crime faces the very real prospect, for lack of a due process-compliant bail hearing, of sitting in jail to await trial?" *Feltz v. Regalado,* No. 18-cv-0298-SPF-JFJ (order on motions for summary judgment) (April 3, 2024), at n. 49. Again, it is not necessary for a state to completely eliminate money at bail, as it is only money's ability to unnecessarily detain that is the primary evil of the American bail system (with the unwise release of extremely high-risk persons coming in at a close second). Nevertheless, and as I discuss *infra,* states should know that, based on current American law, even merely *eroding* money's ability to detain or inserting a small amount of intentionality into a bail system will likely trigger a cascading domino effect leading to comprehensive overhaul.

avoiding money. We look to Kentucky for its ability to help large numbers of persons released pretrial under an extremely tight budget.

When looking for template language for a limited, fair, and transparent detention provision to replace money-based detention, however, jurisdictions are advised to consult the various "hypothetical" release/detain models created after extensive research by groups like Civil Rights Corps, the Center for Legal and Evidence-Based Practices, and the National Association of Pretrial Services Agencies. These models all use a limited, charge-based detention eligibility net and only allow detention after a finding of risk within the net that focuses on: (1) how high the risk; and (2) risk of what, exactly?, followed by a comparison of alternative, less-restrictive conditions. Groups as diverse as the Uniform Law Commission and the Leadership Conference on Civil and Human rights agree on that basic structure, and (so far) Illinois is the only state to adopt it.

Sources: CLEBP, *Model Bail Laws (2017), Changing Bail Laws (2018), Information to Help With State Attempts to Change Constitutional and Statutory Right to Bail (Release) and "No Bail" (Preventive Detention) Provisions,* and other resources found at http://www.clebp.org/helpchangingbaillaws.html.

Second, Illinois made history by not succumbing to the temptation to simply borrow current state or federal language dealing with intentional detention. The trend until Illinois (a trend which, unfortunately, continues today), had been for states changing their detention laws simply to borrow language from the so-called "federal model," or from states that have used the federal model, which, as I discuss in detail, *infra,* is altogether unsatisfactory if not potentially disastrous for use in the states. Instead, Illinois used commonsense model language focusing on detention being applied through a clear articulation of the risk needed to detain eligible defendants, including (1) how high the risk needs to be, (2) answering the question of "risk of what, exactly?" for both a "primary" (i.e., bail based on prediction) charge-based detention eligibility net[54] and a "secondary" (i.e., revocation) charge-based detention eligibility net,[55] and (3) requiring a

[54] In this effort, Illinois was somewhat fortunate to have a constitutional bail provision that included the language, "real and present threat to the physical safety of any person," rather than the "no conditions or combination of conditions" language found in the federal model or states that have copied that model.

[55] There are parts of the Illinois law that do not strictly follow my own model, including the revocation provision, which includes certain deviations (such as using primarily the subjective "no condition or combination of conditions" risk finding (albeit with a clear and convincing burden of proof), using the word "ensure," changing the

comparison of alternative conditions to assure that pretrial detention is absolutely necessary.[56]

It reflected recent research done by numerous American bail scholars, who looked at typical state detention provisions, saw their flaws, and designed new language based on the relevant history, law, and pretrial research in existence at the time.[57] Indeed, having worked on numerous intentional detention provisions across America, I have argued that five crucial elements – fitting together like a puzzle and allowing for negotiated agreements through give and take on each element – must be simultaneously addressed whenever a jurisdiction attempts to change, and Illinois addressed each one.[58] Of course, the Pretrial Fairness Act contained other pretrial improvements; nevertheless, replacing money-based detention with a fair and transparent intentional release and detention process was crucial, and,

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subject from flight to mere appearance, and, for certain less serious charges, allowing up to 30 days detention as a sanction for any FTA or for violating seemingly any condition (including so-called technical violations) of pretrial release. *See* 725 ILCS 5/ 110-6.

[56] These basic elements were first articulated in *Model Bail Laws, supra* note 23, and were repeated in CLEBP, *Changing Bail Laws: Moving From Charge to "Risk:" Guidance for Jurisdictions Seeking to Change Pretrial Release and Detention Laws,* (2018) [hereinafter *Changing Bail Laws*], found at http://clebp.org/helpchangingbaillaws.html.

[57] *See, e.g.,* Civil Rights Corps, *Pretrial Release and Detention Act,* found at 1ted5IrSx2ynPT8kitB5.pdf; CLEBP, *Model Bail Laws, supra* note 23, and *Changing Bail Laws, supra* note 56; Acting on behalf of the Leadership Conference on Civil and Human Rights before the U.S. Commission on Civil Rights, Sakira Cook wrote that the detention eligibility net should be "extremely" limited, and coupled with a risk finding as follows: "clear and convincing evidence that individuals pose a high risk if intentional flight or of seriously harming another reasonably identifiable person during the adjudication period [and] there are no conditions or combination of conditions that will ensure the accused person will return to court and not pose a risk of specific and identifiable harm to known persons in the future." *See* The Leadership Conference on Civil and Human Rights, *Statement of Sakira Cook, Senior Director, Justice Reform Program* (2022), found at https://civilrights.org/resource/statement-of-sakira-cook-senior-director-justice-reform-program-the-leadership-conference-on-civil-and-human-rights-u-s-commission-on-civil-rights-hearing-on-the-civil-rights-implications/. Research done after 2017 has only been confirming of the template language using these "hypothetical" templates.

[58] The five elements are: (1) the detention eligibility net; (2) the further limiting process (or finding of risk within the net necessary to detain); (3) the secondary net and limiting process (i.e., revocation); (4) the use of money; and (5) the use of an actuarial assessment tool in the detention process. These elements are essential to working on the actual detention language. One document describing these five elements and how to balance them is found at http://clebp.org/images/Memo_on_State_Constitutional_Release_and_Detention.pdf. This memo also discusses other important elements, such as due process, speedy trial, and appeals, but these five are those directed at the precise language of the intentional detention provision itself.

according to data released by Loyola University Chicago, the result was a more deliberative process resulting in less detention with no increase in crime.[59]

After working nearly twenty years in this field, it is my opinion that every state will face the same issue of replacing money-based detention with intentional release and extremely limited intentional detention, whether by choice or through compulsion. Thus, it not something that jurisdictions can simply add to a longer list of pretrial improvements that they may or may not adopt, depending on their will to change. It is the inevitable result of a combination of pressures coming from federal and state law, pretrial research, and hundreds of groups determined to force the issue. If one looks at making this change as a "pretrial improvement," then it is a categorically different pretrial improvement, which will force the states into a process that results in constitutional amendments, statutory and court rule overhauls, and cultural change. Moreover, intentional release and detention is the *only alternative* to a system using money bail to detain, based on the history of bail, the American legal structure surrounding bail, and the pretrial research.[60] There is simply no way to avoid it. Accordingly, the words that jurisdictions choose to articulate the boundaries of intentional detention will ultimately determine

[59] *See* Griffin, et al., *The First Year of the Pretrial Fairness Act,* Loyola Chicago (2024), found at https://pfa-1yr.loyolaccj.org/. Most recently, researchers have said that the data reveal "a more complicated picture," with overall detention still less than pre-PFA numbers, but trending upward due to what may be many more complex issues, including a relatively loose revocation provision. *See* Dave Olson, Don Stemen, Patrick Griffin & Amanda Ward, *Pretrial Detention and Supervision Under the PFA* (Oct. 2025)*,* found at https://loyolaccj.org/blog/pretrial-detention-and-supervision-under-the-pfa. Balancing pretrial outcomes, such as release, court appearance, and public safety, often requires explanation for perspective. For example, a jurisdiction with a 100% detention rate that subsequently releases more defendants to comply with constitutional requirements might see an increase in pretrial crime simply because no pretrial crime outside of jail was possible before. Today, it is widely believed that America over-detains (that is, has a large number of false positives), albeit not to the extent of 100%, and does so through a random rather than through a deliberate system. Accordingly, what we are seeing are efforts to increase release and to more accurately and fairly detain in a way that results in no increase in pretrial crime. The gist of intentional release and detention is to provide a limited, fair, and transparent method to assure that the "right" people are in and out of jail, and the rule of thumb is that if a state creates a limited, fair, and transparent detention provision, the ratio of released to detained persons will be the correct ratio for that state.

[60] I focus on money-based detention through secured financial conditions as the abuse leading to creation of intentional release and detention systems, but the transformation can be triggered by pretrial detention through any method short of a due-process laden, lawful preventive detention scheme. Indeed, any pretrial condition that is a pre-condition to release or that can result in pretrial detention for whatever reason (such as being ordered to GPS with no GPS units available or with associated costs) might also trigger the switch. Nevertheless, money-based detention is currently so pervasive that it demands the lion's share of attention.

whether the replacement is a true improvement/reform or actually worse than what came before.

Indeed, virtually every so-called "pretrial improvement" – whether objectively good (such as removing money from a statute) or bad (such as adding money to a statute) is often merely an attempt to work around the edges of intentional release and detention, and, as noted previously, every argument about money bail (i.e., "this amount was too high" or "this amount was too low") is often, at its core, an argument for intentional release or detention. Moreover, as briefly mentioned above and as discussed more thoroughly throughout the remainder of this paper, the pressure to reduce money as a detention mechanism is becoming far too intense to ignore. Finally, and as also mentioned previously, states are *already working* on their existing constitutional intentional release and detention provisions, albeit with many efforts failing and with some leading to objectively chaotic outcomes.[61] Thus, dealing with the issue of intentional detention correctly by using proper language and addressing each key element is paramount.

[61] One particularly egregious example occurred in Ohio. Ohio Supreme Court Rule 46, which contained the process for assessing bail, was amended in 2020 to mandate that financial conditions be set only to address court appearance and not public safety. This notion was based on the history and legal foundations of bail as well as years of study by the Ohio Supreme Court, but was especially necessary given that the legislature had passed a law allowing forfeiture of money bail for failure to appear for court but not for new crimes. When the Supreme Court merely applied that rule in a case, the legislature, apparently believing that the defendant should have been detained for public safety purposes and yet seemingly ignorant of the forfeiture statute or other notions of money and public safety at bail, dropped its existing bipartisan bail improvement efforts and chose instead to amend the constitution to: (1) allow money to be set for public safety (while still forbidding forfeiture for new crimes by statute); and (2) eliminate express constitutional authority for the Court to create rules governing bail. When that amendment passed, the Court repealed its bail rules, putting "Ohio's entire pretrial release system in jeopardy." *See* at Cash Bail Amendment From Lawmakers Put Ohio's Entire Pretrial Release System in Jeopardy | Cleveland | Cleveland Scene. As previously noted, properly dealing with intentional detention involves – at the very least – working on the detention eligibility net, the finding of risk within the net, eliminating money set to detain, revocation, and use of an actuarial tool. The Ohio amendment addressed none of these. Moreover, at least one federal district court has ruled that setting a financial condition of release for public safety purposes when it cannot be forfeited for public safety purposes, is "illogical." *Reem v. Hennessy*, 2017 WL 6539760, slip op. at 7-8 (N.D. Ca. Dec. 21, 2017). Accordingly, through lack of education, Ohio is arguably in a far worse place than it was before it's so-called "bail reform" based on the recent constitutional amendment.

What Illinois Did: Process

Nevertheless, the substance is only half of Illinois' historic work. The other half is its process, and the best way to illustrate this process (intertwined with a broader look at some substance) is to briefly compare it to a similar effort that happened at roughly the same time in Alaska. Persons in Alaska, too, had made recommendations and then changes to the state bail system, and, as in Illinois, it was broadly hailed in the press and by various groups as "bail reform" and described as "eliminating cash bail." Nevertheless, within only months of the effective date of the statutory bail changes (and before any data could even be collected after implementation), the recommended changes to the pretrial system concerning money bail in Alaska were entirely repealed.

I compare states not to denigrate the good intentions and hard work done in Alaska, which, as the reader will see, likely did not know or understand (or have the time to know or understand) the elements needed for success. Instead, I do so to help the reader learn of the importance of the two process pillars of pretrial justice[62] (that is, collaboration and education) as well as the consequences of an unwillingness to tackle the third, substantive pillar, which is crafting a replacement to the money-bail system as explained in detail later in this paper. Moreover, comparison to Alaska's failed attempt is done as a result of public invitation. Alaska State Representative Ivy Spohnholz was quoted in the press, saying, "The State of Alaska's response to SB 91 [the bill initially enacting various criminal justice and pretrial improvements, which was quickly repealed] over the last three years should be a warning to other states. They should be looking to learn from our experience."[63] Accordingly, let us all learn by comparing the experiences of Illinois to Alaska.

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[62] People in Illinois also praise the work done to implement the changes (the most-likely necessary addition to the process pillar list), but time prohibits my discussing implementation in detail. I simply re-iterate that whatever changes a well-educated collaborative group might decide to try, it has a better chance of success by following the literature on implementation science and adaptive leadership.

[63] Zachary Siegel, *Alaska Passed Sweeping Criminal Justice Reforms. It's New Governor Just Unraveled Them,* The Appeal (July 11, 2019), found at https://theappeal.org/alaska-passed-sweeping-criminal-justice-reforms-its-new-governor-just-unraveled-them/.

Illinois Versus Alaska

Illinois started its work through the Supreme Court's creation of a Commission on Pretrial Practices, and included 34 members meeting for over two years before issuing its final report, which contained 54 recommendations specifically aimed at the pretrial phase.[64] It was assisted from the beginning by the National Institute of Corrections, which made sure the Commission – and later, the general public – obtained deep education on bail and pretrial justice from several outside consultants. That education continued through the recommendation process and even into the drafting and implementation of the Pretrial Fairness Act, with the fairly intense implementation period supported by a number of national assistance providers. Collaboration, too, continued to evolve to include dozens of unified civil rights and grassroots advocates, who were ultimately crucial for getting the PFA passed. At one point, the Commission, the legislature, and the grassroots organizers were all engaged in drafting and compromising over particular words found in the Act as well as the trailer bill designed to fix perceived problems in advance of its effective date.[65]

Alaska's Criminal Justice Commission, on the other hand, was created in 2014 by statute, and included thirteen stakeholders, a number unlikely to represent the actual number of true stakeholder groups affected.[66] Nevertheless, there are ultimately four crucial differences in the overall Alaska process that we can see when we compare that process with Illinois. First, the Alaska Commission was charged not with looking solely at the pretrial system; instead, it was tasked with

[64] All of the Illinois official documents, tools, flowcharts, sample orders, town hall meetings, and regional education seminars may be found at https://www.illinoiscourts.gov/courts/additional-resources/pretrial-resources/additional-pretrial-resources/.

[65] In the end, the Illinois Supreme Court rejected arguments against the constitutionality of the PFA in *Rowe v. Raoul,* 223 N.E. 3d 1010 (Ill. 2023). The briefs submitted by those who brought the lawsuit confirmed my surmise that the intense bail education given to the Commission had not yet filtered down to a number of scattered, line-level practitioners.

[66] The Alaska Criminal Justice Commission "story" was gleaned through enabling statutes as well as a variety of reports, legislative bills, and news articles, but primarily from the Commission's annual reports to the Alaska State Legislature, beginning in 2016 (covering 2015), found at https://www.ajc.state.ak.us/acjc/. The Alaska Judicial Council created its own summary of the Commission from 2015 until its end in 2022, found at https://www.oregon.gov/cjc/nasc/Documents/Ak%20Cr%20Just%20Reform%20NASC%20breakout%207-28-2022.pdf.

evaluating virtually all elements of the criminal justice system, from "the effect of sentencing laws" (including core justifications and principles of all forms of punishment), alternatives to incarceration, correctional resources, the adequacy of treatment and rehabilitation programs, incarceration rates, effects of crime on victims, data collection, risk factors for criminal activity, crime prevention, specific issues such as those dealing with scheduling controlled substances and revising sex offense statutes, and everything else under the broad umbrella of "criminal justice practices." Indeed, in the enabling statute, the words "pretrial" and "bail" were only used once, and only in passing versus using them as specific and important topics for study. It was only after the first six months – and after the Commission had successfully retained outside help – that it even had a subgroup dedicated solely to examine pretrial practices.

This might not be concerning but for the second crucial difference found when comparing the process to Illinois. According to the Alaska Commission's 2016 Annual Report documenting the events from 2015, at roughly the same time the Commission received its outside support, "Alaska's legislative leaders contacted the Commission to emphasize the urgency of its work in the current fiscal climate,"[67] and told the Commission to develop recommendations aimed at reducing corrections savings by 15% "for this legislative session."[68] The Commission complied by quickly submitting 21 recommendations in early December, 2015, four dealing with pretrial issues, and three of those four dealing with what we might call today pretrial improvements surrounding money bail.[69]

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[67] While certain Alaska politicians attempted to cite "public safety" as the primary motivator for the criminal justice reforms, author Michael Rosengart makes a compelling case for Alaska legislators being primarily concerned with the budget. *See* Michael Rosengart, *Justice Reinvestment in Alaska: The Past, Present, and Future of SB 91*, 34 Alaska L. Rev. 237 (2017). Of course, while some pretrial improvements can certainly save states money, others, such as providing due process at bail hearings and releasing defendants held through unlawful bail practices, must be done despite any cost.

[68] Alaska Criminal Justice Commission, *Annual Report to the Alaska State Legislature,* at 3 (Feb. 1, 2016), found at https://www.ajc.state.ak.us/acjc/docs/ar/2015.pdf.

[69] The final recommendations were actually very good given the time limits, budgetary focus, and scope of what people knew about pretrial best-practices necessary to save money in 2015. Moreover, other recommendations – such as collecting data, advancing victim priorities, etc. --- clearly affect the pretrial phase, and still others – such as reclassifying crimes and increasing treatment options – could be listed under the broader notion of "pretrial justice." *See* discussion of terms and phrases under the section on education in this paper, *infra.* Nevertheless, the Commission's recommendations specifically surrounding money bail, such as considering ability to pay, allowing

Clearly, three or four months is an insufficient amount of time to study bail, let alone to conduct deep research for a particular state, and it is certainly not enough time for other members to fully understand bail in addition to those areas expressly mandated by the enabling statute.[70] In sum, the time restriction severely compromised Alaska's ability to fully collaborate or become even minimally educated about bail.

Third, the timing of the Alaska Commission's work was simply unfortunate, with the 2015 recommendations coming before the pretrial field had clear answers to: (1) questions surrounding pretrial assessment tools; and (2) how to make meaningful changes to constitutional or statutory right to bail provisions to create safe and fair intentional release and detention processes. The year 2015 was a time during which "risk," the risk principle, and risk tools appeared to be the solution to all problems in bail through repeated calls to "replace money with risk,"[71] but without any consideration of how that solution fit with things like existing state constitutional right to bail provisions. Illinois, on the other hand, was

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bail review hearings, and allowing for unsecured bonds, involved improvements only working on the edges of "true, historic bail reform," and with variations of those improvements already existing and yet historically ignored in other states. The recommendation to eliminate misdemeanor bail schedules (a bona fide best practice and objective pretrial improvement) was presumably left out of the resulting legislative bill due to the Alaska Supreme Court's decision to actually create a statewide misdemeanor bail schedule in mid-2016. Bail schedules are often misunderstood by persons in and out of the system, but the misunderstandings can be fixed. For example, after only minimal bail education, the Colorado state crime commission changed an initial recommendation to create a statewide bail schedule to a recommendation to drastically reduce if not basically eliminate all monetary bail schedules.

[70] By their nature, so-called "Blue Ribbon" commissions or task forces often tend to rely on the expertise of the members to come up with quick, consensus recommendations. After teaching the "fundamentals" of bail for over 10 years, however (*see* the pretrial pillar of education, *infra*), I am confident in saying that bail is simply different from other criminal justice issues and requires a much deeper education to understand (1) the history and legal foundations such as due process and equal protection, and (2) the pretrial research to understand risk, prediction, and what works when it comes to conditions of release. Without deep bail education, including broad, national education as well as understanding research into a state's own laws and practices, it becomes virtually impossible to confidently articulate justifications for even the most rudimentary of pretrial improvements, leaving them vulnerable to counter arguments – and, indeed, legal claims – due to enactment based on various uninformed misconceptions about bail.

[71] The phrase "replace money with risk" or "replace resources with risk" makes two errors. First, risk assessment is only replaced by another form of risk assessment, and money (or resources) is not risk assessment. Money is, instead, a sub-condition of the return to court condition of release and, in secured form, a pre-condition to release. Thus, money is replaced by either no-money, or some other non-financial condition or a financial condition, such as an unsecured bond, which typically does not lead to detention. Second, assuming jurisdictions do not allow some other release condition to lead to detention, replacing money-based release and detention is only done by creating an intentional release/detain scheme, such as that currently in use in Washington D.C. or Illinois.

able to learn about intentional release and detention from research beginning in 2017 as well as to make use of consensus notions of pretrial improvements and bail reform developed over the next few years. Accordingly, Illinois' 52 recommendations directed solely to, and covering all aspects of the pretrial system, coupled with clearly articulated justifications based on the law and pretrial research, were far better than those in similar, but earlier task force studies, including in Alaska.

Fourth and finally, the deficiencies in collaboration and education came together to completely thwart implementation of the Alaska bail provisions. The Alaska Commission's recommendations were passed in a fairly rushed bill in 2016, S.B. 91, but with the main money bail provisions set to become effective later on January 1, 2018.[72] By that time, however, various citizens and politicians were using general crime rates (versus pretrial crime rates) and anecdotes to argue that enacting S.B. 91 – even including the bail provisions that were not yet effective – had been a mistake.[73] After a relatively minor rollback in 2017, the Alaska legislature made significant rollbacks to S.B. 91's money bail provisions in a 2018 bill introduced *the same month* that those provisions went into effect and obviously *before* any outcomes could be measured to see if the changes actually worked.[74]

The next year, the new Alaska Governor signed H.B. 49, which completely repealed and replaced S.B. 91,[75] calling the earlier bail improvements "catch and

[72] S.B. 91, 29th Leg., 2d Reg. Sess. (Alaska 2016).
[73] The Brennan Center for Justice has written a good overall postmortem about Alaska's efforts, and states that "there was no direct evidence that Alaska's crime issues were connected to the criminal justice reforms." Stephanie Wylie and Ames Grawert, *Challenges to Advancing Bail Reform: Lessons from Five States,* at 6*,* [hereinafter *Brennan Center*], found at https://www.brennancenter.org/our-work/research-reports/challenges-advancing-bail-reform.
[74] H.B. 312, 30th Leg., 2d Sess. §§ 12, 33 (Alaska 2018), https://www.akleg.gov/basis/Bill/Text/30?Hsid=HB0312Z; *see also Brennan Center*, *supra* note 73 at n. 67; *see also* Downing, *Big Fixes for Justice: HB 312 Passes Senate* (also noting that 312 was a bill to "removed mandatory release requirements" and "grant judges more flexibility" to jail persons pretrial), found at https://mustreadalaska.com/big-fixes-justice-hb-312-senate/.
[75] While some "pretrial improvements" survived, they did little to nothing to curb problems in the pretrial system. As the Brennan Center has noted, "As of early 2024, Alaskan prisons held more people in pretrial detention than people convicted of criminal offenses. Pretrial detention is well above 2015 levels." *Brennan Center, supra* note 73, at 6.

release" provisions,[76] a term most frequently uttered by those in the for-profit bail industry. Accordingly, though widely heralded as "bail reform" in both 2016 and 2018, Alaska wasted many years simply to learn two harsh but avoidable lessons: (1) pretrial improvements are not necessarily "bail reform;"[77] and (2) both pretrial improvements as well as true, historic bail reform require jurisdictions to slow down and engage in meaningful education and collaboration. Currently, one website describes Alaska's "reforms" succinctly as follows: "Alaska largely eliminated cash bail in 2018, but reinstated it in 2019."[78] In Harvard's *Landscape Analysis of Bail Reforms Across all 50 States,* Alaska is not even listed.[79]

Accordingly, while it could not help the timing of its endeavor, the overarching lesson learned by comparing Alaska to Illinois is clear: to achieve an optimal pretrial system – and to even attempt to tackle true, historic bail reform – jurisdictions must strive for meaningful collaboration and education. With those two things, states (and local jurisdictions and the federal system) can make historic advances toward pretrial justice; without them, jurisdictions will flounder and will likely make mostly reactive changes only when forced. Of the two process pillars, however, bail education is truly the panacea. With more in-depth bail education, Alaska would have quickly realized the need to slow down, split off its pretrial work as a separate project, and proceed methodically toward comprehensive and meaningful changes. Moreover, with proper bail education, Alaska would likely not have settled for a few "pretrial improvements" that do not get to the heart of crafting the replacement to money-based release and especially harmful or ineffective detention, the most important endeavor in American pretrial justice today. Even more fundamentally, bail education would

[76] *See Governor Dunleavy Signs Crime-Fighting Legislation Into Law,* July 8, 2019, found at https://gov.alaska.gov/governor-dunleavy-signs-crime-fighting-legislation-into-law/.
[77] I provide more detail on the differences between "pretrial improvements," "bail reform," and "pretrial justice" in the section on education, *infra.*
[78] *See* World Population Review, *No Cash Bail States 2024,* found at https://worldpopulationreview.com/state-rankings/no-cash-bail-states.
[79] Isabella Jorgenson & Sandra Smith, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across all 50 States,* found at https://www.hks.harvard.edu/publications/current-state-bail-reform-united-states-results-landscape-analysis-bail-reforms-across.

likely have allowed Alaska to learn how and with whom to collaborate, how and with whom to implement.

As mentioned above, Illinois began its journey with deep bail education (including a comprehensive state legal analysis) that continued even through enactment and implementation. Time after time jurisdictions have mistakenly worked on bail issues as if they were typical criminal justice issues, easily fixed by one or two lines in a statute or court rule or by borrowing a single practice from some other state. But years of research and experience in this generation of reform have clearly shown what Illinois learned, which was that "overhaul" and "transformation" are the appropriate words for its response to a system of release and detention – the money-based system – that is slowly becoming extinct. "Overhaul," in turn, requires education. And so, once again, if collaboration and education are necessary to creating an optimal pretrial system as well as for guiding the inevitable shift from money to intentionality, education is crucial not only for: (1) learning the solutions to problems with the American money-based system of bail, an incredibly flawed system that we have allowed to flourish for roughly 200 years due mostly to ignorance; but also (2) understanding how collaboration and, ultimately, implementation should be done so as to craft and enact solutions that survive over time.

Genesis of The Three Pillars

The three pillars of pretrial justice addressed in this paper – collaboration, education, and crafting an intentional release and detention provision to replace money-based release and detention – are a natural outgrowth of 100 years of expert analysis of bail in America.

Roscoe Pound and Felix Frankfurter (1922)

Strong rumors of corruption combined with public perceptions of government failure in responding to crime led Harvard Law School Dean Roscoe Pound and future Supreme Court Justice Felix Frankfurter to write a comprehensive 700-page social science study of crime and institutions of the criminal process in Cleveland, Ohio.[80] The topics ranged from police administration, to prosecution, to all aspects of the criminal courts, to corrections, to medical science, and even to legal education and newspaper coverage of crime with recommendations scattered throughout.

Bail received relatively small but nonetheless important attention, leading to the famous quote about a commercial system that had barely gotten started in America: "The real evil in the situation is not the matter of easy bail, but the disreputable professional bondsmen who make a business of exploiting the misfortunes of the poor, and whose connection with 'runners' and 'shysters' tends to prostitute the administration of justice in the inferior courts."[81] This led to recommendations to "eliminate the professional bondsmen" by "removal of the necessity of bail [defined as money] wherever possible, and a relaxation where such a removal cannot be accomplished." These included various practices designed to avoid the use of commercial sureties entirely by increasing the release of accused persons on a personal bond with no surety (especially for lower level offenses), using "cash bail," and making more use of summonses versus arrest warrants as the "normal mode of beginning the criminal process in certain classes

[80] Roscoe Pound & Felix Frankfurter (Eds.), *Criminal Justice in Cleveland,* at 290 (Cleveland Found. 1922) [hereinafter *Pound & Frankfurter*].
[81] *Id.* at 290.

of cases."[82] In a later section, the authors were especially critical of press coverage seeking to indiscriminately "expose" scandals in bail-setting and designed to change system-actor behavior, but without journalists fully understanding the bail process or metrics of successful change, leading not only to "inefficienc[ies]" but also possibly to "grave injustice."[83]

The Pound and Frankfurter process for determining recommendations relied on deep study and education in all areas of criminal justice, which, in turn, allowed certain issues to rise up as "crucial." In that way, it resembles the thesis of this paper, which allows jurisdictions to collaborate and, through deep research and education, come up with the most pressing issues facing any particular system for ultimate implementation.

Arthur Beeley (1927)

In 1927, Arthur Beeley conducted a similar study of the Cook County justice system, but focused solely on bail. In that study, Beeley concluded, "It is clear, therefore, from the facts summarized above that the bail system as it is administered in Chicago has completely broken down at many critical points."[84] As I wrote in 2014, Beeley summarized the fundamental flaws of the traditional money-based bail system in 1927, which still exhibits the same "waste and injustice" today:

[82] *Id.* at 290-91. Recognizing the difficulty of complete elimination of commercial sureties, the authors recommended that the business at least be "regulated like that of 'loan sharks' in other jurisdictions." *Id.* at 292.
[83] *Id.* at 547. In perhaps the most recited portion of the study, the authors showed how mere increased newspaper coverage of crime during the period studied (from 925 column inches to 6,642 column inches), despite crime not actually significantly increasing, morphed into headlines describing a "crime wave," upon which the papers demanded action for a problem that seemingly did not exist. This led the authors to recommend that the press report on "crime" in a more objective and nuanced manner. A more recent treatment of the same phenomenon is detailed in Alec Karakatsanis' book, *Copaganda* (The New Press, 2025). Each year for the last several years, a prominent Colorado television station has done an "expose" on the dangers of releasing persons on so-called personal recognizance bonds, the timing of which seems only designed to push the General Assembly to increase the use of money bail while ignoring my corrective emails and, indeed, actual testimony showing the flaws of those proposed bills. As in 1922, this television station shows great ignorance of bail bonding and the use of money bail in particular, and avoiding the "grave injustice" that would be caused by increasing the use of money bail offsets, but does not excuse the inefficiencies of having to defeat the same basic bill year after year – the spawn of bad reporting.
[84] Arthur L. Beeley, *The Bail System in Chicago*, at 160 (Univ. of Chicago Press, 1927) [hereinafter *Beeley*].

> [L]arge numbers of accused, but obviously dependable persons are needlessly committed to Jail; while many others, just as obviously undependable, are granted a conditional release and never return for trial. That is to say, the present system, in too many instances, neither guarantees security to society nor safeguards the rights of the accused. *The system is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe.*[85]

One can glean an implied set of recommendations by simply looking at the various flaws to which he points. For example, he decries the lack of judicial discretion and thus hints at the elimination of secured money-bond schedules, which hindered discretion at that time.[86] Nevertheless, he also included the following specific recommendations designed around providing both more discretion and "all-round improvement" in the general administration of criminal bail in Chicago: (1) make bail unnecessary by: (a) making fewer arrests and increasing summonses; and (b) extending the age of jurisdiction for juvenile courts; (2) craft a constitutional amendment granting courts the power to "suspend, entirely, the bail privilege in [additional] certain cases;"[87] (3) individualize bail using five main factors;[88] (4) permit reductions in amounts of bail, accept cash or property as security, and allow release without sureties;[89] and (5) allow courts to use investigators to help judges with their discretionary decisions.

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[85] *Id.* (emphasis added).

[86] Money bail schedules began to get serious attention later, after the United States Supreme Court emphasized the importance of individualization in bail setting. *See Stack v. Boyle,* 342 U.S. 1 (1951). Recommendations about bail schedules have fluctuated between creating statewide schedules for uniformity (based on less bail education) to eliminating them altogether (based on more bail education). Very few recommendations today address judicial discretion directly, although this paper admits a likely decrease in at least some judicial discretion when moving away from money simply due to money's virtually unlimited conveyance of discretion to detain.

[87] Of course, this is the same as my proposal to craft intentional detention provisions in constitutions, statutes, or court rules, although today we would never call bail a mere "privilege."

[88] *Id.* at 167. "Factors" to be weighed by judges in setting bail have been a part of American statutes since the founding. Beeley's is the earliest recommended list we have seen (created well after Section 33 of the Judiciary Act of 1789, which mentioned using the "nature and circumstances of the offence, and of the evidence, and the usages of law," but well before Rule 46 (c) in the Federal Rules (referenced in *Stack v. Boyle*), and which included the nature of the offense, the weight of the evidence, the character of the accused, the seriousness of the potential punishment, and the "quality" of the bail, or security.

[89] Now, of course, most lists say to eliminate commercial sureties altogether, and to use secured bonds, if at all, only when they are affordable and do not lead to pretrial detention.

As more “palliative” recommendations, Beeley suggested: (1) creating licensing and placing more regulation on commercial bail bondsmen (with several specific recommendations going to the substance of regulation); (2) providing arrested persons with adequate and readable information; (3) using social workers for help with indigent persons; (4) making use of “time served” periods from pretrial detention; (5) compensating persons held in jail over seven days when the case is later discharged; and (6) creating a “bail commissioner,” responsible to the courts for overseeing the bail industry.

These recommendations were followed by a number of “indirect measures” to promote a more effective bail system: (1) minimize case delay using a variety of tactics; (2) create a “joint administrative council” of criminal justice stakeholders for policy making;[90] (3) conduct a thorough investigation into the “defects of the criminal law and its local administration, done by paid staff and investigators and possibly for publication of results.”[91]

I mention each of these early studies because they provide a hint of the sort of things that have been ultimately deemed "fundamental" or "crucial" not only when working on bail but also when working on any criminal issue whatsoever. Obviously, the fields of implementation and adaptive leadership were still 70-80 years from development, and, indeed, some put the start of formal collaborative groups for the criminal system in America in the 1930s, several years after Beeley's study. Nevertheless, it is clear that education is one such fundamental element – a pillar of pretrial justice – simply because the studies themselves testify to the importance of research and education based on research to guide system stakeholders. Moreover, each study included a substantive aspect when discussing bail, albeit focused on "fixing" bail by eliminating or avoiding commercial sureties, but with Beeley also recommending constitutional amendments to allow for "no bail" in certain circumstances. And finally, Beeley, who focused solely on the bail system, also recommended collaboration as an

[90] This is the essence of the current paper’s pillar of pretrial justice number one, collaboration, and is akin to statements made by Roscoe Pound under the title of “organization of the administration of justice.” *See* Pound & Frankfurter, *supra* note 80, at 605.

[91] This is essentially the same as pillar of pretrial justice number two, education, which includes deep research into any particular jurisdiction’s own mix of relevant statutes, constitutional provisions, court rules, and court opinions.

important aspect of the process of change, foreshadowing what would become a true pillar of pretrial justice, given that the bail process crosses so may agency boundaries. Indeed, if Beeley's proposal could be boiled down to three major components, in my opinion they would be: (1) collaborate; (2) educate; and (3) fix bail. If true, then this current paper is essentially no different, except for the nature of the "fix."

Lists of pretrial improvements have been a consistent part of bail for the last 100 years, with the number of distinct recommendations growing and receding based on numerous factors, including who wrote them and when they were written. Nevertheless, it is safe to say that almost all lists over the century have addressed the "evils" of the traditional secured money-based bail system layered with commercial sureties leading to the "wrong" people being in and /or out of jail. Moreover, it is safe to say that the federal system relied on such lists to completely change the way bail is done, versus the states that have been far more reluctant to change. Also, when the national standards on release and detention were first created, the lists mirrored the recommendations found within those standards, but the last forty years may be split into three eras: (1) an era in which lists of recommendations or improvements were generally scarce; (2) an era in which lists of recommendations focused on “risk” as assessed through actuarial tools, while avoiding the topic of money bail or its replacement; and, most recently (3) an era in which lists have more forcefully addressed money, risk, intentional release and detention as well as a process for determining the nature and scope of other pretrial improvements.

The best sets of lists should (and typically do) include the need to educate system stakeholders and the public and to allow for collaborative solutions to whatever issues face a particular jurisdiction. Additionally, and beyond any other specific substantive recommendations of pretrial improvements, the best lists recommend true, historic bail reform by replacing the traditional money-based system in the states. For example, the current NAPSA Standards include process (such as collaboration and education) as well as substantive recommendations, which include addressing the need for an intentional release and detention process.

Accordingly, the three pillars described in this paper have 100 years of justification based on the work of numerous individuals and organizations. Nevertheless, I provide the following special mention of the work of the United States Department of Justice and the National Institute of Corrections – which, despite their leadership's unfortunate recent change in direction concerning bail policy and the use of legal and evidence-based practices to achieve safety, and, indeed, justice – nonetheless supported the year's worth of research that ultimately led me to draft this paper.[92]

The Role of the DOJ and NIC in Shaping the Three Pillars

In addition to the various lists of recommendations crafted over the last century, the three pillars owe much of their existence and continued relevance to criminal justice leadership from the Department of Justice ("DOJ") and the National Institute of Corrections ("NIC") for both federal and state systems. Readers of NIC's document titled, *Fundamentals of Bail,*[93] are familiar with Attorney General Robert Kennedy's leadership in bail reform by creating the 1961 Allen Committee (which studied poverty and federal criminal justice and called for a formal "re-appraisal" of state bail practice)[94] as well as hosting the 1964 National Conference on Bail and Criminal Justice, and who, at various times, described the American money-bail system as "cruel," "illogical," "costly," and "needless" – thus requiring us to ask ourselves then (as now), "why we have not developed a remedy long ago."[95]

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[92] I hold out hope that, despite the current administration's recent, unfortunate switch in priorities, both DOJ in general and NIC in particular will be reminded of their important historic role in pretrial justice as well as the many projects they have supported (including this one) that provide solutions designed to foster both fairness and community safety to bail.

[93] *See Fundamentals of Bail, supra* note 20.

[94] *Report of the Attorney General's Committee On Poverty and the Administration of Federal Criminal Justice,* at 58-89, found at https://babel.hathitrust.org/cgi/pt?id=mdp.39015010772674&seq=5&q1=bail.

[95] Department of Justice/Vera Foundation, *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice,* at 225 (1965) [hereinafter *National Conference*], found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/national-conference-bail-and-criminal-justice-proceedings-may-1964. *Fundamentals of Bail, supra* note 20, at note 88 and accompanying text.

Federal Versus State, State Versus Local

Given that the federal system switched from a primarily money-based bail system to an intentional release and detention system in the 1980s (even replacing the word “bail” with “release”), this paper is mostly focused on state bail setting, which is still immersed in the money-bail system. Nevertheless, the federal system is also in need of significant reform, including in its most basic structural statutory wording. Although there appears to be only one outside, formal initiative dedicated solely to curing the ills of the federal system (*see* Alison Seigler in sources, below), it is comprehensive and it, along with other individual studies, reveals numerous problems, including an average (and seemingly obvious unconstitutional) detention rate of 75%. Fifteen years ago, I highlighted the federal system merely to show that states could, in fact, stop relying on financial conditions of release, but I neglected to point out that the federal “model” – and in particular its precise detention verbiage and use of rebuttable presumptions toward detention – is largely responsible for federal over-detention, and should never be used as a template for change in any particular state.

Moreover, while the federal government has an overall history of extraordinary work in bail, federal action concerning help for the states has occasionally been uneven. For example, after one administration’s bold and effective attempt to help states make fines, fees, and bail fairer, the next administration essentially canceled those efforts. The administration after that put “eliminating cash bail” on a list of presidential priorities, but gradually backed off of discussions surrounding bail in the remaining three years, relegating the topic to mostly footnote status in subsequent papers. Finally, I have already mentioned the current administration's astounding slide backward in my "note to readers" at the beginning of the paper. As noted previously, a premise of this paper is that, when fully understood, neither “bail reform” nor “pretrial justice” are partisan issues, and thus those issues and their solutions should not change due merely to changes in federal administrations.

This paper should also be seen as relevant to local jurisdictions within the states. Both state and local jurisdictions should strive to implement pretrial improvements, to move away from money-based detention and toward intentional release and detention, and to aim for pretrial justice, and I have seen both state and local collaborative groups do equally well at these tasks. While state collaborative groups might have an advantage in their ability to recommend or even draft changes to state laws hindering legal and evidence-based practices, by doing deep research and analyzing various alternatives for change, local collaborative groups will quickly recognize their ability to achieve virtually all of their goals (and recommendations in this paper) working within existing law.

An excellent example of local improvement even with sub-par state laws is found in El Paso County, Texas, which "exemplifies the art of long-term pretrial system improvement" by using an assessment tool for early release, eliminating a money bail schedule, making first appearances prompt and meaningful, and making subsequent improvements based on data collection. According to Director of Justice Services Joel Bishop, local jurisdictions should start with collaboration: "Pull together your key justice stakeholders and get everyone to meet and to have a clear vision, purpose, and goal in mind."

Counties looking to improve local policies can also look to the Harris County federal consent decree and resulting changes to county bail policies to show how – even though brought about by litigation – some fairly simple changes to county policy without changes to state law can lead to much better outcomes, including public safety, avoiding other perils of unnecessary pretrial detention, and cost savings. *See* Lindsay Bass-Patel, *Policy Shifts in Pretrial Detention: Lessons From the 2019 Harris County, Texas, Misdemeanor Bail Policies* (Wilson Ctr. for Science and Just., 2025), found at https://wcsj.law.duke.edu/wp-content/uploads/2025/07/Policy-Shifts-in-Pretrial-Detention.pdf. Other counties forced to change policies within existing state law by reducing the use of money during COVID have documented improvements to release rates with no reduction in public safety. *See, e.g.,* Jennifer Copp, *Cash Bail and Pretrial Compliance: Evidence From a Court-Imposed Policy Shock* (Crim. & Pub. Policy, 2025), found at https://onlinelibrary.wiley.com/doi/epdf/10.1111/1745-9133.70002.

All of this being said, if you are crafting local improvements and you recognize the deficiencies of state law, you must resolve never to create policies or practices compensating for bad laws without also bringing the overall issue to people with the ability to change those laws. For example, improvements at bail from two counties in Colorado became the basis for a bail statute overhaul in 2013-14. At the time, an issue was how to weave an actuarial assessment tool (with several truly predictive factors) into a statute that already had mandatory "factors" each judge had to consider, whether they were predictive or not. Rather than to choose a path in which every county would have to compensate for the earlier statutory list (likely requiring our various pretrial services units to interview the accused), my colleagues and I convinced lawmakers to create new language requiring individualization, urging the use of the tool, changing the statutory language saying that the judge "shall" consider the statutory factors to "may" consider the statutory factors, while still mandating that judges still consider the resources of the accused when setting financial conditions.

Sources: Alison Siegler, *Freedom Denied: How the Culture of Detention Created a Federal Jailing Crisis* (Univ. of Chicago Fed. Crim. Just. Clinic (2022), found at Freedom Denied (uchicago.edu);

Christian Dionisio, *Stalled Executive & Active States: Explaining President Biden's Inaction on Bail Reform,* The Fellows Review, at 21 (Ctr. For the Study of the Pres. & Congress) (2023-24); *see also* Dear Colleague Letter of April 20, 2023 (Office of the Atty Gen.), found at https://www.justice.gov/archives/opa/press-release/file/1580546/dl; Stephanie Didwania, *The Immediate Consequences of Federal Pretrial Detention,* 22 American L. and Econ. Rev., 24 (2020); Amaryllis Austin, Sara Valdez Hoffer & Christopher Lowenkamp, *The Presumption for Detention Statute's Relationship to Release Rates Revisited: A Replication and Extension,* 88 Federal Probation 14 (2024); Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates,* Federal Probation (September 2017) at 52 (2017); Charles Doyle, *Bail: An Overview of Federal Criminal Law* (Cong. Res. Serv. 2017); Thomas Cohen & Amaryllis Austin, *Examining Federal Pretrial Release Trends Over the Last Decade,* 82 Fed. Prob. 3 (Sept. 2018); Darly Olszewski, *The Bail Reform Act of 1984: A Cause of and Solution to the Federal Pretrial Detention Crisis,* 52 Univ. Balt. L. Rev. 77 (2022). For a legislative histories of the 1966, 1970, and 1984 bail acts passed by Congress, *see Model Bail Laws, supra* note 23, at 54-86. Lauren Gill, The Art of Systemic Pretrial Improvement (APPR, 2023) (describing El Paso County improvements), found at https://advancingpretrial.org/story/the-art-of-systemic-pretrial-improvement/?utm_source=APPR+Mailing+List&utm_campaign=f1932370fe-EMAIL_CAMPAIGN_2025_03_27_03_26&utm_medium=email&utm_term=0_-f1932370fe-356048858. Timothy R. Schnacke, *Best Practices in Bond Setting: Colorado's New Pretrial Bail Law* (CLEBP, 2014), found at http://clebp.org/images/REVISED_New_Colorado_Bail_Law_06-14-2014_.pdf. Matt DeLisi, Michael Elbert, and Katherine Tahja, *Inverting Risk Assessment: Considering the Lowest Risk Clients in the Federal Justice System,* 30 Crim. Just. Policy Rev., Issue 7, found at https://journals.sagepub.com/doi/abs/10.1177/0887403418776417.

Less familiar, however, is Attorney General Nicholas Katzenbach's role in chairing President Johnson's Commission on Law Enforcement and the Administration of Justice. The landmark and ambitious 1967 document generated by that Commission – *The Challenge of Crime in a Free Society*[96] -- presented three main theses to address issues that are relevant to this paper: (1) treat the criminal justice system as a *system* and *community* issue, with work done through collaborative planning committees made up of persons from in and out of

[96] *The Challenge of Crime in a Free Society* (1967), found at https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/42.pdf [hereinafter *Challenge of Crime*]. The Report was the culmination of information gleaned from three national conferences, five national surveys, hundreds of meetings, and interviews with tens of thousands of persons resulting in 202 recommendations. *See id.* at v.

government to address crime "as a social problem that is interwoven with almost every aspect of American life;"[97] (2) use research to eliminate unfairness and employ only "what works" to effectively achieve goals; and (3) adopt its "implementation vision, which was a theory about how the processes and institutions of the criminal justice system needed to be developed, either to implement the strategy they had decided on or to develop a new idea they could act on if the old idea turned out to be inappropriate."[98]

These three elements animated the DOJ's overall pretrial work over the decades through multiple agencies, each doing their best to achieve pretrial justice with federal and state systems. The work ranged from assisting with the 1966 and 1984 Bail Reform Acts and helping the District of Columbia become a moneyless, intentional release and detention system, to holding a national symposium about pretrial justice in 2011[99] and making bold statements to the states through briefs and "dear colleague letters," which argued the unconstitutionality of America's typical use of secured financial conditions.[100]

After the creation of the NIC in 1974, that agency also began quickly to advance these elements/theses by leading the Criminal Justice System Project,[101]

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[97] *Id.* at xi.

[98] Mark Moore, *Closing Remarks in The Challenge of Crime in a Free Society: Looking Back Looking Forward,* at 168 (OJP, 1997), found at https://www.ojp.gov/pdffiles1/nij/170029.pdf. The Commission had much to say about bail, including the following: "If a satisfactory solution could be found to the problem of the relatively small percentage of defendants who present a significant risk of flight or criminal conduct before trial, the Commission would be prepared to recommend that money bail be totally discarded." *Challenge of Crime, supra* note 96, at 131. The Commission concluded, however, that finding a solution "is not easy," and "might well create more of a problem than the imposition of money bail, in light of the difficulty of predicting dangerousness." *Id.* Obviously, one premise of the instant paper is that the solution has, in fact, been found despite the difficulties of prediction.

[99] *See generally, National Symposium on Pretrial Justice: Summary Report of Proceedings* (BJA/PJI May 23, 2011) [hereinafter *Symposium Report*], found at https://www.scribd.com/document/92690596/NSPJ-Report-2011.

[100] The first such letter was issued March 14, 2016, and directly addressed the unconstitutionality of certain bail practices. The most recent letter mentioning bail and unconstitutional practices (albeit in a footnote), is found here: https://www.justice.gov/archives/media/1288301/dl?inline#:~:text=The%20letter%20includes%20an%20updated,discrimination%20in%20the%20imposition%20and.

[101] *See* Peggy McGarry & Becky Ney, *Getting it Right: Collaborative Problem Solving For Criminal Justice* (2006), found at https://s3.amazonaws.com/static.nicic.gov/Library/019834.pdf. The Project was run under the direction of the Center for Effective Public Policy, a consistent and important partner to NIC over the decades.

publishing numerous documents on Criminal Justice Coordinating Councils,[102] and creating foundational bail-education documents and curriculums to advance legal and evidence-based solutions, including publishing documents on how to fix" bail.[103] Additionally, NIC introduced and advanced organizational management, implementation science, and adaptive leadership principles both in theory[104] and in practice through initiatives such as the Evidence-Based Decision Making Initiative ("EBDM"), designed to apply "empirical knowledge and research-supported principles to justice system decisions made at the case, agency, and system level" for both local and state level improvements.[105] Indeed, the EBDM Initiative is an especially appropriate initiative to study, with numerous parallels to the discussion in this paper. These parallel principles include the following: (1) decision making is enhanced when informed by evidence-based knowledge (i.e., broad education); (2) every interaction in the system offers an opportunity to reduce harm (i.e., specific education); (3) systems achieve better outcomes when they operative collaboratively (i.e., collaboration); and (4) the system will

[102] NIC uses the term "councils," although "committees" or "commissions" are also widely used. The most recent publications on CJCCs began in 2002 with Robert Cushman's *Guidelines for Developing a Criminal Justice Coordinating Committee,* at ix (NIC, 2002), found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/guidelines-developing-criminal-justice-coordinating-committee [hereinafter *CJCC Guidelines*], and continue to 2022, with most resources found at https://jmijustice.org/national-network-of-criminal-justice-coordinating-councils/.

[103] *See, e.g., Fundamentals of Bail, supra* note 20 (articulating the six foundational areas of bail education necessary to guide state and federal pretrial justice); NIC, *Money as a Criminal Justice Stakeholder* (2014) (providing education directed solely on the use of money at bail), found at http://www.clebp.org/images/Final_NIC_Money_as_a_Stakeholder_September_8,_2014.pdf [hereinafter *Money*]. NIC, *Measuring What Matters (2nd ed.)* (Spurgeon Kennedy, Facilitator) (2021), found at https://nicic.gov/resources/nic-library/all-library-items/measuring-what-matters-outcome-and-performance-measures-0. NIC's pretrial executive training curriculum was developed by experts in and out of NAPSA to fill a gap in training directed at the broader issues of pretrial justice beyond pretrial agency organization. NIC also funded the research used to write *Model Bail Laws, supra* note 23, and *Changing Bail Laws, supra* note 56.

[104] For years, NIC has benefitted from Tom O'Connor's (Transforming Corrections) expertise training on these notions in the pretrial executive training curriculum. *See* at https://transformingcorrections.com/.

[105] This 2008 initiative, in which NIC also partnered with CEPP, can be examined here: https://info.nicic.gov/evidence-based-decision-making#:~:text=justice%20system%20reform.-,EBDM%20is%20a%20strategic%20and%20deliberate%20method%20of%20applying%20empirical,that%20will%20result%20in%20measurable. Originally applied only to local jurisdictions, the particulars of bail law naturally pushed it to gradually move toward helping with state level collaboration, education, and implementation, and the initiative was re-named "Evidence-Based Decision Making in State and Local Criminal Justice Systems," which was incorporated into the title of the Fourth Edition of the Framework document, found here: https://s3.amazonaws.com/static.nicic.gov/info.nicic.gov/files/media/file/EBDM_Framework.pdf [hereinafter *EBDM Initiative*].

continually learn and improve through continuous information collection and analysis (i.e., implementation and outcome measurement).

Three Pillars of Pretrial Justice

Two Process Pillars and One Substantive Pillar

Accordingly, this paper is the culmination of thinking and practice designed to further the three elements/pillars initially raised in the 1920s and highlighted in 1967, but applied to pretrial justice in 2025-26.[106] It differs only by the degree in which it provides information needed to fill out those pillars to successfully adopt safe and effective pretrial improvements, achieve true, historic bail reform, and strive toward pretrial justice based on the literature and nearly twenty years of experience. I keep what has worked, discard what has not worked, and add information to help jurisdictions navigate the pressing issues in the pretrial field today, including: (1) adding various stakeholder groups (and their expected roles), new topics, and broader notions of pretrial justice to collaborative bodies; (2) summarizing bail education and updating each of the so-called "fundamentals" of bail education to 2025; and (3) providing precise template language for intentional release and detention provisions based on the latest legal and evidence-based education as well as discussing the future of "risk," risk assessment, and conditions of release based on our ability to forecast or predict. In short, I attempt to show what actually works at bail to keep communities safe while explaining the current urgency of working on fundamental changes that all states and the federal system will inevitably face. I do so, however, while holding up core American values of liberty, fairness, and equality, which constantly remind us of Justice

[106] The two process pillars discussed in this paper (along with proper implementation, which is not) and deemed crucial to making meaningful progress, do not guarantee success; instead, they should be seen as the things having the best chance at providing at least the potential for success, as improvements neglecting the pillars can lead to failure or, at least, the need to constantly revisit the topic of bail. For example, in our home state of Colorado, after an immersive pilot project showing good outcomes from bail changes, the project mostly failed in the end due deficiencies in implementation. Likewise, while Colorado's statewide collaborative body received deep bail education resulting in an overhaul of the bail statute in 2013 and 2014, it was not – as reported in the press – "bail reform." The 2013-14 overhauls contained a number of pretrial improvements aimed at release, but the collaborative body entirely ignored intentional detention, opting, instead, to leave money and all of its flaws in the Colorado bail system. This virtually guarantees another round of so-called transformational "bail reform" in Colorado in order to work on issues surrounding intentional detention. *See* Timothy R. Schnacke, *Best Practices in Bond Setting* (updated 2014), found at http://clebp.org/images/REVISED_New_Colorado_Bail_Law_06-14-2014_.pdf.

Rehnquist's oft-quoted admonition that pretrial liberty is the American "norm" and pretrial detention is the "carefully limited exception."[107]

It is after collaboration and thorough education that a jurisdiction may begin to engage in actual planning to improve particular policies, programs, and operational decision making to hopefully achieve pretrial justice. Based on local data analysis and other research, a jurisdiction may decide, for example, to identify and consider alternatives for reducing the number of persons held in the local jail for compliance violation (including FTA) warrants. Often, jurisdictions will map their systems, identify various decision points, and then do deeper research designed to propose researched-based policies or programs tackling issues sequentially from the beginning to the end of the map. Such an endeavor is often more likely to succeed than, say, working on a later decision point only to recognize that the true "fix" to a particular problem is associated with an earlier point.

Nevertheless, the foremost issue surrounding the release/detain decision point – engaging in the project of true, historic, bail reform by replacing a system of random money-based release and detention with a system of intentional release and detention – must be embraced and tackled even by collaborative groups not focusing solely on pretrial justice and even though, technically, it comes later in the decision-point map versus, say, a decision to arrest or divert. As I discuss throughout this paper, this is for several reasons, including the fact that: (1) the states are already attempting to do true, historic bail reform (albeit poorly and without education); (2) the switch itself appears to be inevitable; (3) it is the only substantive project that specifically tackles the primary abuse of the current bail system; and (4) the decisions inherent in making the switch often affect virtually every other decision point (earlier and later), making certain improvements normally suggested for the money-bail system (such as "bail review" hearings or dealing with money bail schedules) entirely unnecessary. Accordingly, there are two process pillars, collaboration and education, and one imperative substantive

[107] *United States v. Salerno,* 481 U.S. 739, 955 (1987).

pillar, switching systems to intentional release/detain, which I develop in this paper.

Bipartisan

In a 2017 document published by the National Institute of Corrections, the introduction read, “Improving America’s criminal justice system is a national priority with bipartisan support.”[108] While no one today would dispute that improving criminal systems generally – and bail in particular – remains a national priority, one might be tempted to say that pretrial improvements, bail reform, and pretrial justice have, indeed, become somewhat partisan.[109] If true, I believe this is a significant mistake for three primary reasons. First, as is discussed throughout this paper, "true, historic bail reform"[110] means addressing – simultaneously – both persons released and detained pretrial. In America today, we are fixing both the “in” and the “out” by taking opaque randomness out of the system and replacing it with rational and knowledgeable intentionality so that there are enormous benefits to everyone without regard to ideology. Moreover, doing so is quintessentially American, as both bail and “no bail,” release and detention, are perfectly lawful when done pursuant to foundational American legal principles with improvements slanted only toward reflecting the law and the research. There is simply no partisan disagreement with aiming toward both safety and liberty; there is merely balance.

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[108] Lisa Pilnik, *A Framework for Pretrial Justice; Essential Elements of an Effective Pretrial System and Agency* (NIC, 2017), found at https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf [hereinafter *NIC Framework*].

[109] This was written before the current President waded into the bail issue by focusing on money keeping people safe, which is substantively wrong and a notion typically spread through misleading talking points by the commercial bail industry. This paper, however, promotes a pretrial system in which people who are in jail due only to being poor – that is, the people that even the bail industry has refused to help for one reason or another, and, indeed, the people the bail industry says do not even exist – is being replaced. Moreover, it is a system in which rich and extremely high-risk people are not allowed to buy their way out of jail, something that the bail industry would likely oppose, but which communities see as a clear potential public safety violation. Given the reasons for why the topic should not be seen as partisan means that attempts to make it partisan is likely a desperate, last-ditch effort to slow down changes to the status quo.

[110] *See* discussion on "true, historical bail reform" and use of the term “bail reform” versus “pretrial improvements” in the education section of this paper, *infra.*

Second, public polling belies the notion that fixing the bail or pretrial release and detention system is a partisan topic. In 2017, the ACLU found that 91 percent of all Americans believe that the criminal system needs fixing, and that nearly 70% of persons would be more likely to vote for an elected official who would reduce incarceration and reinvest the money saved into drug treatment and mental health programs.[111] More specifically to the pretrial phase, a 2018 bipartisan poll by the Pew Charitable Trusts found that large numbers of Americans support laws and policies that limit pretrial detention. Specifically, persons reported favoring more citations versus arrests, prohibiting detention for minor offenses (including misdemeanors and nonviolent crimes), allowing detention for violent offenses only after assessing risk, and spending more money on treatment programs and victim services and less on jail for persons posing less risk.[112] Most recently, an October 2024 poll conducted for FWD.us found broad, bipartisan support for criminal justice reform, with three fourths of respondents showing support for reducing pretrial detention and building on notions included in the First Step Act, which was passed in 2018 and designed to reduce federal incarceration and promote rehabilitation while maintaining safety.[113]

Perhaps most surprising are polls showing that the things actual victims of crime want are quite different from what traditional criminal system stakeholders *think* those victims want. In 2024, the Alliance for Safety and Justice released a survey of violent crime victims, which showed that they overwhelmingly support

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[111] *See* ACLU, *Smart Justice Campaign Polling on American's Attitudes on Criminal Justice: Topline Memo* (Nov. 16, 2017), found at https://www.aclu.org/publications/smart-justice-campaign-polling-americans-attitudes-criminal-justice-topline-memo.

[112] PEW, *Americans Favor Expanded Pretrial Release, Limited Use of Jail: National Poll Finds Strong Support for Alternatives to Detention* (Nov. 21, 2018), found at https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/11/americans-favor-expanded-pretrial-release-limited-use-of-jail. In what should be an extremely hopeful finding to all Americans, 83% of those polled believe in the presumption of innocence, a notion that often confuses even persons working in the justice system. Of course, analyzing polls requires some understanding of bail to gauge question neutrality. For example, the question, "Do you support or oppose judges setting higher bonds for those charged with violent crimes" (as found in one poll conducted by a public relations and political consulting firm) plays into a general ignorance that money helps to achieve public safety. Despite this caveat, what we know to be true in virtually all instances (and reflected in virtually all polls) is that when the public is fully informed about what constitutes bail and bail reform, the public is favorable to a more rational process.

[113] FWD.us, *New Polling Shows Criminal Justice Reform is a Winning Issue for 2024 Election* (BSG, Oct. 2024), found at https://www.fwd.us/wp-content/uploads/2024/10/New-Polling-Shows-Criminal-Justice-Reform-is-a-Winning-Issue-for-2024-Election.pdf.

investments in communities through prevention, housing, and jobs versus increasing arrests and punishments to combat crime.[114] The same message is highlighted by author Danielle Sered, who writes that we often only pretend to place crime survivors at the center of our debates, using them for our own purposes without asking them what, in fact, they want. Instead, she writes, victims often think that incarceration of the accused makes them feel *less safe*, and that, "the vast majority of victims [i.e. 90% of persons who have experienced violent crime] who have been given the choice of seeing the person who harmed them incarcerated or seeing them take part in an alternate restorative justice process *have chosen* the alternate process," simply because they understand that incarceration only leads to more violence.[115]

This notion is bolstered by the amicus brief submitted by Crime Survivors for Safety and Justice[116] in the California Supreme Court's ongoing bail case, *In re Kowalczyk,* in which the group argued: (1) routinely detaining criminal defendants is excessive and ultimately degrades public safety by harming both detainees and entire communities; and (2) judges should also consider the harm to community safety caused by the detention instead of just the harm typically predicted to result from release.

Third and finally, the literature review for this document uncovered many misconceptions about bail that often form barriers to seeing pretrial justice in a nonpartisan or bipartisan way. Indeed, if one removes these misconceptions, then jurisdictions often see that partisanship quickly dissolves. There may still be disagreements; for example, when discussing the creation of an intentional

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[114] Alliance for Safety and Justice, *Crime Survivors Speak: A National Survey of Victims' Views on Safety and Justice* (Alliance for Safety and Justice/Crime Survivors for Safety and Justice, 2024), found at https://asj.allianceforsafetyandjustice.org/crime-survivors-speak-2024/.

[115] Danielle Sered, *Until We Recon* (The New Press, 2019), at 42-43. In an astute observation, the author writes, "To build the political will to develop and expand these solutions, we have to stop talking about alternatives to our current policy as though they are alternatives to something that works." *Id.* at 158.

[116] Crime Survivors for Safety and Justice is a national network of crime victims advocating for stopping the cycles of violence often exacerbated by unnecessary detention. *See* at https://cssj.org/. *In re Kowalczyk,* No. S277910, *Corrected Brief of Amicus Curiae Crime Survivors for Safety and Justice in Support of Petitioner Gerald John Kowalczyk,* pending, found at https://supreme.courts.ca.gov/sites/default/files/supremecourt/default/2025-03/pendingissues-crim%20-%20032125.pdf.

detention provision, there may be natural disagreements about the scope of detention eligibility. Nevertheless, removing the overall confusion caused by certain pervasive misunderstandings means that disagreements (and thus negotiated compromise) will be intelligent and relevant to the elements that actually have the potential to move communities toward a safer and fairer pretrial system.

Misconceptions

Due to the persistence of these misconceptions, I address four of them in detail in this paper. Three of those four, (1) the misunderstanding of the historical themes and explanations of previous eras of bail reform needed to guide us in our efforts today, (2) the misuse and misunderstanding of terms like "bail" and "bail reform," "pretrial improvements," and "pretrial justice," and (3) confusion over risk and prediction, are discussed at length in the section on education, *infra.* The fourth, a misunderstanding of how, exactly, to craft and enact a moneyless, intentional release and detention system to replace the random money-based system, is addressed separately and highlighted as the only substantive pillar of pretrial justice in this paper. As mentioned above, this is due to its importance as a solution to the problems leading to an era of true, historic bail reform, its tendency to force itself on state and local jurisdictions, and the fact that the states are currently attempting to complete the project right now even without the proper guidance.

In sum, when the underbrush of misconception is removed, it becomes very clear – to persons with all ideologies – as to what should be done about pretrial release and detention. Terms and phrases such as "revolving doors," "higher bails," "catch and release," and "skin in the game" as well as statements conflating postconviction with pretrial crime, "bail" with money, and money with public safety will gradually be replaced with serious but commonsense discussions over the things necessary to create a fair and safe system of pretrial release and detention. Such discussions will include the breadth of detention eligibility nets

for both setting bail and revocation of bail, articulating the risk needed to detain within the net, burdens of proof, and other elements necessary to achieve public safety while maintaining American notions of fairness and liberty.

The Move from Mostly Substantive Checklists to a Process Allowing Checklists to Evolve

Finally, the reader will note that in this document I move away from articulating a system classifying proposed improvements through a list in which particular elements provide tangible, substantive actions for pretrial improvements or so-called "best practices" – often criminal system stakeholder-by-stakeholder. Instead, I articulate a system in which I emphasize the process for improvement through collaboration and education, and through which the substantive practices requiring change mostly reveal themselves, with the sole exception being the switch from money to intentionality, which is already universally revealed. My reasoning follows.

When I and my colleagues wrote our first substantive paper on bail in 2008-09,[117] there were few documents providing concrete and system-wide pretrial recommendations outside of the national standards – primarily the American Bar Association and National Association of Pretrial Services Agency Standards governing pretrial release and detention.[118] Our attempt at classifying improvements involved holding up typical case events chronologically to the various standards and listing recommendations for each stakeholder group at each so-called "decision point." The exercise represented a systems approach to pretrial justice, a process championed by NIC (for whom two of us worked part-time) in its work on both Criminal Justice Coordinating Committees and, later, the Evidence-

[117] Michael Jones, Claire Brooker, Timothy Schnacke, *A Proposal to Improve the Administration of Bail and the Pretrial Process in Colorado's First Judicial District* (2008-09), found at http://clebp.org/coloradobailprojects.html [hereinafter *Jeffco Proposal*].

[118] American Bar Association, *Standards for Criminal Justice (3rd Ed.) Pretrial Release* (2007), found at https://www.americanbar.org/groups/criminal_justice/resources/standards/pretrial-release/ [hereinafter *ABA Standards*]; National Association of Pretrial Services Agencies, *Standards on Pretrial Release (3rd Ed.)* (Oct. 2004), found at https://www.neomed.edu/wp-content/uploads/CJCCOE_I2_StandardsPretrialRelease.pdf (newer editions found at https://www.napsa.org/standards [hereinafter *NAPSA Standards*].

Based Decision Making Initiative.[119] The result was the creation of a list of limited tangible actions or "best practices" that stakeholders could do to help achieve pretrial justice.

Over the next few years, various organizations began crafting more inclusive and specific lists, mostly due to the Pretrial Justice Institute's remarkable efforts at achieving national stakeholder collaboration and consensus, which culminated in the 2011 Attorney General's National Symposium on Pretrial Justice. In the summary report to that Symposium, I crafted what I believed to be a consensus list of pretrial improvements that provided recommendations for each stakeholder group at each decision point (for example, police issuing more citations in lieu of arrests and defense attorneys being present at first appearances). These recommendations were based not only on the national standards, but also on what groups themselves said at the Symposium or what those groups included in their various written stances on pretrial justice at the time.[120]

Other groups created other lists, and, at the time – a time in which statistical risk assessment was believed to be the panacea to all problems in bail – these lists were remarkably similar by being noticeably focused on "risk" and the use of assessment tools while noticeably *unfocused* on what to do about so-called "money bail" and whether and how to change America's bail laws.[121] Over the years, and depending on the group or scholar,[122] the lists have been expanded to

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[119] *See CJCC Guidelines, supra* note 102, and discussion of EBDM Initiative in note 105 and accompanying text, *supra.*

[120] *Symposium Report, supra* note 99, at 39.

[121] Indeed, many of the leading organizations promoting pretrial change at this time were purposefully ignoring the issue of secured financial conditions, or "money bail," and entire states were using actuarial tools and associated matrices to recommend detention for charges not eligible for detention by constitution, statute, or court rule. An early draft of the National Symposium Report included recommendations surrounding secured financial conditions as a natural outcome of the many discussions over money bail at that Symposium. Those recommendations, however, were ultimately removed during the editing process. Although many groups were no doubt focused on money bail across America, in 2014 the NIC shined a bright, national spotlight on money bail, forcibly nudging those who were once content to ignore money to finally take stances against it. Today, of the hundreds of groups dedicated to so-called "bail reform," all but one or two are adamantly against the use of money at bail and, in particular, money-based detention.

[122] A fortunate improvement over the last several years has been the interest in bail shown by academics, and includes articles listing various pretrial improvements along with often more detailed justifications for the various listed elements. *See, e.g.,* Megan Stevenson & Sandra Mayson, *Pretrial Detention and Bail,* Academy for Justice: A

provide more nuance on subjects such as risk or to include additional recommendations, including what to do about secured financial conditions and changing bail laws (which, unfortunately, can lead to its own long list). Occasionally, these recommendations have been adapted into gap-analysis surveys, checklists for a variety of goals, and even attempts to grade each state on their progress toward pretrial justice. In sum, many organizations have lists based primarily on specific substantive recommendations, a practice which has produced both long and short lists over the last century.[123]

My choice to move away from these mostly substantive lists and toward emphasizing an effective process for change (albeit with suggestions for individual stakeholder groups that resemble the substantive topics typically contained in other current lists) is based on three main factors. First, the current substantive lists still tend to leave certain groups/stakeholders out, including very influential groups such as community/grassroots/civil rights organizations, faith-based groups, bail funds, philanthropies, judges,[124] municipal and state lawmakers, and persons in the executive branches. Collaboration on the least to most complex of bail issues requires, at a minimum, that collaborative groups include everyone with any relevant stake in the process.[125]

Second, the roles of all stakeholders have changed as the various topics in pretrial justice have changed. For example, it is not enough to say that a prosecutor's only role in bail today is to screen charges and show up at a first appearance. Today,

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Report on Scholarship and Criminal Justice Reform (2018), found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939273.

[123] I have created a "list of lists," showing the changes from 100 years of bail recommendations, and, with some exceptions, they are mostly focused on the substantive recommendations (such as having defense attorneys at first appearance), rather than the procedural recommendations (such as collaboration through CJCCs). My list of lists will be made available upon request.

[124] Judges were only tangentially involved in previous generations of bail reform in the 1960s and 1980s, but their work in this generation has been instrumental to improvements in states like New Jersey, New Mexico, Arizona, California, and Illinois. The Symposium recommendations merely asked judges to be "thoroughly trained" on pretrial issues, but their role is likely much more important not only as bail setters but also as so-called "adaptive leaders" for change, a topic I have taught to various judicial groups.

[125] There may be exceptions, however, such as any group on record for being adamantly opposed to any change whatsoever, or any group having a documented record of obstructing the work completed by some other well-structured collaborative body.

prosecutors are integral to shaping a jurisdiction's discussion over the use of money to achieve public safety as well as helping to create a more purposeful release and detention system.[126] Likewise, sheriffs most certainly have roles in system discussions, and, indeed, larger roles than they may think both in patrol and jail administration, the latter of which can include data collection, accommodation of pretrial detainees, and stopgaps to what might be deemed unconstitutional detention.[127]

Changes to the sorts of topics studied by pretrial system actors, too, have triggered changes in system-actor roles. For example, the decision to adopt an actuarial assessment tool, and, if adopted, how to use one, is best studied and discussed by a broad array of system actors from particular jurisdictions, including those adamantly against their use. Likewise, intentional release and detention language is gradually finding a place in various lists, albeit with very little guidance and justification as to specific templates, even though intentional detention is one area in which deep education and broad collaboration is absolutely essential. In 2017, for example, NIC listed, "restrictions or prohibitions on the uses of secured financial conditions of release" as an essential element on a substantive list.[128] Today, however, we know that "restrictions" to money bail are often ignored based on their wording, and that both "restrictions" and "prohibitions" on money bail trigger an inevitable domino effect that pressures jurisdictions to craft intentional detention language, a topic in which all stakeholders have an important role and for which express and detailed guidance has been lacking.

Third, and finally, I believe that these mostly substantive lists create the improper impression that merely checking things off of any particular itemized inventory will lead some to believe that they have achieved pretrial justice. Instead, I believe

[126] Indeed, prosecutors have recently been forced into accepting these newer roles due to the threat of poorly worded changes to law, policy, and practice by other, less-informed stakeholders.
[127] Plaintiffs in lawsuits claiming unconstitutional money-bail practices often name sheriffs as parties, and courts have rejected arguments that sheriffs play a wholly passive role in the results of possibly unconstitutional bail settings. *See, e.g., Feltz v. Regalado,* Case No. 18-cv-0298-SPF-JFJ (Order on Motions for Summary Judgment, April 3, 2024), at 20, 27-29.
[128] *NIC Framework, supra* note 108.

that what is truly crucial to achieving pretrial justice is a collaborative group that: (1) recognizes the pretrial system as a system that must be constantly managed; (2) has enough education to articulate the group's own unique goals (including what it believes to be pretrial justice, guided by law and research), pressing topics, and roles for each participant; (3) understands that the substance studied and member roles will undoubtedly change over time; and (4) follows a proven formula for making important policy-level decisions and for implementing the things best suited to achieve their own jurisdictional goals, whether they are adaptive or merely technical in nature.

Put another way, a highly effective pretrial system is unlikely to be one that adheres to a particular set of singular improvements from a pre-determined list; rather, a highly effective pretrial system is one that continually questions the status quo, searches for answers "out of the box" of typical pretrial reforms, and strives, ultimately, to eliminate rather than merely to respond to crime.[129] Years from now, a jurisdiction might assess that creating jobs was far superior to achieving pretrial justice than, for example, merely bolstering the efficiency of its pretrial services program or making sure prosecutors screen cases. Indeed, attempts to judge or grade jurisdictions based on traditional, concrete lists of improvements (including items such as implementing a risk tool or creating a presumption for release) without looking at such important things as crime prevention or reduction programs, diversion at various decision points, and addressing the root causes of crime simply miss the mark.

[129] My own way of articulating the notion is to say that if I am not striving to actively eliminate my own job in the criminal justice system, then I am likely not focused on the right things. It is not necessarily an abolitionist stance in the traditional sense; rather, it is an optimistic stance that recognizes that if we can drastically reduce crime, then the number of police, jails, and criminal courts (as well as those who study them) will naturally decrease.

Pillar Number One: Collaboration

> *"I can do things you cannot, you can do things I cannot; together we can do great things."*
>
> Mother Teresa

Those who study the history of American criminal processes often point to the Johnson Commission's landmark 1967 document, *The Challenge of Crime in a Free Society,* as representing a sea change in our country's perspective about how to deal most effectively with crime. Prior to 1967, criminal systems were mostly described as being comprised of "agency silos," operating in isolation – that is, with fragmentation among traditional stakeholders and with virtually no system education, no sharing of relevant data or research, and virtually no collective solutions to pressing issues.[130] As mentioned previously, the Commission's report set out to convince America that the reforms required to attack perceived increases in crime were not necessarily tougher punishments and associated incarceration, but instead research and data-driven improvements often focusing on the root causes of crime and done through collaborative bodies (including, importantly, citizen involvement) with a systems focus.

The report also contained roughly 200 recommendations, including several concerning bail.[131] Of those bail recommendations, perhaps the most interesting and relevant to the reform movement in America today is actually a "non-recommendation" embedded in the discussion concerning the need to enact "comprehensive bail reform legislation." In 1967, the Commission wrote:

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[130] *See Challenge of Crime, supra* note 96. Obviously, the notion of reducing the adverse effects of agency silos in this paper deals only with efforts to make the system more safe, fair, and humane for citizens. Current efforts to "eliminate silos" of information in order to create more intrusion or efficiency of punishment into persons' lives should never be the goal of pretrial justice.

[131] *See id.* at 296 (recommending establishing bail projects, enacting comprehensive bail reform legislation, establishing early release procedures, improving charging, ensuring fair plea agreements, and sharing information early in the case).

> If a satisfactory solution could be found to the problem of the relatively small percentage of defendants who present a significant risk of flight or criminal conduct before trial, the Commission would be prepared to recommend that money bail be totally discarded.[132]

At the time, of course, there was no solution; indeed, the Commission correctly warned the nation that finding any fix to the money-bail issue might be difficult due to problems with risk and prediction.[133] Moreover, it also warned against a solution/replacement that would be "more of a problem" than the money-based system.[134] Today, however, we are fortunate to have that solution, although we recognize its ability to be worse than the money-bail system if not crafted with care. On the other hand, when drafted and implemented carefully and correctly, I foresee that the solution will undoubtedly create systems of intentional release and detention that will perform far better on virtually every metric than the money-based system.[135] Thus, the only real questions left in America today concern the *process* for actually finding consensus and drafting comprehensive bail reform legislation.

And on that point, the Commission's recommendation was clear. According to the *Challenge of Crime* report, the ***first step*** for state and local governments needed to achieve any of the 200 recommendations, from relatively simple to fairly complex, was to construct a mechanism for collaborative planning: "[A]ll of a State's or city's actions against crime should be planned together, by a single body.

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[132] *Id.* at 131.

[133] Other bail reformers in the 20th Century were also upfront in admitting the problems for which they had no solutions, including how to do intentional detention, whether it could be done for purposes of public safety, and, indeed, whether it should be done all. Today, I believe we have the solution to the problem of money-based detention, and yet an "ultimate" solution – such as, perhaps, a system that requires no prediction based on the drastic reduction in time between arrest and case resolution so that there is no pretrial period with which to be concerned, still eludes us.

[134] *Challenge of Crime, supra* note 96, at 131.

[135] Indeed, the mere act of inserting any intentionality based on detaining only the most objectively dangerous persons as opposed to letting money make that decision, a largely random or accidental system of release and detention, virtually guarantees progress based solely on deductive logic. This is why, for example, using an actuarial tool to detain – while rejected in the best "hypothetical models" of intentional detention – is still better than allowing money to detain. I discuss the details of crafting an intentional release and detention system, *infra.*

The police, the courts, the correctional system, and the noncriminal agencies of the community must plan their actions against crime jointly if they are to make real headway."[136] Indeed, the Commission believed it to be self-evident that "significant reform" takes time and is the result of thought and preparation by system stakeholders acting together as a system.[137]

As a person who has worked with issues surrounding bail for nearly two decades, I believe strongly that system-thinking, guided by the law and research through a collaborative body, is still absolutely crucial for achieving pretrial justice. This is true because discussions over pretrial release and detention impact virtually all system participants and inherently involve balancing safety with American notions of liberty and freedom, a balance that the citizenry expects to be done with at least minimal consensus versus partisan bickering. System collaboration is likely necessary for the most basic of pretrial improvements, but collaborative, systemwide consensus is acutely critical in crafting an intentional release and detention provision. That is because those persons not participating in the project – that is, those persons not nodding their heads in agreement over an often-negotiated detention provision with compromises over the five main elements discussed in the section on education, *infra* – may very well be the persons who end up suing the state over the provision's potentially unlawful structure.[138] These collaborative groups, now called Criminal Justice Coordinating (or planning, or strategic planning) Councils (or committees, or commissions, or boards) – often shortened to "CJCCs" – are a vital part of a system that recognizes itself *as a*

[136] *Challenge of Crime, supra* note 96, at 279-80.

[137] *Id.* As recently as 2018, Justice Gorsuch echoed this point, writing, "Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives." *Sessions v. Dimaya,* 584 U.S. 148, 182 (Gorsuch, J. concurring) (2018). Unfortunately, we have often seen lone stakeholder groups attempting to restrict liberty in a variety of hurried and haphazard ways. Despite this broad push for collaboration in the 1960s, there is fairly broad consensus that the first known collaborative body for criminal justice in America was formed in Los Angeles in 1931. Nevertheless, in 1927 Arthur Beeley recommended the creation of a "joint administrative council" of criminal justice stakeholders for policy making, suggesting that there were such bodies already in use in America. *See* Beeley, *supra* note 84, at 170.

[138] The Commission also recommended that planning groups perform early appraisals of potential law reform, including constitutional change. *Id.* at 282-83. This is critical in that such appraisals can highlight, in advance, those parts of the proposed changes that might be vulnerable to various legal claims after enactment.

system and that resolves to use the law, the data, and research-based education to reach consensus on issues to benefit the entire community.

As pretrial scholar Dr. Michael R. Jones has written,

> [A] CJCC is the forum through which elected and appointed executive-level policymakers in local jurisdictions – and sometimes states – convene to collaboratively address issues facing the justice system and its constituent agencies. These committees . . . typically have staff support from one or more criminal justice planners. They often use a data-guided and structured planning process to identify, analyze, and solve or manage justice system issues, such as jail crowding, resource reductions, case processing inefficiencies, sub-par outcomes, and client populations that pose a particular challenge (e.g., persons with mental illness or a history of substance abuse).[139]

More succinctly, a CJCC is a collaborative "body of elected and senior justice system leaders who convene on a regular basis to coordinate systemic responses to justice system challenges and opportunities."[140] The benefits of CJCCs are enormous, and typically understated. As noted by Robert Cushman in his seminal NIC publication, *Guidelines for Developing a Criminal Justice Coordinating Committee,*

> The work of CJCCs can produce many benefits, including better understanding of crime and criminal justice problems, greater cooperation among agencies and units of local government, clearer objectives and priorities, more effective resource allocation, and

[139] Michael R. Jones, *Keeping Your Criminal Justice Coordinating Committee Going Strong* (NIC, 2013), found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/keeping-your-criminal-justice-coordinating-committee-going-strong.

[140] Thomas Eberly, Aimee Wickman & Spurgeon Kennedy, *National Survey of Criminal Justice Coordinating Councils* (NIC, 2022), found at https://s3.amazonaws.com/static.nicic.gov/Library/033618.pdf. While a CJCC is made up of justice leaders, it is advisable to include leaders from outside of the criminal system, and it is imperative that these leaders distribute information and plans to everyone working throughout their respective agencies.

better quality criminal justice programs and personnel. Taken together, these results can increase public confidence in and support for criminal justice processes, enhancing system performance, and, ultimately, the integrity of the law.[141]

Guiding Principles of CJCCs

In 2022, NIC and the Justice Management Institute published National Standards for Criminal Justice Coordinating Councils. The Standards, in turn, are based on guiding principles "that encapsulate the fundamental precepts of CJCCs . . . [and that] should be the foundation for any council." They include: (1) Create a criminal justice system that is fair, just, and equitable; (2) Enhance public safety and trust; (3) Think systematically and strategically; (4) Communicate and share information; (5) Collaborate, build consensus, and share responsibility; (6) Utilize data and research; (7) Pursue innovation and evidence-based solutions; (8) Maximize existing resources and taxpayer funds; (9) Inform and involve the community; (10) Include diverse perspectives in all aspects; and (11) Embrace transparency and accountability.

Sources: NIC/JMI, *National Standards for Criminal Justice Coordinating Councils,* at 1-2 (2022), found at https://s3.amazonaws.com/static.nicic.gov/Library/033675.pdf; NIC/JMI, *CJCC Essential Elements: A Companion to the National Standards for Criminal Justice Coordinating Councils,* at 2, found at https://s3.amazonaws.com/static.nicic.gov/Library/033676.pdf.

Having worked both with and for CJCCs over the years, I have seen far greater benefits than even these, as there is often an unmentioned synergistic effect created as a result of group dynamics. Even if a CJCC were never to engage in substantive discussions, it is very likely that the group would see benefits from merely having system agency leaders in the same room for some amount of time. Indeed, if all a group did was to have individual agencies inform other agencies about planned programs, such as, for example, increased DUI enforcement by a local police agency, the other entities (such as the jails and the courts) could adequately prepare for the inevitable interagency impacts. The benefits of just getting together can be enormous; indeed, I have witnessed two agency leaders

[141] *CJCC Guidelines, supra* note 102, at ix.

agree to implement a meaningful and shared program to reduce crime before a scheduled meeting was even called to order.

Nevertheless, it is the ability to take on the hard challenges, such as pretrial improvements and bail reform, that makes CJCCs so valuable at this time in American history. When data revealed that jail crowding had become an acute problem in need of solutions in Jefferson County, Colorado, our local CJCC (for which I worked in the mid-2000s), embarked on a multi-pronged approach to reduce compliance violations, such as FTAs. This resulted in one of the first formal court date notification studies for citations in America as well as a "jail use plan," which was designed to reduce unsustainable jail population growth. When asked to "look into bail," our CJCC staff created a pretrial pilot project to compare release on secured versus unsecured bond conditions, the findings of which have subsequently informed courts across America when assessing the notion of "least restrictive conditions."[142] I and my colleagues have since helped to guide various CJCCs through projects spanning a wide range of complexity, from re-designing a statewide traffic summons[143] to changing the proposed language of a state constitutional right to bail clause.

Most importantly perhaps, a CJCC allows system actors to speak in a strong, unified voice about the system's direction, goals, and decisions. When system actors are not collaborating around the issue of bail, there is an unfortunate tendency for agency leaders to separately "debate" the merits of any particular pretrial improvement in the press, which, in turn, tends to make citizens perceive that the justice system is highly partisan. There is perhaps nothing more damaging – both to the notion of procedural fairness and to mere perceptions of

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[142] *See* Claire Brooker, Michael Jones & Timothy Schnacke, *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds,* found at http://www.clebp.org/images/Jefferson_County_Bail_Project-_Impact_Study_-_PJI_2014.pdf; *See also* Michael Jones, *Unsecured Bonds: The As-Effective and Most Efficient Pretrial Release Option* (PJI, 2013), at 10, found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/unsecured-bonds-most-effective-and-efficient-pretrial-release [hereinafter *Jones*].

[143] Since then, other groups have put behavioral science to work in designing traffic tickets so as to improve court appearance and reduce warrants. *See, e.g., Improving Traffic Ticket Outcomes: How Behaviorally Designed Notices Increase Timely Reponses* (Ideas 42/SJC, 2025), found at https://www.ideas42.org/project/improving-traffic-ticket-outcomes/.

competency (as amplified by uninformed reports in the media)[144] – than to have, for example, a district attorney publicly arguing with a sheriff over some pretrial issue that could be solved by collaboration and education. Indeed, of the many hallmarks of a system still entrenched in so-called "silo" thinking, news stories containing public bickering between justice system actors are likely the most obvious.

On the other hand, there is no end to what a CJCC can do when it is properly educated on the law and research, and it is safe to conclude that the successful projects listed above with our particular CJCC could not have been done as well had they been attempted by any single agency on its own. CJCCs typically have subcommittees and workgroups, and ours included three: (1) mental health (focusing on a single pressing issue, albeit with solutions found to apply to a number of criminal justice decision points);[145] (2) prevention (which allowed members to discuss a broad range of solutions to crime, including attacking the root causes of crime and holistic solutions typically neglected by traditional systems);[146] and (3) system performance (which was a catch-all committee for virtually everything else, including bail).[147] Had we all remained on staff, there is

[144] Communicating factual content to the media is crucial to discussions of bail, a field in which there is still ignorance about pretrial release and detention, and in which the media often quotes two representative voices for what it incorrectly believes is an issue with two equal sides. *See* Timothy R. Schnacke, *Ten Things the Media Needs to Know About Bail* (2012), found at https://thecrimereport.s3.amazonaws.com/2/7b/c/1468/what_the_media_needs_to_know.pdf.; A more recent and somewhat harsher assessment of media coverage of bail issues is by Alec Karakatsanis, *The News Media and Bail: A Case Study in Fear and Science Denial* (2022), found at https://equalityalec.substack.com/p/the-news-media-and-bail.

[145] An example of the work from this group was to educate persons on the Substance Abuse and Mental Health Services Administration (SAMHSA) Sequential Intercept Model and its ramifications for criminal justice system improvements [hereinafter *SAMHSA Model*], found at https://www.samhsa.gov/communities/criminal-juvenile-justice/sequential-intercept-model.

[146] An example of the work from this group was to learn about and attempt to implement Botvin LifeSkills Training, which is based on 40 years of peer-reviewed research and is considered one of the top evidence-based substance abuse and crime prevention programs in the country, producing a $50 dollar return on investment for every dollar spent. *See* at https://www.lifeskillstraining.com/.

[147] Virtually every issue put before this subcommittee dealt with, in some way, the local jail, and dealing with any American jail today virtually always leads to discussions concerning a large pretrial population. This subcommittee was the committee that created our court date notification study, mentioned in the text, above. *See* Timothy Schnacke, Michael Jones & Dorian Wilderman, *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders,* 48 Court Rev. (3) 86, found at CR48-3Schnacke-libre.pdf. The research in this area has become ubiquitous, and court date notification programs are now often cited as a true "evidence-based" practice. *See, e.g., Statewide Court Appearance Final Report: Recommendations to Address Court Appearance*

no doubt that we would have witnessed members study and discuss the most pressing and sometimes “out of the box” solutions concerning issues found under the large umbrella of "pretrial justice," such as re-defining public or community safety,[148] reviewing various groups’ recommendations for more “holistic” pretrial solutions,[149] finding ways to prevent and reduce violence given depletions of resources, and following successful research and evidence-based improvements on what works to reduce crime while avoiding ineffective but “popular” solutions.[150] This is likely due, in part, to our CJCC exhibiting nearly all of the nationally recognized essential elements for those groups.[151]

Essential Elements of a CJCC

NIC, Justice Management Institute, and The National Network of Criminal Justice Coordinating Councils have also published “Essential Elements” for CJCCs, which include: (1) A systemic focus; (2) Executive level decision-makers as members; (3) Effective leadership structure; (4) Consensus building for substantive matters and voting for procedural matters; (5) Organized

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Issues in North Carolina (2025), found at https://www.nccourts.gov/assets/documents/publications/Statewide-Court-Appearance-Project-Final-Report.pdf?VersionId=HnLIa4ejZlJaVq5Adic.THprlo8H2bcM.

[148] *See. e.g.,* Lee Ann Slocum, Claire Greene, Beth Heubner, Kiley Bednar, Adriano Udani, Robert Boxerman, Sarah Kirk, Konstadina Spanoudakis, Hayden Steingruby, Elizabeth Lyne & Emelyne Lane, *Redefining Community Safety in Three U.S. Counties* (SJC/Univ. of Mo. St. Louis, 2023), found at https://safetyandjusticechallenge.org/wp-content/uploads/2023/12/RedefiningCommunitySafetyFinalReport.pdf. Defining or redefining public safety can be a first step at creating a consensus preventive detention provision.

[149] *See, e.g.,* Civil Rights Corps, *Beyond Bail: A Holistic Framework for Pretrial Justice,* found at https://civilrightscorps.org/wp-content/uploads/2021/10/H1fmZHQMuJb771jysKSw.pdf. This includes strategies to prevent and reduce violence through community safety investments in the wake of federal de-funding. *See* Thea Sebastian & Hanna Love, *How States Can Lead on Community Safety: Five Recommendations for Preventing and Reducing Violence* (Brookings Institute, 2025), found at https://www.brookings.edu/articles/how-states-can-lead-on-community-safety-five-recommendations-for-preventing-and-reducing-violence/. Most recently, authors Michael Beltran, Stanley Feliciano, Daniel Rosen, Shahiem Smith & Ashia Wilson produced a resource showing how peer supports can improve pretrial justice outcomes. *See* at https://www.advancingpretrial.org/resource/peer-supports-improve-pretrial-justice-outcomes/.

[150] *See, e.g.,* Jennifer Doleac, *Why Crime Matters, and What to Do About It* (Aspen Econ. Strategy Group, 2024), found at https://www.economicstrategygroup.org/wp-content/uploads/2024/11/Doleac-AESG-2024.pdf. A recent study focusing on efforts to effectively reduce violent crime is written by Eliabeth Winchester, Timothy Reling, Kristina Little, Leanna Cupit & Melanie Fields, *What Is Working to Reduce Violent Crime? Evidence-Based Solutions,* LSU Social Res. and Eval. (2022), found at https://repository.lsu.edu/srec_reports/8//.

[151] *See* Thomas Eberly, Winn McKay & Aimee Wickman, *CJCC Essential Elements: A Companion to the National Standards for Criminal Justice Coordinating Councils* (NIC, 2022), found at https://s3.amazonaws.com/static.nicic.gov/Library/033676.pdf#:~:text=dinating%20councils%20%28CJCCs%29.%20The%20ten%20essential%20elements%20are%3A,planning%2C%208%29%20data%20and%20research%2C%209%29%20community%20engagement%2C.

meetings; (6) Subcommittees and workgroups to advance strategic initiatives; (7) A strategic plan to guide the work; (8) Produces and uses quantitative and qualitative data; (9) Community engagement; and (10) A dedicated director and staff. *See* Thomas Eberly, Winn McKay & Amy Wickman, *CJCC Essential Elements: A Companion to the National Standards for Criminal Justice Coordinating Councils* (NIC/JMI/NNCJCC, 2023), found at https://s3.amazonaws.com/static.nicic.gov/Library/033676.pdf. Adequate staffing for a CJCC is discussed in the NIC publication, *Guidelines for Staffing a Local Criminal Justice Coordinating Committee* (NIC/Michael R. Jones, 2012), found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/guidelines-staffing-local-criminal-justice-coordinating-committee.

An abbreviated summary of the elements necessary for any high-functioning CJCC includes: (1) a collaborative group with the right members, capable of making agency decisions and dedicated to system-thinking; (2) qualified staff (because if you have the right members in the group, they will often have no time to do substantive research on their own); and, most importantly (3) adherence to using legal and evidence-based solutions in what is called a "policy planning process," which is constantly trying to answer the question, "What *should* we do and *why*?," and is akin to NIC's Evidence-Based Decision Making process, which, in turn, is rooted in applying the latest research to various system decisions points. In short, CJCCs should primarily be in the business of *policy* planning, versus *program* planning (which assesses alternatives and answers the question "What can we do and how?") or *operational* planning (which produces specific implementation plans and answers the question, "What will we do and when?"). It should be noted that all three types of planning stand in stark contrast to what typically happens in an uncoordinated system, which is reactive decision making that is "largely unplanned and crisis oriented."[152]

Given the enormous benefits of collaborative planning – indeed, given the fact that the 1967 Johnson Commission believed that collaboration and planning should be the "first step" toward making any headway at all in achieving system goals (which, in turn, cannot themselves be articulated without collaborative

[152] *CJCC Guidelines, supra* note 102, at 10-11.

planning) – it is astounding that CJCCs are not ubiquitous across America or vocally championed by more than just a few national justice entities.[153]

As briefly referenced above, prior to 1993 and the discussions leading to the creation of the Criminal Justice System Project ("CJSP"), NIC's focus was directed at single parts of the system rather than the system itself. The CJSP was formally begun in 1997 and focused on criminal sanctions, but ultimately included pretrial improvements when NIC consultants doing so-called jurisdictional criminal justice "system assessments" reported a need to address pretrial inmate populations.[154] Indeed, those assessments frequently unearthed two common themes found in virtually all jurisdictions: (1) the need for better coordination through CJCCs; and (2) the large impact on jails due to oversized pretrial populations, which typically could be reduced through changes in policies and practices under existing law. To help with the first theme, Robert Cushman penned his seminal document, *Guidelines for Developing a Criminal Justice Coordinating Committee,*[155] which was followed by manuals for staffing and sustaining CJCC performance.[156] While NIC

[153] Estimates of the numbers of CJCCs vary widely, but the Justice Management Institute estimates "more than 300 CJCCs or similar bodies across 32 states." Eberly, *The National Landscape of Criminal Justice Coordinating Council,* at 7 (JMI, 2025) [hereinafter *CJCC National Landscape*], found at https://jmijustice.org/national-landscape-of-cjccs/. Other estimates range from 100 to 400 or more, and depend on whether one includes city, county, or statewide groups as well as whether those groups do the kind of substantive work described above or are created for specific tasks. Eberly points to several differences between CJCCs and temporary task forces or ad hoc committees. *Id.* at 5. In my opinion, so-called "Blue Ribbon Commissions" often differ from CJCCs to the extent that BRCs rely mostly on the existing expertise of the participants to reach quick consensus on sometimes urgent issues. CJCCs, on the other hand, can begin to address an issue, such as bail, for which no member has current expertise by relying on staff or outside resources (such as a local professor) to provide relevant education and potential solutions.

[154] *See* Peggy McGarry & Becky Ney, *Getting it Right: Collaborative Problem Solving for Criminal Justice* (CEPP/NIC, 2006), found at https://cepp.com/wp-content/uploads/2021/04/Getting-It-Right-Collaborative-Problem-Solving-for-Criminal-Justice-2006.pdf; Peggy Burke & Robert Cushman, *Guide to Criminal Justice System Assessment: A Work in Progress,* at xiii (CEPP/NIC, 1996).

[155] *See CJCC Guidelines, supra* note 102. Cushman wrote that his document was necessary because NIC consultants frequently reported "that many of the corrections-related issues that trigger requests for technical assistance [often due to jail crowding or planning for new jail facilities] are rooted in underdeveloped local justice system planning." *Id*. at 1. At the same time, Mark Cunniff wrote the paper titled, *Jail Crowding: Understanding Jail Population Dynamics* (NIC, 2002), and it, along with the *CJCC Guidelines,* became two of the primary sources for doing NIC system assessments.

[156] *See* Michael R. Jones, *Guidelines for Staffing a Local Criminal Justice Coordinating Committee* (NIC, 2012); found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/guidelines-staffing-local-criminal-justice-coordinating-committee; Michael R. Jones, *Keeping Your Criminal Justice Coordinating Committee Going Strong* (NIC, Nat'l Jail Exchange, 2013), found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/keeping-your-criminal-justice-coordinating-committee-going-strong.

and others have championed the development of "system thinking" in criminal justice (and, specifically, pretrial justice),[157] none have done so as frequently and consistently after 2000 as NIC through partnerships with groups like the Center for Effective Public Policy ("CEPP")[158] and the Justice Management Institute ("JMI").[159]

These partnerships have led to more plentiful resources coinciding with an increasing interest in research devoted to the work of CJCCs. While there is little research of the kind necessary to claim evidence-based status on CJCCs per se,[160] JMI's reliance on surveys, subject matter expert interviews, and decades-long experience allows it to review the "accumulation of practical knowledge" to call CJCCs a "best practice" with knowable standards, guiding principles, and essential

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[157] *See, e.g.,* Andy Hall, D. Alan Henry, Jolanta Perlstein & Walter Smith, *Alleviating Jail Crowding,* (NIC, 1985), found at https://www.ojp.gov/pdffiles1/Digitization/99462NCJRS.pdf; Pretrial Services Resource Center, *A Second Look at Jail Crowding: A Systems Perspective* (OJP/BJA, 2000), found at https://www.ojp.gov/pdffiles1/bja/182507.pdf; Justice System Partners, *Ten Steps to System Change* (MacArthur/SJC, 2015), found at https://justicesystempartners.org/wp-content/uploads/2015/09/10-Steps-To-System-Change_JSP-Brief.pdf. "System thinking" seems fairly ubiquitous in the literature now, and notable documents applying it (or assuming its application) to the pretrial phase include the Summary Report to the Attorney General's National Symposium on Pretrial Justice, *see Symposium Report, supra* note 99, *Fundamentals of Bail, supra* note 20, and *Money, supra* note 103.

[158] Most recently, through funding by Arnold Ventures, CEPP has developed the preeminent hub for pretrial system information, the Advancing Pretrial Policy and Research Initiative. Before that, it teamed with NIC for the Evidence-Based Decision Making Initiative, which was "designed to maximize collaboration and research by allowing policy teams made up of criminal justice stakeholders to apply evidence-based practices to system issues found at the various decision points." NIC, CEPP & the Carey Group, *A Framework for Evidence-Based Decision Making in Local Criminal Justice Systems (First Edition,* 2010*). See also* note 105, *supra.*

[159] In addition to the influential document, *From Silo to System: What Makes a Criminal Justice System Operate Like a System?,* found at https://jmijustice.org/wp-content/uploads/2023/05/From-Silo-to-System-30-APR-2015_FINAL-1.pdf, JMI has formed the National Network of Criminal Justice Coordinating Councils and has teamed with NIC to author *National Standards for Criminal Justice Coordinating Councils (2022)* [hereinafter *CJCC National Standards*]*, CJCC Essential Elements (2022)* [hereinafter *CJCC Essential Elements*]*,* and *Perceptions of Criminal Justice Coordinating Councils (2022)* [hereinafter *CJCC Perceptions*]*,* all found at https://jmijustice.org/national-network-of-criminal-justice-coordinating-councils-nncjcc-resources/. JMI's latest publication is the *CJCC National Landscape, supra* note 153. JMI, the National Association of Counties, and NIC all have online resource hubs containing relevant information and tools for CJCCs.

[160] For notable exceptions, *see* Lily Gleicher, Jessica Reichert & Christine Head, *Collaboration in Criminal Justice: A Review of the Literature on Criminal Justice Coordinating Councils* (and citations therein) (Ill. Crim. Just. Info. Auth., 2018), found at https://icjia.illinois.gov/researchhub/articles/collaboration-in-criminal-justice-a-review-of-the-literature-on-criminal-justice-coordinating-councils; Storm Ervin & Azhar Gulaid, *Using Cross-System Collaboration to Reduce the Use of Jails (case studies)* (Urban Inst./CUNY Inst, for State & Local Gov./SJC, 2022), found at https://www.urban.org/sites/default/files/2022-05/Using%20Cross-System%20Collaboration%20to%20Reduce%20the%20Use%20of%20Jails.pdf. For a number of reasons, studying the overall effectiveness of CJCCs would likely be more complex than studying, for example, a single program or pretrial improvement.

elements.[161] Moreover, CEPP and NIC cite to numerous studies comprising a literature on collaborative processes, highly effective teams, and team-based implementation to support the principle that criminal justice "systems achieve better outcomes when they operate collaboratively."[162] Of course, a CJCC might fail to reach goals or expectations for any number of reasons, including poor membership, lack of staff, or neglecting various parts of the policy planning process, but even if there were no research to support their use, the logic behind having a CJCC to address a wide variety of criminal justice issues is unassailable.

In bail specifically, the Conference of Chief Justices and the Conference of State Court Administrators' (with help from the State Justice Institute and the National Center for State Courts) National Task Force on Fines, Fees, and Bail Practices lists collaborative task force/committee/commission leadership as one of two most common ingredients for successful pretrial reforms in its case study of six American states.[163] In Harvard University's analysis of pretrial improvements across all fifty states, it writes that, "[in] at least 22 states, task forces have been created to assess the current use of bail and/or to identify potential bail reforms."[164] In my experience, I have found that that a collaborative group is critical in working toward pretrial justice, especially when that work involves better following the law and research to create new, intentional release and detention provisions or processes at the state or local level. Thus, I firmly believe that while a state or local jurisdiction should create a CJCC as the best method for

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[161] *See CJCC National Standards, supra* note 159, at iii.

[162] *EBDM Initiative, 3rd Edition, supra* note 105, at page 27 and citations in notes 42, 43, 54. Those citations include papers by Paul Adler, Seok-Woo Kwon & Charles Heckscher, *Professional Work: The Emergence of Collaborative Community,* 19 Org. Science, 359 (2008), found at https://pubsonline.informs.org/doi/abs/10.1287/orsc.1070.0293, and Carl Larson & Frank LaFasto, *TeamWork: What Must Go Right/What Can Go Wrong* (Sage, 1989), found at https://books.google.com/books?hl=en&lr=&id=FdSTBwAAQBAJ&oi=fnd&pg=PA7&dq=larson+and+lafasto+1989&ots=d2uu9BPs7z&sig=mQV_K6BLdQat_MEp7RQBhLOxW2Y#v=onepage&q=larson%20and%20lafasto%201989&f=false.

[163] CCJ/COSCA/SJI/NCSC, *Bail Reform: A Practical Guide Based on Research and Experience,* at 72 (2019), found at https://read-me.org/more-criminaljustice/2022/9/15/bail-reform-a-practical-guide-based-on-research-and-experience.

[164] 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* (Harv. Kennedy Sch. 2021), found at https://www.hks.harvard.edu/publications/current-state-bail-reform-united-states-results-landscape-analysis-bail-reforms-across.

managing justice systems for a variety of issues over a long period of time, I also believe it is absolutely essential that they use those groups – or similarly collaborative but shorter-term task forces – to specifically address issues concerning pretrial justice and bail.

Collaborative Group Members and Expected System Roles

It is within the membership/duties facet of CJCCs that we begin to see what the pretrial field has previously advocated in the way of "best practices" or lists of substantive recommendations directed at particular stakeholders. Essentially, each collaborative group member has his or her agency role – for example, a defense attorney should be a zealous advocate for his or her client – as well as a "system role," which implies an ability to switch roles, like hats, to consider broader issues and accomplish what is best, overall, for the entire system and community. Occasionally there is tension, but it is typically only the perception of tension or temporary tension. For example, I have seen defense attorneys working with other CJCC system actors to eliminate money bail only to see the same attorneys ask for a money bond in a somewhat rare instance in which money, despite its bad outcomes, provides the quickest means for release for a particular (often wealthy) client. The perception of tension is most often manifested through the work of local and not state collaborative councils, as local CJCCs will often work toward consensus on policies that can be constrained by existing state laws, which, in turn, can only be amended at the state level. Statewide CJCCs, on the other hand, can virtually eliminate all tension by recommending meaningful substantive changes to the law.

Nevertheless, both local and state CJCCs (or even temporary task forces) will include members of system-actor groups, which historically have also been provided with expectations of their roles in achieving pretrial justice. Because those groups have expanded, however, and because the traditional roles have mostly changed over time, in this section I list new groups and update any

relevant research associated with the traditional pretrial justice roles of the various member groups.

One example of the growing number of member/stakeholder groups is provided from direct experience. When I worked for a local CJCC in the mid-2000s, my colleagues and I simply could not get citizen attendance at meetings even when we tried. Today, however, various citizen groups are practically demanding to attend these meetings and thus they should be welcomed, especially if the task is discussing pretrial justice and the project is creating an intentional pretrial release and detention system.[165] Likewise, as to member roles, it used to be enough to merely recommend, for example, that experienced prosecutors screen criminal cases before first appearance. Now, however, based on both the law and the research, prosecutors have a much bigger role to play, including explaining bail reform to the public, explaining victim stances when victim representatives are not present, not asking for a money bond amount that results in detention, making sure that public safety is achieved through both intentional release and detention, and helping to actually craft a safe and fair replacement (through proper template language) to money-based detention.

If I leave out any particular group from this discussion, do realize that I do so unintentionally and that under the broad umbrella of "pretrial justice," virtually every group – including school administrators, civil rights entities, mental health agencies, faith-based groups and philanthropic organizations – will likely know *something* that the other members do not know, including the existence of research-based programs that, if implemented with fidelity, will greatly reduce crime or otherwise prove invaluable to the pretrial process. Moreover, do realize that the literature review for this paper revealed significant changes in member roles, which only reinforces the need for each member to keep up with the research most directly related to their particular function in the pretrial process.

[165] Various resources from the field have nonetheless included illustrative lists of potential members, with each recommending "broad" membership to include a diverse set of groups with attendance from the groups' actual leaders versus a leader-representative. *See, e.g., CJCC Essential Elements, supra* notes 151, 159, at 5; *CJCC Guidelines, supra* note 102, at 26-27.

Thus, when it comes to bail, it is important to remember that each member must be given: (1) broad, system-wide education on the fundamentals of bail (*see* section on education, *infra)*: (2) education concerning each member's own agency and its specific, expected system role based on the current law and research; and (3) somewhat narrower education explaining each of the other members' expected roles concerning bail.

Finally, there are certain additional notions that should be applied to all members in a collaborative CJCC or bail task force. For example, each member of a collaborative group will benefit greatly from a partnership with a local college or university professor, who can help with updating those members on the current literature, initial data collection and measurement, proposed program implementation, and evaluation of results of any particular initiative. This is generally helpful with all topics, but especially helpful when studying more arcane issues such as risk, prediction, and actuarial tools.

Indeed, one of the greatest attributes of a high-functioning CJCC is its ability to come up with ideas, try them experimentally through a pilot or other program, and measure and possibly publish the results so as to advance knowledge in the pretrial field. The success of such an endeavor, however, may require some expert help. Most persons in the criminal justice field already know about the Washington State Institute for Public Policy, a nonpartisan research group created to apply research to assess various government initiatives.[166] Fewer, though, know about the Santa Fe Institute, which has done groundbreaking research in New Mexico to help guide lawmakers with crafting somewhat complex bail legislation and court rules.[167] The fundamental point is that, especially in bail, CJCCs and

[166] *See* at https://www.wsipp.wa.gov/.

[167] *See* at https://www.santafe.edu/. In one important study, researchers took various New Mexico legislative attempts to add rebuttable presumptions toward detention (which is not a "pretrial improvement" based on any objective standard) and showed through statistical analysis that adding those presumptions would not add accuracy – with some presumptions being only slightly more accurate than detaining randomly – and would result in false positive rates – that is, detaining persons thought to be dangerous but who actually are not – of up to 90%. *See,* Cristopher Moore, Elise Ferguson & Paul Guerin, *How Accurate are Rebuttable Presumptions of Pretrial Dangerousness? A Natural Experiment from New Mexico,* 20 J. of Emp. Leg. Studies 377, (2023), found at https://onlinelibrary.wiley.com/doi/abs/10.1111/jels.12351?msockid=1ac3813fc8136cf204ea9441c9eb6d58.

other collaborative groups will likely need the kinds of help that can be provided only by professional researchers or academics trained in using research from other disciplines and applying it to bail.

Finally, please note that I am aware of the fact that some small number of persons in each of these groups might be seen to hinder or thwart pretrial justice, if not justice generally; the harsh criticism in the literature leaves no one out, including persons like me. As a lawyer, I am personally ashamed to see attorneys speak or write on such an important topic of bail either through a lens of political bias or without minimally consulting the pretrial research, including even legal research, which should form the basis for virtually everything we say or do on issues steeped in the law. As one obstructionist lawyer once said to a group of committed stakeholders trying to design a new release and detention provision for Colorado, "I don't care what the research says – I know what really happens."

Other members have roles through which their actions can lead to more dire consequences, and thus their lack of responsibility to follow the law, research, and common sense should face strong criticisms and even calls to leave the field. We simply should not put up with them. And to the extent that these criticisms are true in any other CJCC, the relevant stakeholders will have to confront the member and strongly deal with the issue. Nevertheless, I believe the vast majority of persons in each group I list below seek to learn and work toward consensus to continually better the criminal system with transparent motives, even if the changes are the result of some disagreement and compromise.[168] Accordingly, the following is written in a way that assumes noble purposes and good intent.

[168] The commercial bail bond industry is not included in the list of relevant stakeholders. In my experience, when the industry participates, it does so primarily to slow the process and to maintain the status quo, which is often directly at odds with the many of the goals of the collaborative group. Moreover, even when industry representatives agree to certain changes to the status quo in those groups (including changes the industry has said it favors), other industry representatives typically disregard the concessions and merely move their opposition to another forum, in many cases vocally disparaging the work of the collaborative group in which the industry was initially allowed to participate.

Judges

> *"Under the Constitution, the adoption of new laws restricting liberty is supposed to be a hard business."*
>
> Justice Neil Gorsuch

People who craft lists of pretrial improvements have often (and curiously) left out recommendations for judges, except, perhaps, through implicit inclusion by listing various legal requirements for bail setting with the assumption that judges will follow them. Sometimes the lists merely suggest recommendations for judges by stating that bail settings be guided by "risk" and not solely by charge (or amounts of money) or that judges act intentionally but with little explanatory detail. Part of this lack of more explicit inclusion may be habit, as judges were simply not active in previous waves of bail reform in America,[169] and reformers in those eras blamed the structure of bail laws, rather than judges' bail settings, for the abuses leading to the need for change. Indeed, despite the extensive discussion of judges setting unaffordable money bonds at the Attorney General's National Symposium on Pretrial Justice in 2011, the primary recommendation for judges was that they merely figure out a way to educate themselves with the hope that it would ultimately "provide a roadmap for change."[170] The need for education remains,[171] but now judges should be encouraged to do much more.

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[169] For example, at the 1965 National Conference on Bail and Criminal Justice, Professor Caleb Foote lamented the courts taking a "wholly passive role" in that era of bail reform. *See National Conference, supra* note 95. I am encouraged by a marked increase in judicial involvement in the current era of bail reform, but we must always remember that if bail-setting judges did not allow the detention of "bailable" defendants in the 1800s, and if appellate judges did not ultimately approve of money-based detention due to unaffordable bonds, the states would already have switched to a safe and fair method of intentional detention, thus avoiding possibly 200 years of attempted but largely failed reforms.

[170] *Symposium Report, supra* note 99, at 40. Not all historical lists of improvements have avoided judges, and at least one has written that judges should set bail with a purpose to either release or detain, albeit without instruction for doing so pursuant to a less-than-desirable law.

[171] Indeed, education can lead to swift and dramatic results. After presenting one short, educational presentation making the case for moving away from secured financial conditions, my colleague and I received an email from an attending judge, telling us that he immediately went back to court and, two days before Christmas, changed all secured bond amounts to unsecured amounts, leading to the release of everyone who had, until then, been held pretrial on a money bond and thus providing proof (perhaps inadvertently) that there was really no justification for detention to begin with. In researching and writing this paper, I was disappointed to find very few serious courses

Indeed, when judges do more, significant improvements – such as those done in New Jersey, New Mexico, Arizona, Illinois, Colorado, and California – become possible.[172] With their neutrality and broad knowledge of the law, judges are often best suited to lead the work of CJCCs, especially into a law-laden topic such as bail. Moreover, much of the work toward pretrial justice involves "adaptive change," which requires adaptive leaders, a role for which judges are often a logical and appropriate choice.

In 2013, the Conference of Chief Justices ("CCJ") released a resolution endorsing a Conference of State Court Administrators ("COSCA") policy paper on evidence-based pretrial release, which emphasized that judges should, among other things: (1) collaborate with pretrial justice experts at the state and national levels; (2) analyze state law and work collaboratively to propose revisions; and (3) take "the message" to additional groups and support dialogue on pretrial justice – all recommendations that presume a leadership role for the judiciary in addition to the way they may actually decide to release or detain persons in individual cases.[173]

In 2014, I articulated the "Three Ms" (maximizing liberty, maximizing public safety, and maximizing court appearance) as being commonly understood by both the legal profession and pretrial social science researchers as a convenient way to better convey the "balance" of legal interests mentioned in passing by the ABA Standards, which focused on balancing liberty and public safety while assuming an

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dedicated to bail education for bail-setting judges, even though at least two groups at one time had me help to develop national pretrial justice curricula.

[172] This serves as a lesson for the field, as judges (versus other persons, such as legislators) were the main targets for increased bail education early in this era of reform, leading to numerous judicial task forces, new court rules, and local court practices all changing for the better. The reasons for focusing on judges were partly strategic (as they set bail), and partly due to the lack of resources to fully educate others in the system. Unfortunately, this has meant that groups of persons, such as legislators, have not always been given the foundational education needed to fully understand various court rules or opinions and the reasons behind them, and thus those bodies, in turn, occasionally pass objectively bad bail laws. *See, e.g.,* Nick Evans, *Last Year's Cash Bail Amendment From Lawmakers Put Ohio's Entire Pretrial Release System in Jeopardy* (Ohio Cap. J. May 23, 2023), found at https://ohiocapitaljournal.com/2023/05/23/last-years-cash-bail-amendment-from-lawmakers-put-ohios-entire-pretrial-release-system-in-jeopardy/.

[173] Both the COSCA and CCJ papers can be found at https://www.ncsc.org/pjcc.

overarching interest in court appearance.[174] Maximizing release, safety, and court appearance all at the same time – and aiming for high levels of each – was supposed to reflect the judge's decision most of all, as release represented our important societal liberty interest, and safety and appearance represented the government's compelling purposes for limiting pretrial freedom, thus forming the basis of virtually all constitutional balancing tests.

Nevertheless, this simple formula must be guided by the research, which tells judges that releasing the vast majority of defendants with few conditions or supports (and no monetary conditions) typically results in little to no negative impacts to society versus unnecessary pretrial detention, which results in many negative impacts. As I have mentioned previously and further explain, *infra,* the research shows mostly that – at least during the pretrial period – accused persons are simply not very risky, and certainly not very risky to do the bad things that have traditionally led to intentional pretrial detention in America. Moreover, the research shows that the risk of those bad things – actual, willful flight and the commission of either a serious or violent crime while on release – is extremely difficult to predict without some new articulation of risk that transcends that provided by an actuarial assessment tool and that is better than typical state or federal articulations found in current laws. Finally, judges should realize that while a proper intentional detention provision can be crafted so as to result in 90% (or better) release rates along with 90% (or better) safety and court appearance rates, maximizing these rates (that is, achieving the 3 Ms at the same time) requires

[174] *ABA Standards*, *supra* note 118 (introduction) at 29-30. In 2014, I combined the ABA's discussion of the balance with the research, law, and history of bail to also say that the "purpose of an effective bail decision is to maximize release while maximizing public safety and court appearance." *Money, supra* note 103, at note 127 and accompanying text. I have previously written that the ABA Standards used the phrase "maintaining the integrity of the judicial process" in reference to both securing defendants for trial and to prevent intimidation of witnesses and interference with trial as purposes of bail, but these and other attempts at verbiage designed to add to the Ms could be folded into the three purposes or goals listed in the text, above. In 2009, my colleagues and I argued that if the balance were only based on liberty versus public safety and not flight, then money bail should be eliminated immediately as having no rational relationship to criminal behavior, and, indeed, we are beginning to see models of intentional detention that not only eliminate money but that also exclude intentional pretrial detention for risk of flight based solely on prediction. *See, e.g.,* Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration,* 46 Ford. Urban L. J. 845 (2019).

unique judicial perspective to shape the actual words used to determine the risk to detain.[175]

Having worked with and for judges for decades, I can say emphatically that judges in America are in a unique position to independently assess the new templates for intentional release and detention and to help their states with the changes required to implement them. Who is better suited, when it is the law and the history of bail intertwined with that law that is driving the states toward the inevitability of providing a solution for the tension that intentional detention causes with the ubiquitous American right to bail/pretrial release? Detention eligibility and findings of risk to detain within an eligibility net[176] are American legal and historical concepts, and because an actuarial tool should never be used solely to detain a person pretrial,[177] the articulation of risk used to detain within an eligibility net necessarily centers on judicial findings based on evidence in the record; accordingly, it is essential that judges assist in crafting the language used to guide those findings.[178]

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[175] My intentional detention model uses language gleaned mostly from the history of bail through court opinions at a time in America when judges were being asked what, exactly, must be proved in order to allow for intentional pretrial detention with little to no statutory guidance. The project of choosing precise words, including words providing for burdens of proof or for articulating how high and through what evidence some risk must be shown, is a project not unfamiliar to judges, whether they be trial or appellate judges.

[176] All American intentional detention laws include a charge-based eligibility net (even if it seems wide) along with a finding of risk to determine actual detention for those found within that net. Switching systems from one in which money can detain to intentional release and detention involves mostly working with these nets (for both bail and revocation of bail) and risk findings, as discussed in detail in the section on education and in pretrial justice pillar number three, *infra.*

[177] See *Model Bail Laws*, *supra* note 23, *passim* (listing numerous reasons based on the law, the history, and the pretrial research for never using tools solely to detain).

[178] Based on the history, law, and pretrial research, the commonsense language articulating the risk to intentionally detain that I have proposed is almost always better (that is, more likely to promote liberty, while still maximizing public safety and court appearance) than the language currently found in virtually all state constitutions, statutes, or court rules; accordingly, I typically call on states to change (or at least to examine) virtually all constitutional, statutory, and court-rules-based detention provisions. Moreover, there are often ways to avoid having bad state law as a hindrance to local practices. For example, while a local judge bound by state law could never use a "looser" finding of risk to detain (that is, a risk finding that makes it easier than the state's current constitutional or statutory right to bail provision to detain), that judge could use a "tighter" finding (that is, like the finding I have proposed in my model), as the local jurisdiction can always agree to provisions that provide the opportunity for more citizen freedom without changing the law. This notion is premised on the objective fact that at this time in American history most criminal systems over-detain people facing charges who are simply not very "risky." If the research showed the opposite problem – that is, if the research showed that during the pretrial phase of the case accused persons were all extremely high risk to commit new, violent crimes or to flee, then the states would have a different language issue. In that case, with local judges forbidden from enacting policies that make it easier to detain than

Additionally, the judicial role at bail can begin to improve in individual courtrooms by judges simply making release and detention decisions with the kind of intentionality explained in this document.[179] Importantly, judges can keep up with both the social science and risk research (as well as the law) to better respond to trends pointing toward intentionality and away from money as seen in both federal and state courts.[180] To the extent that judges do not believe those trends – for example, if a judge honestly believes that he or she can use money to detain a risky defendant on purpose by ignoring a closed constitutional "no bail" eligibility net – then that judge should, at the very least, make clear records of intentional detention and encourage appeals to test the hypothesis. If he or she *does* believe the trends but still thinks that money motivates defendant behavior, then that judge should immediately begin using the constitutional (or statutory) "no bail" provision for intentional detention and implement meaningful ability to pay

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the constitution, there would be a greater sense of urgency to amend the state laws to allow for it. In either instance, the use of money for either release or detention fails for both lower and higher risk defendants and thus must be replaced by *some* language of intentional release and detention. To the extent that such a system is perceived to limit judicial discretion, system actors must remember three things: (1) any changes to money bail will likely automatically limit some discretion somewhere simply because the money-bail system allows virtually 100% discretion to detain those brought to jail on the relevant charges; (2) in any particular jurisdiction, there are likely already some limits to judicial discretion (such as laws mandating use of personal recognizance for certain charges), which are simply not being considered; and (3) limits to discretion, if done collaboratively and with ample bail education, will be understood and, indeed, welcomed by stakeholders who have had a hand in crafting the provisions. Persons should think of intentional release and detention as being merely an extension of communities' decisions to, for example, forbid arrest or jail for parking offenses or certain low-level traffic offenses. Nobody questions the automatic release of so-called "risky" persons in those situations, and nobody will question a line of intentionality that is collaboratively drawn in a different place.

[179] The overall theme of NIC's 2014 paper, *Money as a Criminal Justice Stakeholder, supra* note 103, was that if a judge followed the so-called "fundamentals of bail," that is, the law, the history, and the pretrial research along with a proper understanding of why we need pretrial justice and the uses of certain terms and phrases, that judge would make an intentional release or detention decision, immediately effectuated, with nothing standing in the way of release or detention. I understand a special issue surrounding the perceived partisanship of elected judges in America in moving from the status quo to this sort of intentional system. Nevertheless, as with recommendations to elected lawmakers and persons in the executive branches, collaboration and education have a significant dampening effect on what people believe to be partisanship at bail.

[180] In virtually every case against money-based detention, federal courts have minimally required elements of procedural due process in cases where a defendant is given an order of release but remains detained. The use of due process as required for detention, however, indicates intent to detain. And this, in turn, is problematic because deeper research into both federal and state law typically reveals that using money to detain on purpose is also unlawful under excessive bail analysis, putting at least some pressure on judges to follow their constitutional "no bail" provisions instead of money for intentional detention. As seen in our discussion of education on the law, *infra,* judges must minimally be aware of the continuing state of various federal lawsuits that are pushing entire jurisdictions toward new bail practices and thus begin preparing for the change.

processes for all "bailable" defendants.[181] If he or she is unsure of either belief, then that judge should minimally encourage the state judiciary to immediately investigate bail practices, the history of bail in that state, and the law concerning release and detention to provide guidance – including for constitutional change.

Local judges can do all of these things systemwide – including significant policy changes involving the articulation of purposeful detention – based on en banc agreement. They can, as was done in my county, agree to pilot projects designed to test certain theories of bail setting. They can, as was done in other Colorado counties, report program findings to the state to help bring about improvements. They can use the research to avoid ineffective release conditions. They can use the National Standards on Pretrial Release and other documents to properly understand certain legal mandates, such as the use of "least restrictive conditions." They can set bail every day of the week, including weekends and holidays. They can develop diversion and alternative adjudication or restorative justice options, including drug, mental health, and other treatment courts.[182] They can expand delegated release. They can issue more summonses. They can stay warrants for failure to appear in order to provide time for a person to show up for court on their own. They can shrink the pretrial period and/or enact speedy trial rules for certain "higher-risk" released defendants. They can experiment with pretrial "teams," made up of the judge, the prosecutor, and the defense attorney (each with knowledge of local support resources), which are designed to avoid the typical adversarial process for a more collaborative and consensus-driven approach at first appearances.[183] Finally, and as mentioned in the 2011 CCJ

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[181] Ability to pay provisions must include limitations that make the overall notion meaningful. *See, e.g.,* Uniform Law Commission, *Uniform Pretrial Release and Detention Act* (2020) at 30 (requiring that the amount must not be beyond what an accused person is able to pay from personal financial resources within 24 hours after the condition is imposed), found at https://www.uniformlaws.org/viewdocument/final-act-102?CommunityKey=50f7996c-7919-4662-abb6-c77bcebc688e&tab=librarydocuments [hereinafter *ULC Act*]. In 2019, the Vera Institute of Justice launched a downloadable Ability to Pay Calculator, designed to help defense attorneys, family members, and system stakeholders determine ability to pay without undue hardship. *See Vera's Bail Assessment Pilot Launches "Ability to Pay" Calculator: The Tool Will Help Ensure that Bail is Less Burdensome and Punitive on the Path to Eliminating [Money] Bail Entirely,* found at https://www.vera.org/newsroom/veras-bail-assessment-pilot-launches-ability-to-pay-calculator.

[182] *See ABA Standards, supra* note 118, Std. 10-1.5 (and commentary).

[183] *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 (2020).

resolution, judges can and should collaborate with experts, help revise laws, and "take the message" to others.

The fundamental point is that judges must act because they are front and center in the overall bail debate, they have more opportunities than most persons to improve the system, and yet they are sometimes perceived as merely waiting for constitutional or statutory change (or mandates from other courts) to alter their practices. When I traveled to the White House to discuss fines, fees, and bail several years ago, there was a clarion call to nudge judges into more forceful action, and that call is shared by more and more persons each day. Moreover, as I discuss in the section of this paper on intentionality, *infra,* people likely affix a moral element to bail settings, believing that when the results of those bail settings are undesirable, as many times they are, the public believes that the judges intended to cause those negative outcomes *even when they those judges are not aware of them*. Litigants in California have recently complained in briefs to the Supreme Court that judges in that state are simply ignoring extremely recent California Supreme Court bail precedent. Other persons are calling for the complete elimination of all judicial discretion at bail. And still others think that if judges allow people to remain in jail due only to poverty, then nothing else those judges do can be trusted.

I believe that increasingly extreme reactions leaning toward punishing judges are likely not necessary. In my opinion, I see judges as persons most likely to advance a solution – perhaps *the* solution – rather than persons intentionally exacerbating any problem (other than exhibiting a natural avoidance of the hard work of change). Accordingly, I strongly urge judges to get involved and to use their full power and unique role in the justice system to fix the objectively broken mechanism of release and detention in both the states and the federal system.

I did not have to look far to find an exemplary bail-setting county court judge in Colorado, a state in which the laws concerning release – like most state laws – permit nonfinancial or unsecured financial release in virtually all cases, but in which the laws concerning detention are poor and rely upon the so-called

"excessive bail loophole" to do intentional detention.[184] On a typical day, this judge does an excellent job of explaining to anyone in or out of his live-streamed courtroom about his role in both protecting society and in effectuating American liberty. He then does the best he can at achieving intentional release and detention, releasing non-financially 95% of persons he sees (and never setting a commercial surety bond), and advising the attorneys in his courtroom to refrain from arguing about amounts of money. He has introduced the use of an actuarial assessment tool to help with setting conditions of bail, has created a pretrial services unit, and has recently begun an "experiment" in which he only requires a minimal number of return court dates so as to reduce even the opportunity for an FTA.

He is well-educated in bail law and knows that Colorado still suffers from an inferior legal structure that requires, among other things, a constitutional amendment to the right to bail clause to allow for meaningful and transparent intentional detention. Accordingly, in addition to speaking nationally, he has participated on state task forces and even smaller groups engaging in the actual design of an intentional release and detain constitutional amendment for Colorado. That is, he is doing precisely the things the Conference of Chief Justices' resolution, mentioned above, said to do. His work has not gone without opposition,[185] but he currently serves as a bold yet rational bail setter and stands out as a true exemplar to the American judiciary.

[184] *See* note 45, *supra* as well as the section on education under the subsection of "the legal foundations of bail" and *Appendix One.* Again, the "excessive bail loophole" is a loophole allowing judges to detain otherwise "bailable" defendants, so long as they do not make a record that they intend to detain the defendant on purpose. It is a loophole to the general rule that bailable defendants (both historically and now in theory) are meant to be released, but it is also a loophole that allows judicial officials to avoid having to follow any existing intentional release and detention provision (along with any due process requirements) in a state's constitution, statutes, or court rules.

[185] This judge recently received opposition in a state retention election by uninformed stakeholders as well as by persons who normally make money on bail settings, but he survived the challenge mostly due to his ability to adequately articulate the purposes of American bail and fundamental legal principles that guide his bail settings.

Law Enforcement

> *"The inconsistency of policy and guidelines for pretrial release can create volatile public safety challenges for law enforcement and communities. With these challenges in mind, more law enforcement agencies are engaging in innovative pre-arrest, pre-booking, and pretrial justice system programs that provide pathways to treatment and services for eligible individuals, account for the safety of crime victims, and build stronger relationships between law enforcement and communities."*
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> International Association of Chiefs of Police

Typical lists of pretrial improvements include having police issue more citations and judges issuing more summonses in lieu of arrests,[186] even though they are recommendations that might be primarily effectuated by lawmakers.[187] As for law enforcement, my colleagues and I wrote in 2009 that, "Despite the fact that pretrial release has not been historically viewed as a police function, through their discretionary decision-making ability to issue citations in lieu of arrests in certain cases, 'the police are often in the best position to provide for the speedy release of criminal defendants.'"[188] Moreover, we wrote that the issue was often discussed under "delegated release authority," making citations akin to release by jail staff or pretrial services officers, and was deemed a pretrial improvement by the national standards due, primarily, to the "logical extension" of other overarching recommendations, such as to create express presumptions for release

[186] Summonses were typically paired with citations as similar forms of early release, even though the former applied to judges on the bench. The favorability of judges issuing more summonses than arrest warrants is still valid, but, like the issue of citations, changes when one considers operating under a more deliberate release and detention scheme versus using money as the determinate. A defendant who is detention-eligible and shows the requisite risk allowing for temporary detention before a full-detention hearing is quite different from a defendant who is neither eligible nor risky.

[187] The Uniform Law Commission's Uniform Pretrial Release and Detention Act contemplates legislation designed to effectuate broader use of citations (such as was done in Illinois), and yet recognizes that a state might not enact such a provision. *See ULC Act, supra* note 181, at Article 2. The notion of broader release that avoids arrest and/or booking altogether can also be effectuated through other means, such as district attorney/prosecutor arrest standards crafted with local law enforcement and various pre-arrest diversion programs.

[188] *Jeffco Proposal, supra* note 117, at 64 (quoting Wayne Thomas Jr., *Bail Reform in America* (Univ. Cal. Press 1976), at 200).

or to use "least restrictive" conditions.[189] As with judges, however, the issue of citations versus arrest, while still studied and long-argued to be an objective improvement related to law enforcement,[190] greatly understates both the actual and potential role of law enforcement in pretrial justice.

Indeed, early in this wave of reform the International Association of Chiefs of Police ("IACP") wrote a policy statement recommending police involvement on numerous pretrial issues, from pretrial services agencies to preventive detention, albeit with the caveat that the complexity of issues required more detailed study.[191] Nevertheless, it listed far more issues directly affecting law enforcement than just citations, including the criteria to assure that the right people are released and detained, an issue tied directly to the pressing nature of true, historic bail reform through replacing random, money-based release and detention with intentional processes. The current website for the IACP includes a page for its "Pretrial Justice Initiative," which lists various resources, some of which cover the gamut of pretrial issues.

Additionally, the use of citations in a pretrial world built upon the money-bail system is fundamentally different than that built upon an intentional release and detention system, likely making other issues in law enforcement far more important. Today, in virtually all jurisdictions, any person brought to the jail may or may not be incarcerated prior to trial due to the money-bail system allowing virtually 100% discretion to detain any arrestee (intentionally or not, and often randomly) unless certain charges are specifically carved out of the bail process. Such a system places a significant emphasis on citations, simply because if a person is only cited, he or she will not be subject to the often-blanket assignment

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[189] *Id.* at 65.

[190] In 2016, the International Association of Chiefs of Police released a literature review titled, *Citation in Lieu of Arrest: Examining Law Enforcement's Use of Citation Across the United States, see* at https://www.theiacp.org/sites/default/files/all/i-j/IACP%20Citation%20Final%20Report%202016.pdf, as well as an identically titled document drafted with the Arnold Foundation focusing on the same issue in the same year. The overall notion has been advanced as an improvement to the bail system since the 1920s.

[191] *See* IACP, *Law Enforcement's Leadership Role in the Pretrial Release and Detention Process* (IACP/BJA/PJI, 2011), found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/law-enforcements-leadership-role-pretrial-release-and-detention. The IACP's main link to its Pretrial Justice Initiative is found at https://www.theiacp.org/projects/pretrial-justice-initiative.

of arbitrary amounts of money, which may or may not lead to detention, and which, in turn, leads later to needless arguments over how "high" or "low" some bond amount should have been in the event of unnecessary detention or pretrial failure while on release. In an intentional release and detention system, all system stakeholders work to draw lines between on-purpose release and detention based initially on charge,[192] so that everyone has a very good idea – at least initially – whether a person will be released or potentially detained. This, in turn, tells police – in advance – who will be released and detained if that person is brought to the jail, which can lead to other practices such as using a risk tool to decide citations or summonses versus "book-throughs." [193]

As I mentioned previously, when done properly and with adequate education, intentional release and detention will have broad consensus among system stakeholders, who will have taken community safety into account in the design of both the primary detention eligibility net/risk finding and the secondary (revocation or sanctions) net/risk finding as well as with the implementation of various supports shown to help people to succeed on pretrial release. It will be bolstered by the pretrial research, which uniformly shows a minimal presence of risk in the pretrial population, and most certainly far less risk to do the very bad things that America believes should lead to pretrial detention based on prediction. A system of intentional release and detention focuses on addressing these very bad things while allowing the community to know in advance which persons are eligible for detention through a limited charge-based eligibility net. Accordingly, the construction of a consensus-driven intentional system will automatically reduce claims that some person who was either released or detained should not have been released or detained.[194] In such a system, law enforcement will know –

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[192] *See* discussion of intentional detention provisions later in this paper, *infra.* A limited charge-based eligibility net seems required by due process fair notice, *see Changing Bail Laws, supra* note 56, and overly-broad nets will likely be found lawful only if paired with a "tight" finding of risk within that net. *See Model Bail Laws, supra* note 23; CLEBP, *Information to Help with State Attempts the Change Constitutional and Statutory Right to Bail (Release) and "No Bail" (Detention) Provisions,* found at http://www.clebp.org/images/Memo_on_State_Constitutional_Release_and_Detention.pdf.

[193] For example, the Illinois Pretrial Fairness Act keys off of the "detention eligibility" line to provide guidance for police to use citation release, with certain exceptions negotiated during passage. *See* 725 ILCS 5/109-1.

[194] Again, it is extremely important for every stakeholder (including law enforcement) to know and understand the American tradition of intentional release and detention, how it works, the various elements that must be balanced

based on the charge – whether someone will be quickly released or eligible for detention if brought to the jail, thus changing the overall impact of a decision to cite. Moreover, law enforcement can and should be a part of crafting not only the release/detain provisions (both for bail proper as well as revocation) but also whatever mandatory citation or summons provisions might be used within the "release" category.

Accordingly, like judges, law enforcement must be part of the collaborative group, seek out both broad and specialized bail education, and bring law enforcement perspective to every criminal system issue (beyond just citation release), including the somewhat more complicated issues of state constitutional change or, importantly, attacking the root causes of crime. In 2024, former Chief Scott C. Allen from Massachusetts wrote of his journey from an "almost always" reactive focus of responding and working to solve crimes to a realization of the benefits of working on crime prevention and more holistic responses with collaborative groups. He wrote as follows:

> Having spent nearly 30 years in the US public safety and community health fields, 26 years in active law enforcement, and the past 9 years working to support community safety and well-being within my community, other municipalities, counties, and states across the country, I am inspired to see public safety, public health, and community partners working together with common goals, saving lives and positively impacting vulnerable populations across all communities. Throughout the early part of my public safety career that was rarely the case, with these partners often operating in silos.
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> * * *

in crafting the provisions, and the various ways in which language in each element might be negotiated. *See pretrial justice pillar number three, infra.* In sum, broad collaboration and education leading to agreement on the "net" and risk finding will drastically reduce post-hoc arguments following any particular bail setting.

> Although there were and continue to be countless effective community policing programmes, many of which I participated in, I discovered that my and my fellow officers' daily focus was always incident-driven, centered on crimes, crime statistics, number of arrests, and traffic citations.
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> My journey began with realizing that we (police) had a 'front row seat', one which we could leverage to partner and collaborate with community members, community-based organizations, persons with lived experience, and other professionals that we should have but weren't communicating with.[195]

This represents the stance and attitude among those law enforcement professionals with whom I have worked in CJCCs. It is akin to those officers who have agreed to participate in the Substance Abuse and Mental Health Services Administration ("SAMHSA") Sequential Intercept Model,[196] which sees every decision point as a chance to reduce community harm, and which uses research and best-practice literature to inform and train law enforcement (including dispatchers and specialized officer groups) on alternatives at both intercept numbers one (law enforcement) and two (initial court hearings/initial detention). Additionally, it recognizes the important role of law enforcement input and perspective on all decision points/intercepts.

Moreover, having worked in and for police agencies, I have found that law enforcement officers – the persons with the most contact with citizens swept into the bail system – often bring empathetic experience and thus valuable opinions on a virtually all pretrial topics. More than any other stakeholder, officers are

[195] Scott C. Allen, *Collaborations for CSWB, The Groups That Everyone Need to Join* (J. of Comm. Safety & Well-Being, 2024) at 1, found at https://www.semanticscholar.org/paper/Collaborations-for-CSWB%3A-The-groups-that-everyone-Allen/2f0d8ca95c36ce51fbb24f88f1a33dd9db079140.
[196] *See SAMHSA Model, supra* note 145.

keenly aware that persons in jail rarely go to prison, and that jail inmates thus typically return to live among us as our neighbors.[197] In our state, police agencies were leaders in re-designing the standard statewide traffic ticket so as to make it more readable and lead to fewer misunderstandings and, thus, fewer FTAs. At the other end of complexity, the chief of a small Colorado town helped draft alternative right to bail language for the Colorado Constitution. In sum, there is no limit to law enforcement's unique pretrial contributions.

The key to law enforcement agency effectiveness in the bail space is to: (1) provide them with objective and neutral education, data, and information; (2) make sure that the content of that knowledge as well as the decision to alter policies or practices is ultimately conveyed to all supervisors, line officers, and staff; and (3) occasionally remind those agencies to receive feedback and reflect on issues directly related to policing or jail administration for the good of the community even when it means accepting criticism and changing themselves.[198] Those issues might include any number of relevant topics, whether they be termed "alternatives to arrest," "alternatives to traditional policing," or simply "best-practice policing techniques."[199]

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[197] Indeed, while often highlighted by the media, I have personally found law enforcement officers with a harsh view of the citizenry to be mostly aberrational. The media occasionally amplifies (and distorts) officer complaints of arrestees being released immediately, but, once again, this is a complaint that is rooted in the lack of bail education, and is, at its core, typically an argument for intentional detention or, in some cases, harsher punishment after a trial. My colleagues and I have created intentional release and detention schemes for which law enforcement and victim's rights groups have become strong advocates simply due to thorough bail education. As for jail inmates ultimately sentenced to prison, *see Fundamentals of Bail, supra* note 20, at 26 ("Indeed, only a small fraction of jail inmates national (from 3% to 5%, depending on the source) are sent to prison.").

[198] I have personally never encountered a police agency that was a part of a CJCC and that refused to examine its own practices. I have, however, encountered other agency heads with a keen desire to examine other agencies while refusing to subject themselves to similar treatment. In those cases, the group can switch to working on issues with clearer systemic consensus.

[199] Both police groups and others have listed numerous initiatives and programs with varying amounts of research to support them. In addition to citations, the IACP has studied and issued guidance on police-led diversion, *see* at https://www.theiacp.org/alternatives-to-arrest, sobering centers, alternative responses to domestic and sexual violence, and community police engagement, which includes "bias free policing," use of force policies, hiring practices, victim services, mental health responses, broadly reducing incarceration, substance abuse, and various other aspects of community policing and "criminal justice reform," *see* at https://www.theiacp.org/topics/criminal-justice-reform. The Data Collaborative for Justice at John Jay College has reviewed the research and practice surrounding five "alternatives" to typical responses for misdemeanor offenses (including non-police response and decriminalization). *See* Becca Cadoff, Kristyn Jones, Preeti Chauhan & Michael Rempel's, *Lower-Level Enforcement, Racial Disparities, & Alternatives to Arrest: A Review of the Research and Practice from 1970 to 2021* (2023), found at https://datacollaborativeforjustice.org/wp-content/uploads/2023/02/A2AReport-6.pdf. Other groups have

Applying national pretrial standards to this broader notion, the reader of this paper should realize that the ABA Standards simply have not kept up, focusing mostly on citations and certain alternatives to adjudication such as diversion to treatment courts while referring to law enforcement's "caretaking functions" only in passing. The updated NAPSA Standards, however, discuss citations while also mentioning "an array" of "non-arrest" options, citing, as I do, to the SAMHSA Sequential Intercept Model as providing an overall process for looking at evidence on a variety of topics at the arrest decision point.[200]

As briefly mentioned above, a fundamental prerequisite for any agency leader in a CJCC is a willingness to open his or her own agency's practices (or even simply discuss substantive research tied to agency practices) to systemwide discussions. Thus, law enforcement should be open to discussing a variety of topics concerning policing and its relationship to pretrial justice, which, as I have noted, can be anything from sharing data, to providing input on de-criminalization of certain offenses, to experimenting with new forms of officer hiring and training.[201] CJCC staff can help police agencies amass the relevant research, even if that research is not always shared widely. An agency's willingness to open itself up to examination flows naturally from inviting that agency to have a voice in other agency efforts as

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discussed their own lists of alternatives to traditional law enforcement methods, including the Marshall Project, *see* at https://www.themarshallproject.org/records/11645-alternatives-to-policing, and the Local Initiatives Support Corporation, *see* at https://www.lisc.org/our-initiatives/safety-justice/our-strategies/alternatives-arrest-prosecution-and-incarceration/. These can be combined with various discussions of research affecting pretrial decision points both directly and indirectly. *See, e.g., EBDM Initiative, supra* note 105; Jennifer Doleac, *Why Crime Matters, and What to Do About It* (Aspen Inst. 2024) (showing what works and does not work to prevent crime in the first place), found at https://www.economicstrategygroup.org/wp-content/uploads/2024/11/Doleac-AESG-2024.pdf. For other research focusing on evaluating particular law enforcement functions, such as Denver Colorado's STAR or Durham, North Carolina's HEART programs, *see, e.g.,* Sarah Gillespie, Will Curran-Groome & Amy Rogin, *Evaluating Alternative Crisis Response in Denver's Support Team Assisted Response (STAR) Program: Interim Findings* (Urban Institute, 2024), found at https://www.urban.org/research/publication/evaluating-alternative-crisis-response-denvers-support-team-assisted-response; Durham, North Carolina's HEART (Holistic Empathetic Assistance Response Team) (RTI/Arnold Ventures), found at https://www.durhamnc.gov/4576/Community-Safety. The HEART program is apparently still in pilot phase but will be evaluated by RTI and the UNC Center for Health Equity Research.

[200] *NAPSA Standards*, *supra* note 118, Std. 2.1 (commentary) at 19.

[201] In one city in Colorado, the police agency took pride in hiring restaurant workers as officers, focusing on the "service" aspect of community policing while training them in de-escalation, empathy, and restorative justice in addition to traditional law enforcement training methods.

well as systemwide efforts, such as when a jurisdiction decides to implement a crime prevention program or when state or local governments attempt to craft criteria for intentional release and detention.

Defense Attorneys

> *"An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. . .. Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."*
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> Former Justice John Paul Stevens (internal quotes omitted)

In 2009, my colleagues and I split issues at first appearance into two categories based on the national standards: (1) promptness; and (2) the nature of the first appearance, which included what we described as the "somewhat misunderstood" issue of counsel at first appearance.[202] The misunderstanding undoubtedly came from the law, in which the United States Supreme Court had declared: (1) that the right to counsel "attached" at first appearance, "where [the defendant] learns the charge against him and his liberty is subject to restriction;" and (2) that counsel must be appointed within a reasonable time to represent defendants at any "critical stage" thereafter;[203] but (3) did not go so far as to announce specifically that bail settings were "critical stages."[204] Nevertheless, both the ABA and NAPSA Standards (or other standards cited by those two sets), make clear that the best practice is to have defense attorneys prepared and present for bail settings despite the murkiness of the law. This recommendation was added to the 2011 list of recommended improvements from the Attorney General's

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[202] *Jeffco Proposal, supra* note 117, at 101.

[203] *Rothgery v. Gillespie County,* 554 U.S. 191, 212 (2008). In this particular case, it was at an initial appearance in Texas called an "article 15.17 hearing" at which a magistrate addressed probable cause, set bail, and apprised the defendant of the accusations against him. The states vary widely on how certain aspects of these early-stage events are done.

[204] *See* Sixth Amend. Ctr./PJI, *Early Appointment of Counsel: The Law, Implementation, and Benefits* (2014), found at https://www.oregon.gov/opdc/commission/SiteAssets/Pages/documents/6ACPJI_earlyappointmentofcounsel_032014.pdf.

Symposium on Pretrial Justice,[205] and has been repeated by numerous national groups working to achieve pretrial justice.[206]

The "right to counsel at bail" issue has expanded dramatically since then, with numerous lawyers and lawyer groups advocating – often jurisdiction-by-jurisdiction – to require or allow counsel at first appearance bail settings through changes in law, rule, policy, or practice.[207] Nevertheless, a quote from the Sixth Amendment Center's website sums up the current state of this objective pretrial improvement: "Jailing poor people without a lawyer is unconstitutional, un-American, and unconscionable. Yet this is happening to thousands of people every day."[208]

While this issue likely requires no empirical evidence to convince persons of its importance, empirical research nonetheless continues to show the clear benefits of defense counsel at bail settings both for traditional[209] and non-traditional

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[205] *See Symposium Report, supra* note 99, at 39.

[206] *See, e.g., NIC Framework, supra* note 108, at 26-27. The APPR (CEPP/Arnold Ventures) Initiative's Roadmap for Pretrial Advancement weaves the role of defense attorneys through its discussion of a meaningful first appearance, but has a much more substantive document from 2023 that includes other aspects of defense representation, including social science research, found here: https://cdn.filestackcontent.com/security=policy:eyJleHBpcnkiOjQwODAxNDY0MDAsImNhbGwiOlsicmVhZCIsImNvbnZlcnQiXX0=,signature:bf9d04ed62530c164d6fed395e4f74c04e606b95f4b72448ff976857a1e3a5f5/APQCaF3BQK27FGgd1XFN.

[207] In Maryland, the Supreme Court has required attorney presence for indigent defendants at bail hearings as a matter of state constitutional law, *see Maryland Supreme Court Orders Attorneys at Bail Hearings* (Pleading the Sixth, Sept. 26, 2013), found at https://www.ils.ny.gov/files/Maryland%20Supreme%20Court%20Orders%20Attorneys%20At%20Bail%20Hearings%20092613.pdf. In another jurisdiction, the courts used local court rules to creatively avoid an objectively bad state law that required defendants facing certain crimes to meet with the prosecutor before counsel could be appointed. That law has since been repealed. Most recently, despite a number of unfortunate elements found in a new Texas addition to its right to bail provision, advocates persuaded drafters to include an historic constitutional right to representation at detention hearings conducted through the new provision. *See* note 531, *infra.* Many groups active in the issue (and with multiple resources that can be obtained through their websites), include Gideon's Promise, the Sixth Amendment Center, the National Association of Criminal Defense Lawyers, the National Association for Public Defense, The Bail Project, the Bureau of Justice Assistance, the Center for Court Innovation, the National Legal Aid & Defender Association, the MacArthur Foundation, the Center for Effective Public Policy, the American Civil Liberties Union, and the American Bar Association Criminal Justice Section.

[208] *See* at https://6ac.org/.

[209] In 2002, researchers used a controlled study to find that defendants with lawyers versus those without lawyers: (1) were over two and one-half times more likely to be released on their own recognizance; (2) were over four times more likely to have their initially-set bond reduced at the hearing; (3) had their money-bail bond reduced by a greater amount; (4) were more likely to have the money bond reduced to a more affordable level; (5) spent less

roles.[210] Some of the most recent research includes a meta-analysis showing "that indigent defendants experience worse outcomes across court processing stages than defendants with retained counsel" as well as "fewer discrepancies between defendants with public defenders and assigned counsel."[211]

Finally, in a Rand-funded field experiment, researchers showed that providing public defenders at bail hearings "increased the probability of receiving an ROR or nonmonetary release at bail hearings by 21%, reduced the probability an individual was in jail 3 days after their bail hearing by 10%, and had no impact on failure to appear rates or the probable cause determination at the preliminary

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time in jail; and (6) had longer bail bond review hearings. *See* Douglas Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail,* 32 Cardozo L. Rev. 1719 (2002). In 2018, one researcher studying the San Francisco Public Defender's Pretrial Release Unit found, among other things, that persons receiving arrest-responsive services were twice as likely to be released at arraignment than similarly situated, non-treated arrestees. Alena Yarmosky, *The Impact of Early Representation: An Analysis of the San Francisco Public Defender's Pre-Trial Release Unit* (Cal. Policy Lab, 2018), found at https://sfpublicdefender.org/wp-content/uploads/sites/2/2018/05/The-Impact-of-Early-Representation-PRU-Evaluation-Final-Report-5.11.18.pdf. Others have found a 28% increase in the likelihood of pretrial release and a 36% increase in the likelihood of having the case dismissed for arrestees with representation versus arrestees without. *See* Johanna Lacoe, Brett Fischer & Steven Raphael, *The Effect of Pre-Arraignment Legal Representation of Criminal Case Outcomes,* NBER Working Paper No. w31289 (2023), found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4461639. Researchers have also begun studying more nuanced challenges to implementation of counsel at first appearance, for example, in rural settings for both misdemeanor and felony dockets. *See* Alissa Worden, Kirstin Morgan, Reveka Shteynberg & Andrew Davies, *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts* (Crim. Just. Policy Rev., 2018), found at https://www.researchgate.net/profile/Reveka-Shteynberg/publication/325087768_What_Difference_Does_a_Lawyer_Make_Impacts_of_Early_Counsel_on_Misdemeanor_Bail_Decisions_and_Outcomes_in_Rural_and_Small_Town_Courts/links/5af9dff40f7e9b3b0bef0433/What-Difference-Does-a-Lawyer-Make-Impacts-of-Early-Counsel-on-Misdemeanor-Bail-Decisions-and-Outcomes-in-Rural-and-Small-Town-Courts.pdf; Alissa Worden, Reveka Shteynberg, Kristin Morgan & Andres Davies, *The Impact of Counsel at First Appearance on Pretrial Release in Felony Arraignments: The Case of Rural Jurisdictions* (Crim. Just. Policy Rev., 2020), found at https://nyapsa.org/assets/files/0887403419873018.pdf. In 2023, Duren Banks, Lynn Langton, Madison Fann, Michal Planty, Michael Vermeer, Brian Jackso & Dulani Woods identified a number of future research needs and priorities for a full range of defense counsel issues. *See Indigent Defense Environmental Scan: Identifying Research Needs to Support Fair and Equitable Indigent Defense in the United States,* (RTI/RAND/NIJ, 2023), found at https://www.rand.org/pubs/research_reports/RRA108-19.html.

[210] In a less traditional sense, authors have studied and/or advocated "community responsive defenders," *see* Alexis Hoag-Fordjour, *Community Responsive Public Defense,* 93 Ford. L. Rev. 1309 (2024), "bail advocates" for information gathering, *see* Paul Heaton, *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities,* 96 Ind. L. J. 701 (2021), and even collaborative pretrial "teams" made up of defense counsel, prosecutors, and judges, *see* Douglas Colbert, *"With a Little Help From My Friends:" Counsel at Bail and Enhanced Pretrial Justice Becomes the New Reality,* 55 Wake For. L. Rev. 795 (2020).

[211] Sarah Clarke, Samantha Zottola, Evan McKinsey, Bailey Kurtz, Tiffany Shao, Brandon Morrissey & Sarah Desmarais, *Indigent Injustice: A Systematic Review and Meta-Analysis of People's Criminal Legal Outcomes,* 32 Critical Crim. 761 (2024).

hearing." The authors concluded, "This evidence is important for constitutional arguments about whether bail hearings should be considered a critical stage requiring a lawyer."[212]

Nevertheless, as with judges and law enforcement, the recommendation that defense counsel be present at first appearances merely scratches the surface of what defense attorneys should be expected to do at bail, when either wearing the hat of "zealous advocate" or the hat of "system improver," and whether it be a state or federal system.[213] Meaningful bail advocacy, first and foremost, requires education in the so-called "fundamentals of bail," which includes not only law but also history, social science and risk research, terms and phrases, and the reasons why we need pretrial justice to begin with.[214] Education is crucial because it is simply not acceptable for counsel to focus on money amounts and merely ask judges for "reasonable" bonds – indeed, based on the history, law, and research, the only acceptable course to take in the face of money-based detention is likely to object and appeal virtually every unaffordable money bond leading to detention.[215] Objecting and appealing is crucial to forcing trial and appellate judges to deal with a subject they often seemingly want to avoid, and objecting requires education in both federal and state law, the pretrial research and, occasionally, the history of bail.

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[212] Shamena Anwar, Shawn Bushway & John Engberg, *The Impact of Defense Counsel at Bail Hearings,* 9 Science Advances, 2023), found at https://www.science.org/doi/pdf/10.1126/sciadv.ade3909. The study also found that those with a public defender showed a slight increase in re-arrest on theft charges, but the reader should recognize that: (1) a variety of outside factors likely confounded this finding; (2) the authors estimate the theft would need to be eight times that of the cost of one day in jail to make any tradeoff undesirable; (3) money virtually never deters crime, legally or empirically; (4) release supports and/or nonfinancial conditions can help alleviate crime or fears of crime; (5) knowledgeable persons would likely desire attorneys at first appearance for purely legal reasons versus traditional bail outcomes; and (6) a properly crafted intentional detention and revocation process can adequately deal with any issue of real or perceived pretrial crime.

[213] Meaningful bail advocacy in the federal system can pose different challenges, but is still considered an important improvement. *See* Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention,* found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3601230.

[214] *See* discussion on bail education, *infra.*

[215] There are good arguments for why any money-based detention would be unlawful, and even money-based release suffers from arbitrary numbers as well as research showing that money simply does not work to achieve either public safety or court appearance.

In 2013, Kentucky published a "pretrial release manual," which was one of the first widely acknowledged attempts at putting history, federal and state law, research, and standards into a single resource to help defense counsel maneuver through bail settings in that state.[216] Since then, the National Association of Criminal Defense Lawyers has helped other states and even counties to draft similar manuals,[217] and these documents should be crafted and kept up-to-date in every state.

When I have trained defense attorneys on bail, I have often somewhat lightheartedly likened counsel's role as one simultaneously emulating Michael Jackson, Spock, and Carlos Santana. Michael Jackson once said that he became an expert dancer by merely learning one move per day; in bail, as in dancing, learning one new fact about bail each day means learning 365 bail-related facts (from the proper meaning of the presumption of innocence to the defense bar's stance on actuarial tools) in a year. When a defense lawyer amasses enough facts – that is, when counsel gets to the point where he or she is confident in articulating the likely illegality of virtually all money-based detention, then that lawyer will know that the education is very nearly complete. The literature in this field is rapidly expanding, though; accordingly, keeping up to date and being the first to digest and use that literature for both client and system work should be something that every defense attorney should strive to do. Bail education can defeat bad legislation, can be the key to helping to draft good legislation or court rules, and can shape caselaw in a field that, until very recently, had very little caselaw in it. Importantly, because bail education tells us how to craft lawful, intentional detention provisions, that same education tells us how to have similar provisions declared *unlawful* when they are crafted without an understanding the legal boundaries.

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[216] *Kentucky Pretrial Release Manual,* The Advocate, June 2013, found at https://dpa.ky.gov/wp-content/uploads/2020/10/PretrialReleaseManualExternal102814REDUCED.pdf/. That manual includes an interesting section on "federalizing" arguments for bail, which was based mostly on excessive bail analysis as it was written prior to the first money-bail cases claiming violations of federal due process and equal protection. Nevertheless, federalizing even an excessive bail claim brings in the clear federal rule that it is not a proper purpose under excessive bail jurisprudence to set a money bond with the intent to detain a bailable defendant. *See* section on education and the legal foundations, *infra,* as well as *Appendix One* concerning the "excessive bail loophole."

[217] *See* at https://www.nacdl.org/Landing/PretrialReleaseAdvocacy.

To be like Spock (the Star Trek character known for his unwavering logic) expresses the notion that a judge setting bail might do so incorrectly or potentially unlawfully 30-100 times per day. To Spock, it would be illogical not to object every single time, and so defense counsel simply cannot be afraid of repetition. Finally, the renowned guitarist Carlos Santana once famously said, "I don't have to be the best guitarist in the world, I only have to be the best guitarist in the room." Likewise, defense counsel should strive to be the most knowledgeable person in the room, weaving history, law, and research into valid objections that can be handed off for potential appeal. "Outside" groups like Civil Rights Corps have recently been teaming up with private defense attorneys and public defenders to raise both state and federal issues for appeal or in post-conviction filings. Even when working alone, however, defense counsel making a single objection can start a process with the potential to result in a landmark case such as New Mexico's *State v. Brown,*[218] which was public-defender-driven and the trigger to true, historic bail reform in that state.

Working at the system level, it is imperative that defense attorneys do what is right for pretrial justice, and not necessarily what is right for a particular client. Accordingly, even though a money bond might be (albeit rarely) in the best interest of any particular arrestee, for all the reasons found in this paper – indeed, for all the reasons found in a plethora of research studies, law review articles, and opinion pieces – money bonds as a whole (and at least money-based detention) should be replaced with intentional release and detention provisions. Thus, it is imperative that defense attorneys become educated not only in the flaws of money bail, but also in how, exactly, to craft a replacement intentional release and detention provision by negotiating over the five main elements to reach collaboration on a particular provision. Given the importance of the law when drafting improvements at either the state or local level, defense perspective is, quite simply, indispensable.

[218] 338 P.3d 1276, 1277 (2014).

Indeed, when I began writing this paper, I had assumed that the defense bar was likely leading others toward the best possible template language for intentional pretrial detention. I was surprised and disappointed, however, to see that virtually none of the national defense attorney organizations had done so (as of early 2025). It is neither wise nor practical to tell the states to completely eliminate pretrial detention, as one can always formulate at least one extreme hypothetical in which detention is appropriate. Likewise, it is an unwise mistake to tell the states to eliminate money-based detention without having the replacement language ready for intentional detention. And doing nothing is out of the question, as the states are already crafting those moneyless, intentional detention provisions (albeit poorly, and without defense counsel help) even today. Thus, it is essential that defense attorneys not only know why and how to eliminate money-based pretrial detention; they must also know how to craft the alternative so that the resulting release and detention scheme is not worse than the traditional money-bail system.

Prosecutors

> *"The practice of admission to bail, as it has evolved in Anglo American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense."*
>
> Former Prosecutor and Supreme Court Justice Robert H. Jackson

Consider a bail hearing in which a judge merely calls a case from the bench and looks at a television monitor showing a stark room in the jail in which the accused sits. The judge reads the charge, announces a finding of probable cause for the arrest, and then sets a money amount assigned to the relevant charge pursuant to a money bail schedule, making no record, written or otherwise, of any reason for the amount of the need for the financial condition to begin with. Consider, too,

that a defense attorney is not (and indeed, has never been) present at the bail setting, thus precluding both advocacy against money-based detention as well as the provision of at least one guardrail against self-incrimination. When the accused tries to speak, he is gruffly told merely to listen and be quiet. This is no hypothetical; indeed, it was the status quo for bail settings in my home county prior to my initial study of bail. Indeed, this is – and has been – the status quo in courtrooms across America for decades. In such a scenario, on whom can we rely to insert common sense and justice based on the law and research? The answer is the prosecutor, typically an individual with both the function and the power to effectuate great influence in the pretrial system.

A surprising number of persons outside of the criminal justice system do not know the unique role of the prosecutor, which is "to seek justice within the bounds of the law, not merely to convict."[219] Both the American Bar Association Prosecution Standards and the National District Attorney Association ("NDAA") Standards call prosecutors independent "administrators of justice," with a primary duty to seek justice by presenting truthful and relevant information while respecting the constitutional rights of all persons, including defendants.[220]

The NDAA Standards make it clear that a prosecutor "is not a mere advocate,"[221] and so prosecutors are to zealously protect both individual rights and the "rights and interests of society."[222] Thus, unlike other stakeholders in the criminal justice system, prosecutors are also expressly encouraged to let those societal interests guide them toward helping with legislation or rule changes, and to "reform criminal laws whenever it is appropriate and necessary to do so."[223] Their importance to the justice system is akin to that of judges (albeit with little fear of

[219] ABA *Criminal Justice Standards on the Prosecution Function*, Std. 3-1.2 [hereinafter *ABA Prosecution Standards*].
[220] *Id.;* National District Attorneys Association, National Prosecution Standards, Std. 1-1.1, found at https://ndaa.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition_January-2023.pdf [hereinafter *NDAA Standards*].
[221] *Id.* Std. 1-1.7 (commentary).
[222] *Id.* Std. 1-1.2. Prosecutors also have a special role with victims of crime, but for a number of reasons I believe that CJCCs should also allow for victim's rights groups or victims themselves to participate as members rather than to rely solely on prosecutors to speak for them.
[223] *Id.*

having to rule on their own work), and we have seen prosecutors lead CJCCs, provide bail education, lead efforts at constitutional change, and craft historic language aimed at reforming the American system of bail.[224] Indeed, it is likely this unique role and history that has led to only sporadic calls to completely ban prosecutors from first appearances when defense attorneys are not present.[225]

Given this importance, it seems curious that the pretrial field has not expected more from prosecutors than simply having experienced attorneys to screen cases prior to first appearance. Of course that is still important,[226] as is the overall motivation for the recommendation, which was for the system to treat working in the pretrial phase not as some throwaway duty delegated to inexperienced interns, but as the most important part of the case, affecting all future decisions and creating serious lapses in public safety when done wrong.[227]

This singular recommendation, however, fails to recognize what surveys of prosecutors, themselves, have revealed, which is that, "it is not a matter of *if* bail reform should occur, but a matter of *how* bail reform should occur."[228] And "bail

[224] In 1991, prosecutors worked closely with defense counsel and others in Washington D.C. to add language that, while not eliminating money bail altogether, essentially forced judges to make better use of intentional detention provisions by eliminating money bail *that results in detention. See The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth,* found at https://www.psa.gov/?q=node/34.

[225] *See, e.g.,* Sandra Thompson, *Do Prosecutors Really Matter?: A Proposal to Ban One-Sided Bail Hearings,* 44 Hofstra L. Rev. 1161 (2016). The author concludes that prosecutors cannot act to preserve pretrial rights while participating in unfair bail hearings, but I believe the fairness of the hearing is best achieved through bail education for prosecutors, defense counsel, and judges, each of whom has the potential to rectify an unfair hearing when it is, in fact, unfair.

[226] Reasons for doing so have been occasionally articulated, such as in NIC's 2017 Framework document, and which include: (1) reducing needless pretrial detention based on bail decisions made using arrest charges; (2) aiding the prosecutor in determining appropriate conditions; (3) disposing of weaker cases to target resources on higher level cases; and (4) identifying defendants eligible for diversion. *See NIC Framework, supra* note 108, at 24. Avoiding later dismissals is especially important given the great harm done by needless pretrial detention. *See* Wendy Calloway, *Probable Cause as Bail Reform,* 67 St. Louis U. L. J. 295 (2023) (documenting a higher than 50% overall case-dismissal-rate for cases in a typical county court system, the majority of which were dismissed while the defendant was detained on a money bond).

[227] *See* Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything,* 12 Berkeley J. Crim. L. 135 (2008).

[228] Rachel Fulmer, *Summary of Main Findings from the 2d Annual Workshop Convening of Prosecutor Research Collaborations,* at 3 (CJL/WEI, 2023), on file with author. The summary also focused on the need for collaboration, and the descriptions of presentations for bail showed a need for better overall bail education.

reform," as I have written, goes far beyond typical pretrial activities such as merely doing a better job of screening cases.

Since we know how true, historic bail reform should occur – that is, by switching from random, money-based release and detention to safe and fair intentional release and detention[229] – then it seems clear that prosecutors mostly need the kind of deep bail education of the sort that we have only, until recently, primarily taught to judges. Comprehensive pretrial improvements as well as true, historic bail reform require knowledge of a combination of subjects, including the law, the pretrial research (including risk research), and the history of bail as well as information illuminating other relevant stakeholders' roles. Yet, when I see sincere efforts at compiling literature reviews designed for prosecutors, those reviews – while perhaps comprehensive in other areas – are somewhat limited in pretrial release and detention in that they primarily discuss only pretrial studies focusing on the "prosecutor's role," which is often perceived to be limited due to the judges' ultimate discretion to actually set bail.[230] Accordingly, there is clearly a need for more education and for prosecutors simply to know their important role in working toward concrete societal goals in order to achieve pretrial justice.

And thus, at a minimum, prosecutors should agree to: (1) help (if not lead) the collaborative process even to the point of allowing inspection of their own prosecutorial practices; (2) educate themselves on *all areas of pretrial justice* so as to remain involved in virtually every effort to improve; and (3) help draft policies (at the local level) or laws (at the state level) to implement the sorts of improvements needed in this era of reform. In a topic overflowing with legal standards and boundaries, a neutral assessment of bail – like the translation of

[229] *See* the section on the history of bail in the section on education as well as the section detailing the creation of an intentional release and detention provision, *infra.*

[230] *See, e.g.,* Prosecution Research Collaborative: Systematic Literature Review, at 28, (2024), found at https://ndaa.org/wp-content/uploads/LitReview-FINAL-508c-06122024.pdf, ("Empirical studies focusing on bail, bail reform, and decision-making are much more extensive than those discussed in this section. However, most studies infrequently included input from prosecutors, and even less frequently focused on prosecutors' decision-making process about bail.").

citizen concerns into legal language – is often best understood and done by stakeholder lawyers such as prosecutors.

There are three main issues that stand out when reviewing the current literature on prosecutors at bail. The first is the so-called "progressive prosecutor" movement, a term that is often an unfortunate label given to any prosecutor who runs for elected office on a platform of seemingly seeking any sort of reform, including bail reform. The term is unfortunate in the pretrial phase mostly because it hints at partisanship in bail reform; once again, bail reform is focused on fixing both release and detention, and is based on neutral, legal and research-based evidence that the money-bail system should be replaced with one providing intentional release and detention. There may be arguments as to the details of intentional detention, but those arguments do nothing to dimmish the fact that the project of bail reform is primarily and simultaneously focused on liberty and public safety, which are both important American values that require balance, and which, in turn, is (or should be) above partisan politics. The fundamental point is that I believe that *all prosecutors* should shun money-based detention based on the law, the research, and common sense, and labeling oneself as a prosecutor who merely follows the law, the research, and common sense should be enough.

Moreover, when it comes to bail, "progressive" prosecutors have often been evaluated based on the single, unilateral act of refraining from asking for a secured money bond at first appearance,[231] and those evaluations can be negative

[231] The literature generally appears split between papers describing the progressive prosecutor movement generally and papers criticizing it. For general papers on the movement, *see, e.g., Ojmarrh Mitchell & Nick Peterson, The Rise of Progressive Prosecutors in the United States: Politics, Prospects, and Perils* (Ann. Rev. of Criminology, 2024) (reflecting on some research showing some effectiveness while admitting "crucial gaps" in the research literature), found at https://www.annualreviews.org/content/journals/10.1146/annurev-criminol-111523-122427; Chicago Appleseed Ctr. For Fair Courts/Chicago Council of Lawyers, *When You're a Hammer, Everything's a Nail: Examining the "Progressive Prosecutor" Movement and Possibilities for Future Reform* (2024) (including a history and recommendations for effectiveness), found at https://www.chicagoappleseed.org/wp-content/uploads/2024/03/20240315_Examining-Progressive-Prosecutor-Movement_Chicago-Appleseed-Council-of-Lawyers.pdf. For more critical papers, *see, e.g.,* Brooks Holland & Steven Zeidman, *Progressive Prosecutors or Zealous Defenders, From Coast-To-Coast,* 60 Am. Crim. L. Rev. 1467 (2023) ("challeng[ing] the narrative that the progressive prosecutor movement can meaningfully transform the criminal legal system"); Carissa Hessick, *Pitfalls of Progressive Prosecution,* 50 Fordham Urban L.J. 1 (2023); Sarah Gottlieb, *Progressive Façade: How Bail Reforms Expose the Limitations of the Progressive Prosecutor Movement,* 81 Wash. & Lee L. Rev. 1 (2024). Many of the

or critical due to events completely outside of the influence of any particular prosecuting attorney. As noted above, it would be far better to educate prosecutors so that they can work on more collaborative issues (or prosecutor-initiated efforts with more collaborative support), including those pointing toward pretrial justice even when primarily associated with some other system actor. As with any issue studied by a CJCC, the most successful initiatives will be adopted only after input by every relevant group, vocally supported by both traditional and non-traditional stakeholders who were involved in creating the initiative, and implemented through adaptive leadership principles using implementation science to bolster success. A prosecutor who seeks merely to ask for less money bail at first appearances will undoubtedly have far more success having gone through this collaborative process than by going it alone.

This does not mean that the act of unilaterally refraining from asking for money bail cannot help the overall quest for pretrial justice. In one of the most robust studies unearthed in my research, Aurelie Ouss and Megan Stevenson evaluated the impacts of eliminating prosecutorial requests for cash bail in Philadelphia and concluded that the change in requests did, indeed, affect judicial bail setting, ultimately leading to more releases with no effect on either failure to appear for court or new crime.[232] Accordingly, in defining the research-based role of prosecutors, not asking for cash bail (akin to defense counsel objecting to cash bail and judges not setting cash bail), should be a minimally required addition to merely showing up to screen cases.

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papers criticizing the movement note that often success or failure can turn on whether other stakeholders (or even others in the same office) agree with the policy. *See, e.g.,* Cynthia Godsoe & Maybell Romero, *Prosecutorial Mutiny,* 60 Am. Crim. L. Rev. 1403 (2023).

[232] *See* Aurelie Ouss & Megan Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail* (2022), found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138. A similar study in Florida found several unanticipated results, leading to the provocative conclusion that the bail policy may have been "sabotaged" by others in the system. *See* Alisa Smith, Sean Maddan, Caroline King & Nefertari Elshiekh, *Testing the Effects of a Prosecutor Policy Recommending No-Money Release for Nonviolent Misdemeanor Defendants,* 48 Am. J. Crim. L. 43 (2020). I understand the influence prosecutors can have when it comes to dollar amounts, having seen several judges routinely grant whatever number the government requests. My point, however, is that given enough education, prosecutors will quickly realize that money cannot affect public safety unless it is set to purposefully detain, which is unlawful, or unless it is set in an affordable amount for lower and medium risk defendants, which eliminates unnecessary pretrial detention and thus its harmful consequences. Knowing this should lead those prosecutors to begin working on the far bigger issue of finding a replacement for money-based detention.

The second issue deals with diversion of cases from the criminal justice system, which the NDAA Standards write, "should be the responsibility of the prosecutor."[233] I note only that the most recent ABA Standards on Diversion define the term "diversion" broadly, and include programs covering both the period before prosecutorial involvement as well as "post-plea," occasionally placing law enforcement[234] and judges squarely into a position of primary responsibility.[235] While I believe that prosecutors are crucial to *any* discussions concerning *any* type of diversion, all stakeholders should be included in those discussions (if only to be heard), even when the diversion program is seemingly the sole responsibility of a single agency. Due to the differences in various educational resources on diversion (including such basic information as the purposes of diversion), were I to advise jurisdictions on diversion today, I would likely begin by combining fundamental resources, including: (1) the NDAA National Prosecution Standards; (2) the ABA Standards on Diversion; (3) CEPP's Diversion 101 Project (including a twelve-part informational series on the topic);[236] and (4) even the slightly dated NAPSA Performance Standards and Goals for Pretrial Diversion/Intervention[237] (as well as more particularized diversion literature) to come up with systemwide, consensus-driven programs based on the law and the research.

The third issue deals with the national prosecution standards as so-called "models" of intentional detention. As I write, *infra,* different standards can be viewed as providing "models" of pretrial release and detention, differing from virtually all existing state models (laws, policies, practices, including the use of

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[233] *NDAA Standards, supra* note 220, Std. 4-3.1.

[234] Diversion at the law enforcement decision point would not include issuing citations, which is more appropriately considered to be a type of delegated release, even if that delegation is articulated by statute. Both can be thought of as "alternatives," however, when they differ from the typical system response to human behavior.

[235] American Bar Association, *Criminal Justice Standards on Diversion* (2022), found at https://www.americanbar.org/groups/criminal_justice/resources/standards/diversion/.

[236] Found at https://cepp.com/?s=diversion+101.

[237] NAPSA, *Performance Standards and Goals for Pretrial Diversion/Intervention* (2008), found at https://napsa.memberclicks.net/assets/NAPSA%20Standards%20on%20Diversion%20and%20Intervention%202008.pdf. Another fairly recent resource written in 2018 is, Melissa Labriola, Warren Reich, Robert Davis, Priscilla Hunt, Samantha Cheney & Michael Rempel, *Prosecutor-Led Pretrial Diversion: Case Studies in Eleven Jurisdictions* (CCJ, 2018), found at https://www.ojp.gov/library/publications/prosecutor-led-pretrial-diversion-case-studies-eleven-jurisdictions.

money bail) due to the standards' "aspirational" recommendations typically being far superior to actual state practice. They can also help provide guidance in crafting intentional detention provisions to the extent that they discuss those provisions in detail. Unfortunately, the NDAA Standards mention intentional detention only in passing, recommending the prosecutor request a defendant be "held without bail" "where permitted by law."[238] This is unfortunate.

In every state – whether articulated by constitutional provision, statute, or court rule – the only persons who may be "held without bail" are those eligible for "no bail," meaning non-bailable defendants, simply because every state has a court opinion (typically from the state supreme court) holding that judges must set bail for bailable defendants.[239] Nevertheless, the NDAA Standards neither explain the problem with money-based detention being the de-facto equivalent to "holding without bail" nor thoroughly discuss the fact that intentional detention is, in any event, only "permitted by law" through the right to bail clause of a state constitution, statute, or court rule. In sum, the NDAA Standards skip over the most important issue at bail facing American states today, and focus instead on factors for determining the "proper amount" of bail.

Likewise, the ABA Standards on the Prosecution Function state only that prosecutors should "consider . . . whether the accused should be released or detained pending further proceedings," albeit with little guidance on how to make that determination.[240] Indeed, the main recommendation states: "The prosecutor should favor pretrial release of a criminally accused, unless detention is necessary to protect individuals or the community or to ensure the return of the defendant for future proceedings."[241] There is nothing in those standards about seeking detention when a constitutional right to bail clause would not allow it, nothing about seeking detention through unattainable money bonds, and nothing about seeking detention despite the fact that one can never actually "ensure" (that is,

[238] *NDAA Standards*, *supra* note 220, Std. 4-4.1.
[239] *See* discussion in *Appendix One* on the excessive bail loophole.
[240] *ABA Prosecution Standards, supra* note 219, Std. 3-5.1 (b) (iii).
[241] *Id.* Std. 3-5.2 (a).

"guarantee" or "make certain") anything at bail.[242] In sum, the Standards make recommendations of the sort one might make when a state is immersed in the traditional money-bail system, with no guidance on how to make an informed and intentional "in or out" decision based on actual law and research. Accordingly, individual prosecutors are advised to look to template language found in other models, such as the ULC, CLEBP, or Illinois statute models, to understand the overall issue as well as the sort of risk for which American history and law allows on-purpose pretrial detention.

Finally, as with judges and defense counsel, national prosecutor standards and groups are mostly silent on the exact template language that should be used to craft an intentional detention provision – something the states are currently doing poorly due to the lack of expert help. Even the group arguably doing the most to educate persons on the prosecutors' more meaningful role at bail – Fair and Just Prosecution – encourages the elimination of money bail, but stops short of describing the actual words that states should use to provide fair and just detention, a project that would be forced on any jurisdiction that eliminated money bail.[243] Understanding the perceived complexity of the task, I nonetheless repeat my plea for prosecutors – including prosecutor groups – to expand their role in pretrial justice to include providing expertise in creating these collaborative templates, which is an area of change that is happening even as I write this paper, and which would benefit greatly from their help.

[242] Because one can never absolutely "ensure" that a released person will return to court, the focus should be on whether conditions or supports on release can provide "reasonable assurance," but allow detention of an eligible defendant when (1) the risk is extremely high (2) to do a very bad thing, such as flight or committing a serious or violent crime, and (3) other conditions simply cannot supply that reasonable assurance. The word "ensure" is also unfortunately used as a part of the release standard in the ABA Standards on Pretrial release. The term "reasonable assurance" (that is, not complete assurance), is derived from Justice Jackson's concurrence in *Stack v. Boyle,* 342 U.S. 1, 9 (1951), and repeated throughout the D.C. statute. Complete assurance, or to "ensure," would conflict with Supreme Court acknowledgment that risk is inherent in bail. *See supra* note 46 and accompanying text.

[243] *See* Fair and Just Prosecution, *Issues at a Glance: Bail Reform,* found at https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.BailReform.9.25.pdf.

Elected Officials

"Partnerships are key to creating this policy because it's a marathon, not a sprint, that requires a large amount of research and planning. The end goal is to make sure our communities are safer (and) to make sure that the individual who committed the crime is held accountable but then made whole again."

Sen. Elgie Sims (D)

"We have a system now where if you're wealthy enough, you can get out of jail no matter what you do. And if you're poor enough, you get stuck in jail no matter what you do. It shouldn't be that way."

Sen. Whitney Westerfield (R)

By elected officials, I mean persons other than elected judges, prosecutors, and sheriffs (about whom I have already written) or treasurers, secretaries of state, or similar officials (about whom I have not written but who infrequently exhibit a keen interest in bail). Instead, I mean to point out the importance of including those persons capable of enacting or having some part in enacting rules, statutes, or ordinances that can affect bail. This can include Governors and their staffs, as was shown to be crucial to bail reform in New Jersey, and it need not exclude anyone so long as they are interested in how their community does pretrial release and detention and have some connection to the law or rulemaking process.

CJCCs should strive to include county commissioners and city council members in local collaborative groups and to include state representatives, state senators, and executive branch leaders in statewide collaborative groups. When they attend group meetings, they virtually always provide excellent feedback and guidance based on their unique experience working in those lawmaking bodies. My focus, however, is state legislatures – where we see the most activity concerning bail year after year, both good and bad. While it is true that the acute bail issue facing

the states today is how to switch from a system in which money decides who to release and detain to a system based on intentional release and detention, it is also true that some of the worst proposals for that switch are originating in state legislatures. Thus, the role of state lawmakers on a CJCC is vitally important.

There is an old saying that if you can imagine the sound of thunder, you should listen to and heed important advice as though you had heard it "with thunder." It is meant to convey the importance of the advice, perhaps due to persons having ignored it before. Today, when discussing the pretrial justice roles of lawmakers in America, I make the following recommendation *with thunder*: slow down, educate yourself about bail, and do not treat a bail issue as you might treat any other criminal justice issue. States lawmakers often believe that an issue in criminal justice can be fixed with a line or two in a bill amending some particular section of the statutes. Sometimes it can; far more often – and especially in bail – it cannot. Likewise, state lawmakers often look to other states for ideas on template language for articulating the particular provision to be enacted. This, too, is a serious mistake when it comes to bail. Every state that has meaningfully studied bail has come to the conclusion that, for a numerous reasons, statutes (and often constitutions) require major overhauls versus minor adjustments.[244] Moreover, those who have meaningfully studied bail have also realized that virtually all current state laws provide poor templates for change.[245]

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[244] Recommendation ten of the California Supreme Court Pretrial Detention Reform Workgroup concluded: "A structure will be sustainable only if it is built on a solid foundation. To undertake such comprehensive reform, this system must not be grafted onto the current complex statutory framework of monetary bail. Provisions currently in the California Constitution that presume release, permit preventive detention, and protect victims' rights will serve as the bedrock of a reformed pretrial system that balances public safety, release, and return to court. Comprehensive legislation and rules of court should be adopted to create a system of release and detention that is efficient and does not impose excessive layers of procedural requirements." *Pretrial Detention Reform: Recommendations to the Chief Justice* (2017), found at https://courts.ca.gov/sites/default/files/courts/default/2024-08/pdrreport-20171023.pdf. As implied by those recommendations, the California Workgroup examined its constitutional right to bail provision and decided that it did not need amendment. In Colorado, after being told that Title 16 (the bail statute) required a complete overhaul, a prominent legislator said that and overhaul would be "impossible" and that it "would never happen." Roughly two years later, we overhauled most of the statute, including the very definition of bail.

[245] Most recently, the Minnesota Legislature directed the Minnesota Justice Research Center to study the state's pretrial system and provide recommendations. After 18 months of study, the report recommended "pretrial system transformation," including a specific plan to eliminate money-based detention and replace it with intentional pretrial detention language derived from one of the so-called "hypothetical detention models" as well as Illinois' Pretrial Fairness Act, which closely resembles the hypothetical model language. *See* MNJRC, *Toward Safety, Liberty,*

Community/Grassroots/Civil Rights Organizations

> "*Ending money bail is the headline demand . . . but, as we all know, the question for pretrial policy and for advocates like ourselves is what replaces a money-bail system.*"
>
> Sharlyn Grace

If you look at any list of CJCC members, you will mostly find executive-level, so-called "traditional" justice system actors, including elected officials, judges, attorneys, jail administrators, police chiefs and sheriffs, probation and parole executives, etc. Nevertheless, the current national standards and essential elements drafted by NIC and JMI also recommend including "directors across the continuum of care network (e.g., substance use disorder, mental health, housing)."[246] Moreover, since 2002, the relevant literature explaining the creation of CJCCs has mentioned the need to include community members both for subject matter expertise and for general community engagement. In my experience, however, at least until roughly 2010, it was difficult, if not impossible, to find anyone from the community willing to even attend, let alone help with CJCC system work. That has most definitely changed.

These days, and especially for work involving improvements to the pretrial phase, community members want to be involved, and will be involved, whether by working with a CJCC or task force or by working against it. Indeed, if certain groups are not a part of the collaborative process for crafting improvements to bail, they may well be the groups that bring lawsuits after those non-collaborative improvements are implemented. Their role is often defined by their own

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and Equity: A Community-Centered Framework for Redesigning Minnesota's Pretrial System (2025), found at https://www.mnjrc.org/pretrial-best-practices [hereinafter *MNJRC*]. So far, Illinois has crafted the best template (and non-hypothetical language) for change to its detention provisions, although it is likely that researchers will need to watch how stakeholders treat what may be a somewhat loose revocation and sanction process. Other jurisdictions, while not helpful for template language, are nonetheless helpful for making other points. For example, the federal detention process is important to study as a part of the history of bail, but its actual structure would be a bad fit for the states due to its poor language.

[246] *See CJCC National Standards*, *supra* note 159, at 9; *CJCC Essential Elements*, *supra* note 159, at 5.

preferences, with some focusing on organizing, others with telling stories of those affected by the system, others publishing useful educational documents, and still others doing more sophisticated pretrial research and using that research in focused litigation.

Finding the appropriate groups representing the interests of the general public – including persons who have been entangled in the system – can be tricky, but it is not impossible. In one state, I and my colleagues helped train a bail task force that claimed to have a "community representative" as a member. Soon after, though, another group convinced us that they were the true representatives for the community, and so we began to also include them in substantive discussions over the direction of bail in that state. In the end, the second group was vital to the success of the project, and so the seemingly clear lesson is to err on the side of inclusion.

The CJCC or task force can decide where best to use these grassroots groups, such as on the main council, on subcommittee work, or even as ad hoc subject matter experts at different times during a study period, and there is a gradually increasing number of resources explaining how to build relationships between community residents and system stakeholders.[247] The fundamental point is that these groups have risen to a level of prominence in this era of bail reform, and in many cases they have not only pushed jurisdictions in the right direction, they have done so with better ideas for changes than those envisioned by even the longest-serving traditional stakeholders. Indeed, a primary reason for the value of community representatives is their ability to more easily see the strengths and weaknesses of the legal system from their "outside view."

This is especially so concerning the project of true, historic bail reform (or pretrial improvements that might trigger bail reform) based on creating safe and fair

[247] *See, e.g.,* APPR, *Mobilizing Allies for Justice* (CEPP, March 2025), found at https://advancingpretrial.org/story/mobilizing-allies-for-justice/; Travis Reginal, Rod Martinez, Natalie Lima & Janeen Willison, *Community Engagement Strategies to Advance Justice Reform* (Urban Inst./ CUNY Inst. for State and Local Gov./SJC) (2023), found at https://www.urban.org/research/publication/community-engagement-strategies-advance-justice-reform.

intentional detention provisions. The project of bail reform often leads to big changes to statutes, rules, and even constitutions – the sorts of changes that only endure when everyone in the room is nodding in agreement over language that likely included some level of compromise. I note only one caveat, which is to understand that there are essentially two levels of equally important community engagement. The first level is reached by simply listening to people and their stories about pretrial release and detention. When compiling recommendations for the Minnesota Legislature, the Minnesota Justice Research Center interviewed system actors, held numerous "listening sessions" across the state, partnered with a variety of community-based (and indigenous) organizations, and even interviewed incarcerated persons to hear their particular experiences with bail.[248] To the extent that providing people a voice in discussions of important issues restores any real or perceived loss of power, continued engagement like this is crucial.

The second level, though, involves taking the concerns of citizens as articulated in their own voices and translating them into what is often legal language for changes to statutes, rules, and constitutions. While the process can likely be explained to anyone, it is a process that nonetheless requires those with some legal education to actually put words on paper. The best example of this, once again, is Illinois, which took citizen concerns and, working through various attorneys, came up with specific language for the Pretrial Fairness Act. A lawyer is best suited to take lay concerns over fairness, for example, and answer those concerns through the language of substantive due process, procedural due process, and equal protection.

These two levels point to an important recommendation for the groups themselves. Civil rights groups are often experienced and highly proficient at merely opposing various bad laws or policies, but the nature of true, historic bail reform in this generation requires more. Indeed, it is important to give the states a civil-rights-crafted proposal for a solution – preferably one justified by the

[248] *MNJRC*, *supra* note 245, at 2-5.

literature – to provide both opposition to bad initiatives as well as the "answer" – the better alternative – to what the states are seeking to do. If a state seeks to change the status quo to craft a detention provision based on public safety, then civil rights, grassroots, and other community organizations are in a perfect position to provide them with the actual language of change.

Litgators and Academics or Other Pretrial Researchers (Special Note)

> *"If it comes to be generally accepted that in the outcome of his case the jailed defendant is prejudiced compared with the defendant who has pretrial liberty, such a finding will certainly have a profound impact on any judicial consideration of constitutional bail questions."*
>
> Caleb Foote, 1965

One of the most impactful moments in the current era of bail reform was the moment litigators began using novel theories (versus the historic claims based on excessive bail) to challenge money bail using various pretrial research studies showing: (1) prejudice to detained persons accused of crimes; and (2) that money bail is "unnecessary" or even irrelevant to the pretrial phase of the case. The combination of using research to show the flaws in the money system as a part of a formal legal challenge is a powerful way to force change. Accordingly, these two things – adding to the body of research and filing lawsuits based on that research – remain crucial to actually reforming bail. While it might now only be labeled as a means of pressuring states to change their bail practices, these suits still have the potential to provide the "national fix" to a broken money-based system by showing that using money bail is arbitrary and thus unlawful. It is imperative, though, that the groups doing this work be ready to quickly assist the states with finding a means of providing for pretrial release and detention apart from money. In particular, the states must be guided toward *limiting intentional detention* lest their fears of danger based solely on prediction lead to even worse ways to detain without money.

Pretrial Services Organizations

> *"Pretrial services agencies should be structured to assist Courts in making informed bail decisions that promote pretrial release, future court appearance, and public safety and to provide practical non-financial release options [including treatment and behavioral health services as voluntary supports] consistent with assessed risk."*
>
> NAPSA Pretrial Standards (2024) Std. 4.1 (commentary)

For as long as people are released pretrial (in an ideal system in this country, this will be the vast majority of persons accused of crimes), there will be some need to help those people succeed during the pretrial phase of the case by coming to court and by remaining arrest-free. In 2008, my colleagues and I stressed the importance of pretrial services programs and agencies to a system that is – or should be – heavily reliant on release into the community as a means of upholding core American legal principles of liberty and autonomy. We wrote:

> While pretrial services agencies and programs vary in their organizational structure, these agencies and programs 'perform functions that are critical to the effective operation of local criminal justice systems by assisting the court in making prompt, fair, and effective release/detention decisions.'[249]
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> * * *
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> The importance of a professional pretrial services function, no matter where it is housed, and no matter how large or small it may be, cannot be overstated. 'Pretrial programs are a vitally important part of [criminal justice systems] because they perform functions that, in their absence, are often performed inadequately or not at all.' When these functions are performed well, however, the benefits are significant: 'jurisdictions can minimize unnecessary pretrial detention,

[249] *Jeffco Proposal, supra* note 117, at 87-88, (quoting *NAPSA Standards on Pretrial Release (3rd Ed. 2004),* Std. 3.1, at 53).

> reduce jail crowding, increase public safety, ensure that released defendants appear for scheduled court events, and lessen the invidious discrimination between rich and poor in the pretrial process.'[250]

The current NAPSA Standards correctly note that pretrial services agencies are "an essential element of effective bail systems," and describe their core functions as collecting and verifying individual background information, assessing accused persons for risk, making recommendations to judges, monitoring and supervising released persons, notifying the court of compliance with any court-ordered conditions, constantly reviewing the status of persons accused of crimes for changed circumstances, and tracking outcome measurements so as to help with (1) specific cases; and (2) system improvement.[251]

Participation by these agencies in any collaborative body looking at the pretrial phase of a criminal case has never been questioned. However, because it is literally the pretrial professional's job to be current on pretrial history, law, research, and standards, it is imperative that pretrial agencies maintain or increase their role in those bodies to be a role that provides pretrial expertise, keeping other participants firmly rooted in the things that matter most to managing a justice system, including the law and the research. This expertise is sorely needed by legislatures that frequently pass laws without justification, by courts who are asked to determine whether one or another condition of bail is "necessary" (or, indeed, whether it works at all), and by other government bodies, who are asked to change bail policies without the data needed to fully understand the issues. I envision a day in which local pretrial services leaders provide testimony, help craft state laws, and warn jurisdictions of the harms connected to bad bail practices. In short, the leadership role adopted by NAPSA officials through their exemplary work on national standards should seep down to reflect a neutral leadership role by all pretrial professionals across the country, ultimately designed

[250] *Id.* at 88, (quoting Barry Mahoney, Bruce Beaudin, John Carver, Daniel Ryan & Richard Hoffman, *Pretrial Services Programs: Responsibilities and Potential,* at 1 (NIJ, Washington D.C., 2001).
[251] *See NAPSA Standards (2024), supra* note 118, at 1 (introduction); Std. 4.1 (a), (b), at pp. 61-62.

to keep states and local jurisdictions rooted in "legal and evidence-based practices."

It is becoming clear that certain functions of pretrial services agencies are being re-shaped to reflect current notions about "needs" versus only "risk," the consequences of research showing various bail conditions to be ineffective, and even more in-house matters, such as staffing and where the agency should be housed. This should be expected by any group committed to questioning the status quo and responding to the latest changes in the law and research guiding the field. Accordingly, as these things change, pretrial services agencies should be quick to explain those changes and their justification to other stakeholders, further cementing their main role as "pretrial justice experts."

Other Groups

> *"Although it may not be apparent at first, planning demonstrates an optimistic attitude. It reflects the point of view that citizens, as well as appointed and elected officials, can change the way things work instead of being victimized by circumstances that appear to be beyond their control."*
>
> Bob Cushman, 2002

Depending on the jurisdiction, there are other groups that will be deemed essential to the collaborative process. In one state, it might be a sentencing commission. In another, it might be the bureau of prisons.[252] I note several here merely to remind jurisdictions of the importance of those groups and to nudge those jurisdictions toward a policy of inclusion.

Community bail funds, in particular, have become crucially important to policy discussions by showing important data about the lack of any need for money to motivate persons to show up for court. One such fund with dozens of locations

[252] The District of Columbia, with its unique federal/local legal system, includes both D.C. prosecutors as well as prosecutors from the U.S. Attorney's Office on the local CJCC.

across the U.S., The Bail Project,[253] has even become a leader in helping states change language in their constitutional bail clauses.

Jail administrators can be essential in collecting baseline data as well as data used to gauge program effectiveness.[254] Mental Health, housing, youth, and educational groups (whether public or private) can provide important information on evidence-based practices in those areas. Faith-based groups can provide a focus on empathy and help ease the public's feelings of anonymity and antipathy toward government systems.[255] Philanthropies can help provide resources to fund research-based programs designed to attack the root causes of crime. Victim rights groups give important, first-hand perspective of the opinions of victims and survivors of crime, which is sometimes at odds with what the system stakeholders believe those opinions to be.[256] Again, I strongly support independent victim representation in addition to whatever victim interests might be advanced by prosecutors.

Other advocacy groups can provide equally important perspectives. For example, a jurisdiction discussing detention eligibility for persons charged with DUIs or with

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[253] *See* at https://bailproject.org/. For an interesting history of bail funds in America written by the former CEO of the Bail Project, *see* Robin Steinberg, Lillian Kalish & Ezra Ritchin, *Freedom Should Be Free: A Brief History of Bail Funds in the United States,* 2 UCLA Crim. Just. L. Rev. 79 (2018). The pretrial field was initially wary of bail funds simply due to their use of money. Nevertheless, these funds have consistently proclaimed that their participation in the money-bail system was designed not only to provide immediate release but also to highlight the problem of unnecessary pretrial detention and to call for the end of money bail entirely.

[254] Jail administrators can also be crucial in designing systems of early release, for example, by using a "proxy" assessment. *See* Evan Lowder, Chelsea Foudray, & Madeline McPherson, *Proxy Assessments and Early Pretrial Release: Effects on Criminal Case and Recidivism Outcomes,* 28 Psych. Pub. Policy & Law, 374, found at https://psycnet.apa.org/record/2022-23870-001. Sheriffs often serve dual roles of traditional law enforcement and jail administration. Their inclusion in bail discussions under the latter role is key, given that they are increasingly being named as defendants in bail litigation. *See, e.g., Feltz v. Regalado,* No. 18-cv-0298-SPF-JFJ (Order on Motions for Summary Judgment, April 3, 2024).

[255] The Prison Fellowship ties pretrial recommendations to moral standards found in the holy books of most world religions. *See* at https://www.prisonfellowship.org/resources/advocacy/pretrial/pretrial-detention-bail-and-bond/. In North Carolina, the Council of Churches created a network of faith leaders to work on cash-bail reform, *see* at https://ncchurches.org/cash-bail-reform/, and the North Carolina Judicial Branch reports the work of the North Carolina Faith and Justice Alliance working on issues such as access to justice. *See* at https://www.nccourts.gov/commissions/north-carolina-equal-access-to-justice-commission/north-carolina-faith-and-justice-alliance#:~:text=Solving%20the%20access%20to%20justice,this%20program%2C%20view%20this%20resource.

[256] *See supra* notes 114-116 and accompanying text.

domestic violence would benefit from presentations by advocacy groups specializing in those topics as well as groups capable of compiling data on charge prevalence varying by demographics. When it comes to bail, the fundamental point is that pretrial improvements will be sustainable only to the extent that all relevant groups are involved in their creation.[257] In particular, drawing an intentional line between release and detention requires the perspective and input from a variety of persons and groups simply because American history shows that virtually every time that line has been drawn before, it has been best drawn by an informed populace and their representatives.

Summary

The fundamental point of this entire section on collaboration is to stress its past and future importance to criminal systems. The point of recounting member roles for collaborative groups is that the various, older lists of pretrial improvements – typically tied to one or another stakeholder as being their primary role in helping to achieve pretrial justice – are incomplete both by: (1) not including all of the relevant groups who should be involved; and (2) not recognizing that each group has many roles, including simply being a part of the overall collaborative project of achieving bail reform by creating intentional release and detention. If the reader of this paper believes that I, too, have left out any particular group, then my overall point is bolstered: inclusion is essential.

In the end, it is the coming together that is the activity crucial to having any possibility of success with pretrial issues, whether that coming together is through a long-term CJCC designed to tackle a variety of criminal justice issues by managing the system, or through a more focused task force designed to look only at pretrial release and detention. In sum, collaboration is important for making pretrial improvements, but it is essential for doing the project of bail reform and is thus a pillar of pretrial justice.

[257] This is true for even the most complex of issues, including public understanding and choice of various equality metrics for re-validation of an actuarial risk tool. *See, e.g.,* note 467 and accompanying text, *infra.*

Pillar Number Two: Education

"Education is not the filling of a pail, but the lighting of a fire."

William Butler Yeats

The second pillar necessary for achieving pretrial justice is bail education. Specifically, after persons from various agencies and organizations come together in a collaborative body designed to reach consensus on issues concerning pretrial justice, it is imperative that they be educated not only in the particular areas associated with their traditional roles (for example, law enforcement learning about various law enforcement-led pretrial initiatives, such as alternatives to arrest or diversion), but also in the many facets of general bail and "no bail" education comprising what I called in 2014 the six "fundamentals of bail." Those fundamentals include: (1) why we need pretrial justice; (2) the history of bail; (3) bail's legal foundations; (4) the pretrial research, including risk research; (5) the national pretrial standards; and (6) definitions of various terms and phrases used in pretrial justice, including the word bail itself.[258] This section of the paper explains and updates those categories.

In 2007, at a time when criminal systems sought to implement so-called "evidence-based practices" into the pretrial phase, Dr. Marie VanNostrand correctly concluded that we should instead strive to follow "legal and evidence-based practices," which recognizes the various unique and fundamental legal principles underlying the entirety of American bail.[259] The need for this reminder only highlighted the fact that bail law, at the time, was at least stagnant, if not altogether ignored. At the same time, some in the field recognized confusion over certain terms and phrases at bail across the United States, the lack of any decent and neutral history of bail done after the early 1980s, a growing literature of

[258] *See Fundamentals of Bail, supra* note 20 (developing the six facets/categories current to 2014).
[259] *See* Marie VanNostrand, *Legal and Evidence-Based Practices: Applications of Legal Principles, Laws, and Research to the Field of Pretrial Services* (Luminosity/NIC/CJI) (2007) [hereinafter *LEBP*], found at https://www.ojp.gov/ncjrs/virtual-library/abstracts/legal-and-evidence-based-practices-application-legal-principles.

pretrial research, and an overall ignorance of the various sets of national standards on pretrial release and detention. More importantly, virtually everyone to whom I spoke at the time uttered the most frustrating of phrases, "If it ain't broke, don't fix it," demonstrating a dire need to first articulate why, in fact, we should strive for pretrial justice and fix what many would come to believe to be an objectively broken money-bail system.

The Educational Categories: The Fundamentals of Bail

Thus, when I wrote the 2014 paper, *Fundamentals of Bail,* my goal was to isolate these six main categories of study, which I believed were necessary for understanding any issue in bail, no matter how simple or complex. My decision to include these specific categories was quickly confirmed: within just weeks of the paper's publication, the New Mexico Supreme Court issued its opinion in *State v. Brown,*[260] which set in motion a complete overhaul of that state's pretrial release and detention system, and which did so by relying on *Brown's* discussion of the same six categories, albeit without the opinion's authors even knowing about the *Fundamentals* paper.[261] These six categories have remained parts of a seemingly complete set, as I have yet to see or be persuaded to include any new information requiring the creation of some new overall category of study. Nevertheless, after ten years, there is a clear need to bring at least some of those categories up to date. For example, in 2014, I questioned why the Equal Protection Clause was never used in bail litigation; today, it is used frequently across America. Likewise, in 2014, there was little in the way of risk research and very few scholars who were attempting to explain risk and prediction; today, risk research is ubiquitous and one of the most crucial sub-topics to understand.

Accordingly, in this section I will only provide highlights of updated information associated with the six categories – the six fundamentals of bail – with the

[260] 338 P.2d 1276 (N.M. 2014).

[261] Thus, the six categories were developed at roughly the same time, by two entirely separate persons, both of which deemed the information crucial for explaining bail and "no bail." The fact that the New Mexico Supreme Court had not seen the *Fundamentals* paper (or drafts of the paper) was confirmed through my discussions with authors of the opinion, including Chief Justice Charles Daniels.

understanding that any person providing education to any particular collaborative group must both explain information provided by the original *Fundamentals* paper and also strive to keep the categories up to date.

Why We Need Pretrial Justice

"Freedom Should Be Free."
Erin George, The Bail Project

The change in this fundamental from 2014 to today has been significant, and the clear consensus pointing to a need for pretrial justice has become so widespread that it is almost unnecessary to teach it at all. In 2014, many system stakeholders actually argued for the continuation of the traditional money-bail system, and some rejected and even outwardly fought attempts merely to question it.[262] Today, virtually every research paper, news article, court opinion, or brief concerning bail begins with several paragraphs dedicated to the rapidly growing list of evils of the money-bail system. As mentioned previously, virtually everyone – including the bail industry – is calling for "reform," with disagreements over the substance of reform due mostly to ignorance of its replacement. Each new group to enter the debate brings with it additional reasons to aim for pretrial justice, and the traditional sub-topics of study, such as the harms of unnecessary pretrial detention, have become so plentiful that I have been forced in this paper merely to list bail scholars who specialize in unearthing and publishing on those harms.[263] Accordingly, there is no question that we need pretrial justice – and, in particular, an end to money-based release and detention; the only question is what, exactly, pretrial justice will look like when this era of reform is done and whether the alternative to the traditional money-bail system as crafted by the states is objectively better or worse than that which it replaces. Nevertheless, I list four important reasons for why we should work to achieve pretrial justice based mostly on the other fundamentals of bail.

[262] Indeed, numerous people across the United States actually took offense at my use of the term "unnecessary pretrial detention," believing, instead, that everyone who was in jail belonged in jail.
[263] *See supra* note 40 and accompanying text.

The History of Bail Shows the Need for Pretrial Justice

First, as mentioned above, the history of bail consistently tells us that whenever we perceive the "wrong" people in and/or out of jail, we see bail reform rise up to fix the systemic abuse causing that perception. By simply walking though any particular jail with an actuarial risk assessment tool, we can clearly see that we have certain lower and medium-risk defendants in jail due only to their *inability* to pay money, and certain higher-risk persons buying their way out of jail due only to their *ability* to pay money. Thus, we have the "wrong" people in and out of jail (with mostly the "wrong" people *in jail,* thus offending foundational American concepts of liberty) and this, alone, is enough to trigger an era of national bail reform and calls for pretrial justice.[264] In the past, reforms based on this theme have included the creation of habeas corpus, the rule that prosecutors must charge an accused, the excessive bail clause, England's bail law allowing release without sureties, America's adoption of the commercial surety system, and, later, its ability to detain based on future dangerousness. Today, the primary abuse is our casual use of secured financial conditions for both release and detention and the reform is to replace a random money-based system with one based on intentionality.

Moreover, pretrial research adds two important facts that punctuate the effects of finding ourselves in this situation, which is that both: (1) allowing truly dangerous persons to buy their way out of jail; as well as (2) keeping lower risk persons in jail unnecessarily due to lack of money – both of these things – make communities *less safe.* Of course, the public safety impacts of releasing extremely high-risk people once they pay money needs little explanation. Nevertheless, in 2014, I also

[264] I have written enough about risk and money to quickly dismiss the incorrect (but frequently resurrected) argument that persons detained with an unaffordable money bond are never in jail due "solely" to lack of money, but always due to a combination of risk and lack of money. Such a notion is belied by both the pretrial research and by practical experience, which demonstrates that the money has no bearing on risk. Nevertheless, I caution states to not use the word "solely" when describing unnecessary detention, as it only invites the confusing argument and wrong thinking. Crafting an appropriately worded intentional release and detention provision through which money cannot lead to detention will eliminate the argument altogether.

reported on the important early research showing the "strong correlations between the length of time low and moderate-risk defendants were detained before trial, and the likelihood that they would reoffend in both the short- and long-term."[265] In that same paper, I wrote:

> Specifically, the researchers found that when compared to defendants held no more than 24 hours, low risk defendants who were held for two to three days were 40% more likely to commit new crimes before trial and 22% more likely to fail to appear, and if held for 31 days or more were 74% more likely to commit new crimes pretrial and 31% more likely to fail to appear. Moderate risk defendants showed the same correlations, albeit at different rates. Moreover, the researchers found, low risk defendants held two to three days were more likely to commit a new crime within two years, and defendants held for eight to fourteen days were 51% more likely to recidivate long-term than defendants detained less than 24 hours. *See* Christopher Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *The Hidden Costs of Pretrial Detention* (LJAF 2013). Interestingly, for high risk defendants there was no relationship between pretrial detention and increased crime, 'suggest[ing] that high-risk defendants can be detained before trial without compromising, and in fact enhancing, public safety and the fair administration of justice.'[266]

Again, this is why bail reform is (or should be) bipartisan; both money-based release and money-based detention diminish public safety, and the only way to change this is to replace the randomness of money and its often-accidental

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[265] *Money, supra* note 103 (citing *Pretrial Criminal Justice Research* at 2 (LJAF, 2013) found at http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.).

[266] *Id.* at 51 (citing *Pretrial Criminal Justice Research*, supra note 265 at 4). Again, very recent research confirms these findings. *See, e.g.,* Matthew DeMichele, Ian Silver & Ryan Labrecque, *Locked up and Awaiting Trial: Testing the Criminogenic and Punitive Effects of Spending a Week or More in Pretrial Detention,* 24 Criminology & Pub. Policy, 99 (2024) ("we found that longer time spent in pretrial detention is associated with greater likelihood for missed court appearances, new arrests, and new arrests for violent crimes") [hereinafter *Locked Up*], found at https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9133.12685. I discuss more of this research, *infra.*

outcomes with safe, fair, and intentional release and detention. This is also mostly why bail reform is inevitable, for as long as we have the "wrong" people both in and out of jail, the history of bail says that bail reform will continue until the abuse is completely eliminated. Pretrial justice is simply that – justice. It is neutral and necessary, and universally the right thing to do, but it is also relentless.

The Legal Foundations of Bail Show the Need for Pretrial Justice

The second reason pointing to a continuing need to work toward pretrial justice is due to a shift from courts deciding cases under excessive bail jurisprudence to courts deciding cases using due process and/or equal protection analysis. Specifically, the legal foundations have long told us that whenever a judge sets a secured money bond with the express intent to detain a bailable defendant, it is unlawful under both federal and virtually every state's law based on excessive bail jurisprudence.[267] Of course, because that rule only applied when judges made express records to detain and not when they remained silent, it led to 150 years or more of judges setting money bonds without a record so as to avoid near-certain reversal.[268] Now, however, people are bringing legal claims based not on excessive

[267] For federal cases, *see, e.g., Galen v. County of Los Angeles*, 477 F.3d 652, 660 (9th Cir. 2007) ("The court may not set bail to achieve invalid interests.") (citing *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting bail at a level designed to prevent an arrestee from posting bail); *see also Stack v. Boyle*, 342 U.S. 1, 10 (1951) (setting a financial condition in order to intentionally detain a defendant pretrial "is contrary to the whole policy and philosophy of bail.") (Jackson, J. concurring); *Bandy v. United States*, 81 S Ct. 197 (1960) ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom"). Many states use federal excessive bail jurisprudence to guide state excessive bail analysis. Nevertheless, for state cases, *see, e.g., Torrez v. Whitaker,* 410 P.3d 201, 219 (N.M. 2018) ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release....") (citing other state cases); *Foreman v. State*, 875 S.W. 2d 853, 854 (Ark. 1994) (judge reversed after asking defendant's counsel how much defendant can make, "so I can set it above what he can make"); *People v. Snow*, 173 N.E. 8, 9 (Ill. 1930) (judge reversed for stating, "If I thought he would get out on that I would make it more"). In addition, state courts often tie the notion of intentionally detaining a person with a money condition to their constitutional or statutory "no bail" provision, reasoning that allowing money-based detention beyond the detention eligibility net would negate that net – and thus the right to bail – altogether. *See, e.g., State ex rel. Corella v. Miles*, 262 S.W. 364, 365 (1924) ("The bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail. If, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates [the right to bail under the Missouri Constitution]. For that is saying the offense is not bailable when the Constitution says it is."). *See also Appendix One* discussing the excessive bail loophole.

[268] Occasionally, an appellate court will reverse a bail-setting judge using an amount so egregiously high that it appeared to be set with intention to detain. Typically, though, the opinions are confusing as to motive, and the appellate court will often send the case back for a new bail setting or set the amount itself, with no thought or

bail, but on federal equal protection and due process. When those cases are successful – and most, if not virtually all are successful on the merits[269] – then *any* money-based detention, whether intentional or not, with or without an express record, is unlawful. Accordingly, we are discovering nuance to the legal foundations – and, in some cases, using entirely new legal foundations – to clearly show the unlawfulness of traditional bail setting and thus the need for pretrial justice.

The Pretrial Research Shows the Need for Pretrial Justice

These due process/equal protection cases are often reliant upon the third reason pointing to a continuous need to strive for pretrial justice, which is that the pretrial research is beginning to demand it. For decades, researchers had shown that pretrial detention for the entire length of the pretrial period caused very bad things to happen not only to persons accused of a crime, but also to their families and broader communities. Today, the most recent research builds on those studies to show that even extremely short periods in jail lead to "a series of negative outcomes," thus "fall[ing] short of its intended public safety purposes."[270] Moreover, the most recent research on money bail actually shows that *even when the defendant is released,* the money precondition is not a motivator – that is, money bail does not work to achieve the government's purposes of court appearance and public safety even when the money is used properly as a condition of actual release and not as a means to detain.[271] Thus, when constitutional claims require the government to show that money resulting in

discussion over whether the new, lower number might be equally arbitrary or capable of detention. I provided an example of this sort of case in *Model Bail Laws, supra* note 23, at 60-61, in which the reviewing court acknowledged no evidence showing any ability for the defendants to "make" the amounts set and hinting that those amounts were thus crafted with intent to lead to "no bail." Unfortunately, the reviewing court then subsequently set its own subjective amounts, which, while lower, were still between two and ten times more than each defendant said he could meet.

[269] *See* discussion in the education section discussing the legal foundations of bail, *infra.*

[270] *Locked Up, supra* note 266, at 28.

[271] Aurelie Ouss & Megan Stevenson, *Does Cash Bail Deter Misconduct?,* (2022) ("We find no evidence that financial collateral has a deterrent effect on failure-to-appear or pretrial crime."), found at Does Cash Bail Deter Misconduct? by Aurelie Ouss, Megan T. Stevenson :: SSRN. This is discussed further in the section on education discussing the pretrial research, *infra.*

detention is "necessary"[272] to achieve public safety or court appearance (that is, to show that there are literally no other less-restrictive ways to help achieve the government's interests; it must be money), the research shows that money bail is not only unnecessary, it also does not work to motivate defendant behavior and, instead, actually *increases the harms* the government claims it wishes to avoid. This means that using money at bail is clearly irrational, and thus obviously unlawful under even the most lenient of constitutional ends/means balancing tests for any legal claim.

Moreover, knowing that money-based detention is premised on an assumption that is simply wrong – that is, the assumption that money works and is thus rational to use – places a bright light on two particularly egregious statistics. The first is that more studies are beginning to track the high rates of criminal case dismissals.[273] Obviously, a person held in jail pretrial only to have his or her case dismissed is likely an injustice and often indicative of some failure on the part of the system. When that detention is itself based on an unlawful bail setting, however, it is particularly unjust. The second is that studies are also showing large numbers of in-custody deaths, with most deaths occurring while the persons were on pretrial status.[274] Obviously, any in-custody death is a tragedy. When that

[272] This is often the test whenever the government acts in a way that affects a so-called suspect classification or fundamental right, such as liberty. It should be noted that in many states, money bail has no legal relation whatsoever to public safety, thus leaving the inquiry only to money's ability to motivate persons to return to court. The argument that a person who has skipped court is inherently risky to public safety due to the open warrant is strained and refuted by the research, which shows the vast majority of people missing court do so for benign reasons and that they ultimately return without engaging in lawless crime sprees.

[273] *See, e.g.,* Wendy Calloway, *Probable Cause as Bail Reform,* 67 St. Louis U. L. J. 295 (2023) (documenting an over 50% dismissal rate in the county studied). Such studies can also serve as a warning for states trying to do detention more purposefully, but with a legal structure that includes a very wide detention-eligibility net and risk finding. In one county in New Mexico, for example, a state that includes moneyless, on-purpose detention for any felony, one researcher found that of 6,698 cases in which a judge granted a prosecutor's request for detention, a full 43% of closed cases (including those involving violent charges) were either dismissed by the court or abandoned by prosecutors after a medium length of stay of 120 days compared to roughly 8.5 days for cases in which a motion for detention was denied. *See* Paul Guerin, *Bernalillo County Second Judicial District Court Preventive Detention Motion Review* (October, 2024), found at https://isr.unm.edu/reports/2024/bernalillo-county-second-judicial-district-court-preventive-detention-motion-review.pdf.

[274] *See* Care First California, *A Decade of Lives Lost: Report of In-Custody Deaths in California Between 2011-2022* (showing 2,312 in-custody deaths in California from 2011-2022), found at https://carefirstca.org/decadeoflivestlost/.

person is in jail due to a likely unlawful bail setting, however, the death is unconscionable.

Core American Principles Show the Need for Pretrial Justice

The fourth reason to continue working toward pretrial justice is due to our growing understanding of foundational American principles (often tied to the law and the history) when it comes to bail. For example, we occasionally hear the phrase, “One crime on pretrial release is one crime too many,” a phrase typically preceding over-conditioning and over-detention. Unfortunately, that phrase disregards what is known as Blackstone’s Ratio, which was a fundamental principle behind the English law that was ultimately adopted by America, and which the United States Supreme Court has connected to the presumption of innocence.

That ratio is the maxim that "the law holds that it is better that ten guilty persons escape than that one innocent suffer."[275] This articulation of the ratio is foundational to American justice, and is a *quintessential statement about accepting risk*. In America, a country based on liberty, we use “the moral and deterrent effect of laws which define particular acts as criminal and which punish all who violate their proscriptions.”[276] Thus, we take certain risks every day in both the substantive criminal law and in bail to maintain the freedoms articulated in our founding documents. In bail, this means following Justice Jackson’s admonition that risk is inherent in the bail process,[277] and so we must recognize that the government may not do things to people – such as over-conditioning or detaining those people – “just to make sure.” As persons begin to understand how risk and liberty are connected, they become more confident in calling for pretrial justice, especially when they learn about the true extent of defendant risk (which is typically low) and our general difficulty with predicting it.

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[275] *Coffin v. United States*, 156 U.S. 432, 456 (1895) (quoting 2 Bl. Com. c. 27, margin p. 358). We discuss this ratio at length in *Model Bail Laws, supra* note 23, at 41-44.

[276] Laurence H. Tribe, *An Ounce of Prevention: Preventive Justice in the World of John Mitchell,* 56 Va. L. Rev. 371, 376 (1970).

[277] *See Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring) (“Admission to bail always involves a risk … a calculated risk which the law takes as the price of our system of justice.”).

Likewise, Americans are becoming aware of Judge Learned Hand's somewhat famous quote that, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."[278] This directly affects our perceptions of bail, since rationing justice seems to be the essence of the traditional money-bail system. Indeed, when presented with a federal equal protection claim against a typical money-based bail system in Texas, a panel of the Fifth Circuit Court of Appeals described that system's intrinsic ability to provide justice unequally. That panel wrote as follows:

> [T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. . . . One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.[279]

In sum, Americans are gradually becoming aware of the unfairness of a system of bail and "no bail" based on money, especially when the money is shown to be arbitrary and irrational to the very goals of pretrial release and detention. Accordingly, they are rightfully calling for pretrial justice in order to follow core foundational legal principles found in a country formed to ensure liberty.

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[278] This quote came from Hand's speech to the New York City Legal Aid Society in 1951. *See* The Legal Aid Society website, found at https://legalaidnyc.org/historical_event/thou-shalt-not-ration-justice/.
[279] *O'Donnell v. Harris County,* 892 F.3d 147, 163 (5th Cir. 2018).

The History of Bail

"We study the past to understand the present. We understand the present to guide the future."

William Lund

The history of bail has been critical in bringing an explanatory framework to what was once a complex and confusing topic of American pretrial release and detention. I and my colleagues published our first history document for a local audience in 2009,[280] simply because the most recent and widely distributed history of bail had been published in the early 1980s (thus prior to *United States v. Salerno* in 1987 and with other historical omissions), and was largely copied from a discussion of the history used in the 1981 opinion from *United States v. Edwards.*[281] We published a simplified and up-to-date version of the history of bail for a national audience in 2010,[282] and I published later versions in *Fundamentals of Bail* (mostly to add detail and fill in gaps found in the earlier histories)*,*[283] *Money as a Criminal Justice Stakeholder* (mostly to show the history with an emphasis on money bail),[284] and *Model Bail Laws a*nd *Changing Bail Laws* (mostly to show the history as it applies to changing state statutes, court rules, and constitutions).[285] I would occasionally publish histories simply to focus on the latest misconceptions arising from earlier publications. In 2017, for example, I published a history focusing on differences between this era of bail reform and other, earlier eras,[286] and in 2018, I published a history highlighting what I

[280] *See Jeffco Proposal, supra* note 117.
[281] 430 A.2d 1321 (D.C. Ct. App. 1981). *Edwards* settled the constitutionality of the D.C. Statute of 1970, which was the first to allow for preventive detention based on public safety. *See Model Bail Laws, supra* note 23, at 68-74.
[282] *See* Timothy Schnacke, Michael Jones & Claire Brooker, *The History of Bail and Pretrial Release* (PJI, 2010), found at https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf [hereinafter *PJI History*].
[283] *See Fundamentals of Bail, supra* note 20.
[284] *See Money, supra* note 103.
[285] *See Model Bail Laws, supra* note 23; *Changing Bail Laws, supra* note 56.
[286] *See* D. Smith, C. Campbell, and B. Kavanagh (Editors), Timothy R. Schnacke, *The Third Generation of Bail Reform,* found in 2017, Trends in State Courts: Fines, Fees, and Bail Practices: Challenges and Opportunities (Williamsburg, Va: NCSC, 2017) at 8. Although I coined the term "third generation of bail reform" by borrowing language from Professor John Goldkamp, and as we mention, *infra,* I am now reluctant to call this era the "third generation" due to my recognition that the central evil of secured money bonds has been the main driver of all three main generations of bail reform in America in the 20th Century along with a number of other and earlier so-called

believed judges needed to know about the topic.[287] The point is that in addition to being crucial to understanding bail, the history is rich and vast and can be used to create context and thus help persons to focus on (and find solutions to) pressing problems in the field.

In *Fundamentals of Bail,* I stressed that the history was not merely academic, and since then my surmise has been confirmed, as most important American court opinions dealing with bail in the last ten years typically have included segments recounting the history of bail in order for judges to reach and articulate their ultimate legal conclusions.[288] Moreover, the same basic historical themes in that paper have endured, such as viewing "bail" as release and showing how release was historically done through what we might call today "unsecured" bonds, a practice that ultimately disappeared with the gradual disuse of unpaid (un-indemnified) personal sureties in America starting in the early-to-mid 1800s.

If I were to sum up the long history of bail in only a few paragraphs today (and recognizing the need for real historians to correct me whenever necessary), it would likely read as follows: With the enacting of England's Statute of Westminster of 1275, bail in England was meant to be an intentional, in-or-out proposition, with "bailable" defendants (those given a right to bail and not included in the "no bail" net) expected to be released and "unbailable" defendants expected to face potential or even automatic detention. Over the course of several centuries, England slowly eroded that simple, intentional

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"reforms." To the extent that "generation" merely means another era of reform focusing on the same basic abuse, then I fully accept it.

[287] Timothy Schnacke, *A Brief History of Bail,* 57 Judges Journal at 4 (2018). In addition to the piece on history, this edition of the Journal included several papers that, together, provided a state-of-the-art overview of bail reform in America at that precise time period. It requires one correction in that I had said the first instance of a judge setting a secured money bond was in 1835, when I meant to say that the first recorded instance of a judge *recognizing* that a secured money bond might keep an otherwise bailable defendant in jail was in 1835. As far as I know, no one has yet pointed to the precise case in which the first secured (or "self-pay") bond was set.

[288] *See, e.g., Holland v. Rosen,* 895 F.3d 272 (3rd Cir. 2018) (examining the history of bail to determine that the right to bail does not mean a right to money bail). The history of bail is an important part of the pending California Supreme Court case interpreting the California right to bail provision. *See In re Kowalczyk,* found at https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2460117&doc_no=S277910&request_token=NiIwLSEnTkw7WzAtSSI9XEhIUFA0UDxTJCMuIztTMCAgCg%3D%3D.

"release/detain" dichotomy through the introduction (and ultimate abuse) of judicial discretion to determine bailability in a large number of cases.

America's distaste for that broad, more-discretionary process led our country to eliminate judicial discretion to determine bailability and to craft bail laws based on England's pure process of 1275, embracing intentional release and detention in our early articulations of "bail" and "no bail," and using personal sureties and unsecured bonds in an attempt to assure the release of "bailable" defendants.[289] In addition to eliminating discretion, America also broadened the right to bail and added the necessity for some finding of risk for persons facing "no bail" (that is, risk within the detention eligibility net), meaning that even if a person found him or herself in the "no bail" category, he or she might still be released if that risk finding was not made.[290] Essentially, everyone in America was to be deemed eligible for bail or release – even those who started out as potentially detainable. It was truly liberty-oriented and, at least in theory, intentional.

When America began to run out of personal sureties,[291] however, and likely still exhibiting the good intention of finding avenues to release "bailable" persons, it

[289] Recent legal historians using primary sources have added nuance to these themes, such as the fact that America, in fact, chose between two alternative bail clauses, with one focusing on intentional release and detention with no discretion (the so-called "dissenter model"), but with another copying the English (or common law) provision with a great deal of discretion. Ultimately, the "dissenter model" won out. *See generally* Sandra Mayson & Kellen Funk, *Bail at the Founding,* 137 Harv. L. Rev. 1816 (2024) [hereinafter *Founding*].

[290] The first of these articulations was "proof evident, presumption great," under the theory that if an accused person found him or herself in the "no bail" net based on charge, a finding of a great amount of evidence of guilt of that charge (typically capital crimes) suggested a risk to flee. America has kept the requirement to make some finding of risk within the net, but in many states (and in various hypothetical models) they have been better-articulated, such as "clear and convincing evidence that the person is extremely high risk to willfully flee to avoid prosecution or to commit a serious or violent crime." Indeed, there are cases suggesting that using "proof evident, presumption great" (or other phrases like it) as a finding of risk by itself might now be unlawful. *See, e.g., Lopez-Valenzuela v. Arpaio,* 770 F.3d 772 (9th Cir. 2014).

[291] There are different theories as to why America ran out of personal sureties, which are made more complex due to the fact that it also happened in England for seemingly different reasons. I provide my own theories in *Fundamentals of Bail,* but the most frequently used theory in this country is that the expansive American frontier gradually diluted the personal relationships necessary for a personal surety system while advancements in policing and technology made the issue of flight less acute. Again, a more recent history using primary sources has added significant detail to the question by showing that "cash" bail was also created to stop the abuse of so-called "straw bail" as well as to provide a more transactional means of release not requiring association with some reputable surety. *See* Kellen Funk, *Bail at the Second Founding* (August 7, 2025), *Columbia Pub. L. Research Paper No. 5383498,* found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5383498 [hereinafter *Second Founding*].

ultimately settled on a system of bail in which commercial sureties using mostly secured bonds somewhat randomly determined the release or detention of any particular arrestee. This system has never worked, however, in that the somewhat arbitrary and accidental nature of the process has still led to both the wrong people being in and out of jail. Importantly, in addition to allowing higher risk persons to buy their way out of jail, it has led to increased numbers of "bailable" defendants (those who were historically meant to be released under the intentional system) being detained with the help of certain aspects of American law growing up to provide a legal gloss that hid the systemic abuse.[292] This, in turn, led to three distinct eras of reform in America in the 20th and 21st Centuries, all focusing primary on eliminating money as a means to detain "bailable" persons, but with a more recent emphasis on adding express articulations for intentional detention for both flight and future danger.[293]

Most recently, and in addition to acquiring a more complete knowledge of the actual problem/abuse, we have learned that America's use of secured money bonds leading to detention is likely unlawful based on several legal theories. In addition, we have confirmed that: (1) our jails are populated with lower and medium-risk persons unable to afford even the smallest amounts of money, while the system allows for extremely dangerous but more wealthy persons to buy their way out of jail; and (2) money itself is irrelevant to the bail process in that it does not motivate an accused person's behavior even when that person is released. These findings, coupled with multiple other pressures pushing against using money at bail and for adding intentionality to the system, are causing states to seek other ways to accomplish pretrial release and detention. Accordingly, like the federal and District of Columbia systems in the 1970s and 80s, the states are

[292] I have called this gloss the "excessive bail loophole," because it allowed for judges to set unaffordable bonds leading to detention so long as the judge did not make a record of intentional detention. It was a "loophole" to the historic, general rule that "bailable" persons were expected to be released as well as allowing judges to avoid using any existing intentional release and detention provisions. The gloss is based on the fact that, despite the flimsiness of the legal fiction supporting it, people believe it to be lawful merely because it has been thoughtlessly upheld for so long. *See Appendix One.*

[293] Theoretically, the use of "self-pay" or secured bonds was an effort at reform in the 1800s, as was the introduction of commercial sureties in 1898, which were both designed to, among other things, keep the "right" people in and out of jail. In practice, though, they are rarely listed as reforms because both made the bail system worse by detaining even more bailable defendants.

moving once again toward crafting intentional release and detention processes, which is really the only alternative to the traditional money-bail system.[294] Unfortunately, this means entirely overhauling statutes, court rules, and even constitutions (the main sources of a state's intentional release and detention language) and ridding its laws of provisions surrounding money-based release and detention. Fortunately, since 2017 we have learned exactly how to make these changes.

In my opinion, there are three things to know in order to update the fundamental known as the history of bail since 2014. First, and most importantly, is that there still appears to be pervasive confusion over how the history of bail shines a bright light on understanding "true, historic bail reform" and why that reform – today consisting of switching from a random money-based system to a safe and fair intentional system – is likely inevitable across all American states. Second is the rise of actual historians verifying certain historical notions using primary sources. And third is an increase in "alternative" histories (avoiding or even misinterpreting certain events or documented facts) seemingly created only to keep the status quo and justify bail as a money-making enterprise.

How the History of Bail Warns of the Inevitability of Bail Reform

As I mentioned briefly, above, I have published many histories of bail, with differing versions drafted to appeal to different audiences or to focus on the history applied to different issues. If a person were to read those histories, he or she would quickly realize three main themes: (1) "bail" has historically meant release, with "bailable" persons expected to be released (with a few inevitable

[294] The notion that intentional release and detention is likely the only alternative to money-based release and detention (after nearly twenty years, I and others have thought of no other alternative) should come as no surprise. The Statute of Westminster created an intentional release and detention system, and early American laws copied that intentional system. Moreover, virtually all states have intentional release and detention language in their laws, and occasionally that language is used despite overwhelming use of the money-based alternative. Finally, the states that are meaningfully changing today, including New Jersey, New Mexico, Illinois, and California, are all aiming toward intentional release and detention.

exceptions);[295] (2) release was typically assured by using personal sureties (people) and unsecured bonds (promises to pay something only upon failure to face justice, versus a secured bond, through which the accused or his sureties have to pay money up-front); and (3) whenever people perceive some systemic abuse leading to the "wrong" people being in and/or out of jail, something typically called “bail reform” rises up to fix that abuse.[296] Moreover, while bail reform can certainly be triggered when people only perceive the wrong people *out of jail* (for example, the American changes allowing detention for public safety are an important example), bail reform typically happens when the wrong people are *in jail* due to some systemic abuse. Thus, a rule of thumb concerning the third

[295] For example, in Sandra Mayson and Kellen Funk’s *Bail at the Founding,* the authors note that the American criminal system included the jailing of many persons beyond any finding of risk needed for an appearance bond, and that ensuring release using personal sureties and what we might call today “unsecured” bonds for appearance would occasionally break down for those unable to find sureties altogether, which was true even in England with its more formal processes for finding sureties. In my opinion, however, It was later, at some point in the 1800s, when the lack of personal sureties reached such numbers as to become a tipping point leading to a quest for solutions. *See generally Founding, supra* note 289.

[296] For example, beyond the need for the Magna Carta to address jailing without trial, when sheriffs were abusing the customary system by holding bailable persons in jail while allowing “unbailable” persons out of jail (and taking money from each group) in the 1200s, the English Parliament passed the Statute of Westminster to eliminate those abuses. More abuses by sheriff/bail setters led to more reforms in the late 1200s and early to mid-1300s. As bail setting evolved from sheriffs to magistrates, various abuses by those magistrates affecting “bailable” persons led to reforms in the 1400s and 1500s, such as requirements to have two magistrates present and to create written records. When judges were holding accused persons on no charge in order to avoid setting bail, Parliament passed the Petition of Right in the 1600s, which required charges to be filed and bail to be set within a certain amount of time. Similarly, not setting bail after being charged led to Habeas Corpus, the Great Writ, and setting impossibly “high” amounts for bail led to the creation of the excessive bail clause, which was also adopted by America. *See generally, PJI History*, *supra* note 282; *see also* William Duker, *The Right to Bail: A Historical Inquiry,* 42 Alb. L. Rev. 33, 43-67 (1977-78) (describing a number of abuses leading to reforms to both bail and “no bail” through bail’s early history). In 19th Century America, the gradual erosion of personal sureties led judges and states to experiment with “self-pay” (secured financial conditions) and later with commercial sureties to remedy the problem, “reforms” that only exacerbated the perception of having the wrong people in and out of jail. According to Professor Kellen Funk, the abuse of “straw bail” using fraudulent sureties (thus allowing the “wrong” people to get out of jail) also provided justification for early statutes allowing cash “in lieu of bail” and various bail abuses against freedmen post-Civil War were discussed at length during passage of what would become 42 U.S.C. Section 1983. *See Second Founding, supra* note 291. The gradual lack of personal sureties led England and America to eventually settle on two radically different solutions; in England, Parliament outlawed contracts to indemnify sureties, *see* James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases,* 6 Fordham L. Rev. 387 (1937), and enacted the Bail Act of 1898, allowing judges to release persons without sureties, while, at the same time, America quickly ushered in the commercial surety system, again only exacerbating the underlying problem. In the 20th Century, the federal system recognized the need to make reforms to release more “bailable” persons in the 1960s (mostly perceiving the wrong people to be *in* jail), and, to make reforms to both to release and detention in the 1980s (perceiving the wrong people to be both *in and out* of jail). This federal “fix” from 1984 was designed to finally and completely address the abuse caused by secured financial conditions, or money bail, which has been the catalyst for nearly all major attempts to reform bail in America in the 20th Century.

historical theme is that, throughout history, whenever we see "bailable" persons in jail, we tend to see "bail reform" simply because, throughout history, bailable defendants were typically supposed to be released.

Of these themes, the third is also the most relevant because we currently see the wrong persons both in and out of jail in America due to a systemic abuse caused by the casual use of secured financial conditions – that is, bonds typically requiring someone to pay some amount of money (or, occasionally, pledge property) upfront as a pre-condition to release. Specifically, we now see lower and medium risk "bailable" persons in jail due to their inability to pay a secured bond, but we also occasionally see extremely high-risk persons being released unwisely due to their ability to pay a secured bond.

Nevertheless, despite having the wrong people both in and out of American jails for nearly two centuries (and especially having bailable persons in jail, thus triggering the rule of thumb, above), the notion that this might be wrong was apparently not clearly evident to the states until quite recently. Indeed, when I first began writing about bail, persons adamantly disagreed with my conclusion that some, if not most, pretrial detention in America was "unnecessary." By dutifully relying on laws presenting a façade of fairness while still allowing judges to set unaffordable financial conditions leading to the detention of bailable persons, judges and others would argue, instead, that all persons accused of crimes were exactly where they needed to be. To them, lacking money indicated risk, not poverty. This argument, however, was entirely refuted by two fairly recent developments.

The first development was the creation of more sophisticated, multi-jurisdictional pretrial risk assessment instruments starting in the early 2000s.[297] Using these

[297] Previous tools either focused on single, smaller jurisdictions, did not use statistics to analyze numerous potential predictors (with some using mere intuition), and all lacked the adequate research base used for tools predicting, for example, recidivism versus pretrial crime. *See generally* Christopher Lowenkamp, et al., *The Development and Validation of a Pretrial Screening Tool,* 72 Fed. Probation No. 3, found at https://www.uscourts.gov/sites/default/files/72_3_1_0.pdf; Pretrial Justice Institute, *Overview of Pretrial Risk Assessment Validation Study Findings,* found at

tools, researchers and others were able to walk through jails and find that there were significant numbers of “low” and “medium” risk (and typically “bailable”) persons in jail who simply could not pay a particular secured bond amount, and that there were equally significant numbers of “high” risk persons leaving the jail by merely paying some secured bond amount.[298] Thus, these tools clearly showed that the “wrong” people were both in and out of jail, which is a primary marker, if not the guaranteed catalyst of historic bail reform.[299]

Research used to create these tools accelerated the recognition of this notion by showing that charge was, at best, a weak proxy for predicted risk, that persons facing felonies were often “lower” risk than persons facing misdemeanors, and that persons accused of crimes generally were simply not very risky to begin with. Indeed, the tools and the research used to create them showed that even the “highest” risk persons often succeeded on pretrial release more than half of the time, that predicted risk could be lowered through the use of various conditions (or supports) of release, and that when released persons failed, it was often for non-willful FTAs or being arrested for crimes such as theft, fraud, and drugs.[300]

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https://biblioteca.cejamericas.org/bitstream/handle/2015/2962/PJI_Overview_of_RAI_Findings_2009.pdf?sequence=1.

[298] *See* Arnold Foundation, *Developing a National Model for Pretrial Risk Assessment* (2013), found at https://cjcc.doj.wi.gov/sites/default/files/subcommittee/LJAF-research-summary_PSA-Court_4_1.pdf. As explained in the text, research has recently shown that virtually all persons accused of crimes are relatively “low” risk, especially when assessing their risk to do significant harm if released. This, and other factors, has helped to lead the pretrial field to recognize that actuarial assessment tools must never be used solely as a basis for detention, which requires a different and more appropriate articulation of risk than that provided by statistical aggregates. Nevertheless, realizing that there were people in jail who, if released, were likely to show up for court and remain crime free more than 90% of the time was eye-opening to those who simply did not believe in the possibility of “unnecessary pretrial detention.”

[299] The fact that the wrong people were *both* in and out of jail made initial attempts at change in the last twenty years relatively easy and bipartisan, if not nonpartisan. The recent, more partisan nature of bail reform in America is largely due to simple ignorance of both the problem (a random money-based detention system) and its solution (a limited, fair, and transparent intentional release and detention system). Bipartisan bail reform typically means addressing the randomness of release and detention *at the same time* while simply following certain guardrails imposed by the law and the research.

[300] *See* notes 37, 38 and accompanying text, *supra*; *see also Model Bail Laws, supra* note 23, at 99-100 and citations therein. Actuarial assessments themselves are often misinterpreted because of subjective designations of what amount of failure is labeled as "high," "medium," or “low” risk.

In a 2022 publication for the NIC, Spurgeon Kennedy, Tara Blair, and Robin Wosje discussed actual defendant risk versus stakeholder and public perception of risk, summarized the research underlying the creation of risk tools, and similarly concluded that: (1) most defendants are simply not very risky (even when assessed by tools that, by their nature, overestimate risk); (2) even so-called "high" risk persons typically succeed at high rates and even higher rates with best practice interventions and supports; and (3) pretrial arrest for serious or violent crime and willful FTA or flight – the only things for which detention may be deemed appropriate – are very rare.[301] Essentially, one of the foundational assumptions underlying the money-bail system – that there was no "unnecessary detention" – was being quickly erased.

Knowledge of this "lack of riskiness" of the vast majority of unconvicted persons has been significantly bolstered by the work of community bail funds, such as The Bail Project, which, since 2017 has "bailed out" over 30,000 persons nationwide who are in jail due merely to the lack of money.[302] These are the persons who government officials and others incorrectly believe are the "highest risk" persons due to the unwillingness of anyone to pay the secured financial condition in order to have them released. Instead, The Bail Project reports that these persons – who do not have any money on the line or "skin in the game" (essential elements, according to those who seek to keep the status quo) – still return to court 91% of the time with only a few needs-based supports. This, of course, completely upends the notion that money is a motivator for court appearance and that we have the "right" people in jail. The Bail Fund's most recent data from Tulsa, Oklahoma, only bolsters these facts.[303]

The second development has not only confirmed that lacking money does not indicate risk, it has likely signaled the death knell of the money-based bail system – or, at least, has become a major part of the movement to replace it. This

[301] Spurgeon Kennedy, Tarah Blair & Robin Wosje, *Court Nonappearance and New Case Filings* (JMI/NIC, 2022), found at https://s3.amazonaws.com/static.nicic.gov/Library/033626.pdf.
[302] *See* The Bail Project website, found at https://bailproject.org/.
[303] *See* note 48, *supra.*

development is the result of: (1) research looking at the harmful outcomes arising from even short periods of unnecessary pretrial detention;[304] (2) the non-effectiveness of secured financial conditions (so-called "cash bail" or "money bail") even for released persons;[305] and (3) various courts using that research to show that the government's reliance on money bonds to assure either public safety or court appearance is legally flawed.[306]

Because secured financial conditions are typically the only pre-conditions to actual release, they have been studied in greater depth than other, less intrusive conditions. Often, these studies end up in expert declarations for lawsuits alleging equal protection and/or due process violations against states using money bail to achieve court appearance and public safety. In one such declaration from 2025, Professor Jennifer Copp did an exhaustive survey and analysis (examining reliability and accuracy of study findings by looking at the modeling approach, study design, covariates and potential sources of confounding, and statistical significance) of a wide array of pretrial research documented in multiple studies to come to the following conclusions concerning the consequences of pretrial detention and different mechanisms of pretrial release: (1) As compared to unsecured money bail or non-monetary conditions of release, the use of secured money bail increases defendants' odds of pretrial detention – indeed, pretrial detention primarily results from inability to pay; (2) Pretrial detention for periods of more than 24 hours has more severe negative effects on defendants' case outcomes; (3) Pretrial detention actually *increases* defendants' likelihood of future crime, thus harming entire communities; (4) Pretrial detention (followed by release) heightens the risk that defendants will engage in new criminal activity during the pretrial period and either decreases or has no effect of on defendants'

[304] *See* notes 39-41 and accompanying text, *supra*.
[305] *See* notes 47-49 and accompanying text, *supra*.
[306] Perhaps the best example of this (despite tortured post-opinion treatment) is found in the lengthy district court opinion in *O'Donnell v. Harris County*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017), in which the judge looked at both national and local research to determine, among other things, that because there were less restrictive (that is, would not lead to detention) alternatives to secured money bonds that can achieve public safety and court appearance, the use of money to achieve those interests was unconstitutional. *See id.* at 1140. The essence of many of these money bail cases is that when liberty is in the balance, a higher standard of scrutiny often requires the government to show that money is "necessary," that is, the only alternative that works to achieve safety or court appearance. The research, however, shows that exactly the opposite is true.

appearance in court; (5) The empirical evidence demonstrates that secured money bail has no positive effect on appearance rates (thinking that money motivates defendant behavior has been the primary justification for using money at bail since America's founding) and other less-intrusive alternatives have been shown to work better; and (6) Findings from several high-quality empirical investigations demonstrate that secured money bail provides no greater incentive to remain law-abiding than unsecured money bail or non-monetary conditions of release.[307]

These findings correspond to other, non-litigation lists of conclusions gleaned from studies looking at the various ramifications of financial conditions of release. For example, APPR (Arnold/CEPP) has summarized the research on financial conditions and has concluded: (1) There is no evidence that financial conditions improve court appearance for people released before trial; (2) There is no evidence that secured financial conditions improve community safety or law-abiding behavior; (3) Secured financial conditions contribute to higher rates of pretrial detention and exacerbate the collateral consequences of incarceration; and (4) Secured financial conditions exacerbate racial injustice and deepen economic disparities in the criminal legal system.[308]

In 1965, before the rise of any great interest in this sort of bail research, Professor Caleb Foote predicted that, "If it comes to be generally accepted that in the outcome of his case the jailed defendant is prejudiced compared with the

[307] Jennifer Copp, *Declaration in Support of the State of California County of Riverside, Western District* (Plaintiff's application for order to show cause for preliminary injunction) (May 24, 2025). In other declarations, experts have had to analyze "studies" put forward by government bail setters or the commercial surety industry used to argue for maintaining the status quo. The most recent of these studies, the so-called "Yolo County Zero Bail Study," has been used in numerous court cases to argue against the use of "cashless" bail, and was even cited by the current Presidential administration as a singular source arguing against bail reform. This study's methodology and conclusions have been dismantled both in the press, *see* L.A. Times Editorial Board Opinion, *Ending Cash Bail* (September 25, 20230, found at https://www.latimes.com/opinion/story/2023-09-25/ending-cash-bail, and in official court documents, *see* Sup. Court of the State of California Cty of L.A., Central District, *Declaration of Michael R. Jones in Support of Plaintiffs' Opposition to Crime Survivors Inc.'s Motion for Leave to Intervene in Action,* Case No. 22STCP04044 (June 8, 2023) (finding the Yolo Study had fatal problems with group selection, with self-selection, with lack of independent analysis, and with comparing general crime rather than pretrial crime rates).

[308] Arnold Ventures/CEPP, *Advancing Pretrial Policy and Research, Pretrial Research Summary: Financial Conditions of Release* (2024), found at wI23qGd5Q0KEaUyQN7oc.

defendant who has pretrial liberty, such a finding will certainly have a profound impact on any judicial consideration of constitutional bail questions."[309] More recently, after recounting much of the current research from this new wave of interest, Professor and bail scholar Kellen Funk correctly concluded: "If these studies make their way into the factual record of a federal court applying a searching level of review, the most common American bail systems, which casually impose detention for failure to put up secured money, are almost certain to fail."[310] Equipped with these studies and court opinions, countless grass roots groups, civil rights advocates, philanthropies and funders, bail reform initiatives, faith based groups, institutional stakeholders, professors, journalists, and even celebrities have joined in vocal opposition to the traditional money-bail system permeating America. And this, in turn, testifies to the notion that America is experiencing a wave of true, historic – and inevitable – bail reform.

Inevitability Based on Intentionality

A deeper dive into the more recent American history of bail (and the law intertwined with that history) can provide another way to articulate why "true, historic bail reform" – as I define it for this era – is inevitable in the states. As already mentioned, in the 1800s, America gradually saw more and more "bailable" persons in jail due to the lack of personal sureties.[311] Because throughout history bailable persons were supposed to be released and the historical rule of thumb had always been that having bailable persons in jail would inevitably lead to bail reform, judges naturally began searching for ways to get those incarcerated persons out of jail. At some point in the 1800s and possibly late in that century, those judges tried replacing what was used – and what are now

[309] *National Conference, supra* note 95, at 225. As I have noted previously, *see supra* note 40, this particular finding of prejudice toward detained versus released defendants is so ubiquitous as to force me merely to list names of scholars who have each produced multiple studies showing the disparity.

[310] Kellen Funk, *The Present Crisis in American Bail,* 128 Yale L.J.F. 1098, 1114 (2018-19) [hereinafter *Funk*].

[311] The history of bail during the 1800s has often been described only generally in secondary sources, leading us to mostly speak to the broadest trends, such as the gradual loss of personal sureties and the eventual rise of secured financial conditions and the commercial surety industry. Again, much more nuance to the various abuses leading to the historical problem of having the "wrong" people in and/or out of jail has been recently illuminated by scholars Sandra Mayson and Kellen Funk, primarily through two sources. *See Founding, supra* note 289; *Second Founding, supra* note 291.

known as “unsecured” bonds (a mere promise to pay called a "recognizance") – with “secured” bonds (an up-front payment, called “self-pay” at the time).[312] Of course, many persons could not pay the amount up-front, and so the courts dealt with this problem by creating an unfortunate line of opinions holding, essentially, that persons accused of crimes did not have a constitutional right to bail that they could “make.” It was a rule based in perceived practicality; judges in America (but not England) apparently believed that the entire system would break down if we released everyone who had no personal surety and claimed to be broke.

Importantly, however, this rule was coupled with a rule from another line of cases found in a vast number of states and the federal system saying, essentially, that even though money could keep a bailable person in jail, judges could not use money to detain a bailable person *on purpose*. Accordingly, in addition to simply looking at numbers relative to other numbers, excessive bail analysis starting in the 1800s also hinged on intentionality applied to proper purposes, and using money to detain intentionally was then – and is now – considered to be setting bail to achieve an improper purpose. Based on these rules, certain accused persons were no doubt detained with money “unintentionally” – that is, the judge did not mean to detain on purpose but the money amount led to detention. But the rules also meant that judges had 100% discretion to *detain anyone intentionally so long as the judge remained quiet about his or her purposes*,[313] for to show intention to detain using money was to invite reversal.

This is called the “excessive bail loophole,” because the jurisprudence surrounding this practice is based on the excessive bail clause and because it is a loophole to the traditional, historic rule that “bailable” persons are expected to be released.[314]

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[312] *See Model Bail Laws, supra* note 23, at 44-61 (explaining America’s attempt to deal with the reduction in personal sureties along with its later struggle with both unintentional and intentional detention).

[313] In my opinion, this is likely the primary reason that money still exists in the bail system. Money as a motivator either to return to court or stay out of trouble has been questioned for over 100 years. The true advantage of using secured financial conditions is that it gives judges 100% discretion to detain a person in a fast, easy, and opaque way, free of the hurdles of due process and shielded by laws that lessen meaningful appellate review.

[314] *See Appendix One,* explaining the loophole in more detail with illustrative cases. At the 1965 National Conference on Bail and Criminal Justice, *see supra* note 95, at 149-175, the attendees discussed “setting high bail to prevent pre-trial release,” and although the members readily admitted the practice, the actual discussion focused more specifically on setting unaffordable bail for purposes of future danger, and not flight. Nevertheless, the

It provided (and still provides) a gloss of legal respectability covering the abuse of allowing judges to set bail without a record and without any meaningful due process hearing even when those ordered released remained detained.[315] Indeed, the whole system relies on *not* having any record or any other process that might show intent to detain, lest the judge be reversed for using money to detain on purpose. Moreover, the loophole has allowed the states to avoid changes to their constitutional or statutory "no bail" provisions simply because money-based detention meant that those intentional detention provisions could be ignored.

Nevertheless, in this wave of bail reform, the states are implementing practices designed to make bail settings more intentional – such as using an actuarial risk assessment tool, looking at "ability to pay," or forcing judges to explain their intentions on the record. Moreover, certain practices are being thrust upon the states by the courts – such as requiring written records for using secured bonds or having due-process laden hearings designed specifically to guide an intentional decision. When those indicia of intent are present, virtually all unaffordable bonds will look more and more like they were set with purposes to detain[316] – again, a practice that is forbidden under federal and most states' clearly articulated laws. This means that – in addition to either deciding or being forced to use less or no money at bail – the simple act of inserting intentionality into the money-bail

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guiding legal document used as a reference by those members made clear that setting bail for *any* invalid purpose, including to intentionally detain based on risk of flight, was also unlawful. *See* Daniel Freed & Patricia Wald, *Bail in the United States: 1964* (DOJ/Vera), at 8 ("In sum, bail in America has developed for a single lawful purpose: to release the accused with assurance that he will return at trial. *It may not be used to detain,* and its continuing validity when the accused is a pauper is now questionable.") (emphasis added). In short, setting bail to intentionally detain someone pretrial is – and has always been – unlawful. In *Fundamentals of Bail,* I called the historic mandate to release all "bailable" persons accused of crimes "the big rule," simply because it was a constant premise of bail since before the Statute of Westminster in 1275 and up to America in the 19th and 20th Centuries.

[315] While having a "gloss" of legality, it is based on an incredibly flimsy legal fiction, which is that so long as an accused person is ordered release, the secured money amount – whether five dollars or five million dollars – is no barrier to release; all the accused needs to do is pay the sum and so the release is entirely under his control.

[316] Indeed, it has always been curious that appellate courts would disallow "intentional" detention using money, and yet allow so-called "unintentional" detention caused by money even after the mere passing of time has seemingly demonstrated that the money-based detention was actually done on purpose. Indeed, the flimsiness of the premises behind these cases makes it almost embarrassing to discuss; if a judge did not mean to detain someone using money on day one, then did that judge nevertheless mean to detain him on day 3, or 5, or 75? At what point does it become clear that the bail-setting judge has used money to unlawfully detain on purpose? After how many days may we say that a judge's release order becomes an order of detention when that judge knows of the money-based incarceration and still does nothing?

process will force states to look for another way to detain. In 41 states, that means using their constitutional "no bail" detention provisions.[317] Accordingly, in addition to the traditional history and research, the even more recent history and law makes it inevitable that certain states will change their laws simply because those states either want or will be required to do things more intentionally, and yet using money to intentionally detain is forbidden.

True, Historic Bail Reform: What It Is, and What It Is Not

In sum, the history of bail explains why we are in a period of "true, historic bail reform." Moreover, it tells us what this era of bail reform entails; it is switching from a random, unsafe, and unfair system of money-based release and detention to a safe, fair, and intentional release and detention system. The primary, systemic abuse is the use of secured financial conditions causing the wrong people to be both in and out of jail, and the reform is, as it was in the federal system and Washington D.C. in the second half of the Twentieth Century, intentional release and detention, albeit based on everything we know about the law and research today. Indeed, this is what the public wants, for if we analyze the various arguments stemming from any particular issue concerning bail in the media, we see statements calling out for either intentional release ("those persons are in jail only because they are poor" or "that bail was too high") or intentional detention ("that bail was too low" or "the system is just 'catch and release'"). Everyone wants true, historic bail reform even when they cannot or do not know how to articulate what that means.

Unfortunately, the recent literature reveals that, despite this history, authors and the media are causing needless complexity by vastly overusing the term "bail reform" and often applying it to mere "pretrial improvements" (both major and minor), a term having definitional problems as well as applying to things having a tendency to appear and disappear based on whim (*see* discussion on pretrial

[317] Those nine states without a constitutional right to bail with exceptions typically have a statutory right (as in the federal system), the amendment of which is similar to, but easier than, amending a constitution. States cannot do away with bail or pretrial release altogether. *United States v. Salerno,* 481 U.S. at 755 (1987).

terms and phrases, *infra*). Moreover, given the importance of actuarial tools in creating this latest wave of reform as well as their obvious advantages over subjective assessments of risk, for a time (and until at least 2017), the pretrial field thought that using a tool might provide all the answers to a country searching for a more intelligent way to do pretrial release and detention. Thus, "bail reform" became equated with implementing a risk tool, which is better described as a mere "pretrial improvement," depending on the tool and how it is used.[318] Indeed, persons would often say that American bail reform seeks to "replace money with risk," or "resources with risk," and that the risk derived from a statistical tool could determine who to release and detain.

Today, however, we know that we do not replace secured money (a precondition to release and a sub-condition of the return to court condition) with risk; instead, we replace money with no money or with affordable money or other appropriate non-financial conditions or supports. In true, historic bail reform, we replace a random, unsafe, and unfair money-based release and detention system with a moneyless (meaning money cannot keep someone in jail), safe, limited, and fair intentional release and detention system.

Moreover, throughout history, we have typically replaced risk assessment with newer forms of risk assessment. Indeed, since 400 A.D., we have repeatedly replaced one type of assessing risk with another, and actuarial tools are merely a replacement for earlier forms of risk prediction, such as risk based on charge or risk based on subjective notions. Indeed, we know that this replacement process will continue, as even the best tools have a harder time predicting with substantial accuracy the outcomes we need to know in order to actually detain someone pretrial, such as willful flight and extreme risk to commit a serious or violent crime. Moreover, articulations of risk that do not use tools will likely change, too, as we learn more and more about actual defendant risk; for example, if the

[318] Implementing a "good" actuarial tool, without more, is not true, historic bail reform (even if it supports a more intentional process), simply because a jurisdiction could implement a tool and use it to set money bonds, again inserting randomness into a system. Bail reform involves *entirely replacing* money-based release and detention with intentional release and detention.

research continues to show accused persons are even less risky than we think they are today, then the wording of the "risk needed to detain intentionally" should naturally become more limited, making it more difficult to detain. And finally, assessing risk with or without a tool can always be made more accurate or fair, even if we have not clearly seen the mechanisms for doing so.[319]

All this, then, tells us how to use the phrase “bail reform” properly when describing the various state improvements. Again, the primary historic hallmark of bail reform is that it seeks to fix whatever problem leads to a perception that the “wrong” people are in and/or out of jail, with a rule of thumb that even though bail reform could solely address having the wrong people out of jail, having “bailable” persons in jail more often leads to eras of reform. Nevertheless, in this country we currently have problems with *both* release and detention, and the cause is our casual use of secured money bonds leading to both unfair detention and unwise release.[320]

Accordingly, the fix – so long as we do not allow any other release condition to serve as a barrier to actual release – is the total elimination of money’s ability to detain[321] and the replacement of that system based on intentional release and

[319] For example, even using the same basic method for assessing risk using a tool, we could increase accuracy and fairness “by producing counterfactual models that assess risk under different release conditions,” something few have considered. *See* Alexandra Chouldechova & Kristian Lum, *The Present and Future of AI in Pre-Trial Risk Assessment Instruments* (MacArthur SJC, 2020), found at https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/06/AI-in-Pre-Trial-Risk-Assessment-Brief-June-2020-R2.pdf. Most recently, researchers investigated using abbreviated criminal histories in risk tools as a method to foster fairness without loss of accuracy by remedying mean score differences *See* Matthew DeMichele, Christopher Inkpen, Ian Silver & Jason Walker, *How Long is Long Enough: Using Abbreviated Criminal Histories for Pretrial Assessment Instruments,* Justice Quarterly (2024), found at. https://www.tandfonline.com/doi/abs/10.1080/07418825.2024.2422834. Others are looking into “proxy” tools to facilitate early release. *See* Evan Lowder, Chelsea Foudray & Madeline McPherson, *Proxy Assessments and Early Pretrial Release: Effects on Criminal Case and Recidivism Outcomes,* Psych., Pub. Pol’y & Law, 2022), found at https://psycnet.apa.org/doiLanding?doi=10.1037%2Flaw0000341. Finally, it is no secret that current risk tools do not currently tell us individual versus aggregate risk and risk of what, exactly, and they do not routinely use protective factors that offset risk. *See Model Bail Laws, supra* note 23, at 103-15. Articulations of risk not using a tool will likely require time to sort out which word choices are superior to others.

[320] *See Fundamentals, supra* note 20; *Money, supra* note 103.

[321] Even though Illinois completely eliminated money, a decision that simply followed the research and thus could be copied by other states in the future, bail reform only requires the elimination of money’s ability to detain persons pretrial. Until jurisdictions are convinced, as I am, of the complete irrationality of money bail, they are free to retain *affordable* money amounts (that is, money an accused person is able to pay through his or her own resources within a short amount of time) to motivate persons to return to court. It is the elimination or erosion of

detention. Switching systems based on the acute need for a replacement is the big, persistent gorilla in the room with which we all must deal, lest we face decades of more failed "reform." Indeed, years after coining the phrase "the third generation of bail reform" (albeit stealing the concept from Professor John Goldkamp), I now recognize that there has only really been one generation of bail reform in America. In my opinion, it started when the first "bailable" defendant was detained, continued when the first secured bond was allowed to lead to detention, persisted through waves of interest in the early 1900s, the 1960s and the 1980s and 90s (when the federal system finally changed), and it is currently focused mostly on the states.

Switching systems from a random, money-based bail system to one based on intelligent, safe, fair, and effective intentionality is thus "true, historic bail reform." Indeed, it is this one thing, and nothing else. Accordingly, states may implement any number of pretrial improvements in an attempt to achieve pretrial justice and never touch true bail reform, almost guaranteeing the need to revisit the issue later. Indeed, using this definition we can quickly assess which jurisdictions have accomplished it. Of course, the federal system and Washington D.C. accomplished true, historic bail reform many decades ago (although I strongly oppose using their template language so as to avoid the abysmal outcomes of the federal system, which achieves higher court appearance and public safety rates by detaining as many as 80% of persons booked into jail).[322] Most recently, Illinois accomplished bail reform, even though it was unnecessary to completely eliminate money as Illinois did. New Jersey accomplished bail reform while keeping money as a lawful alternative. New Mexico very nearly accomplished it, but kept money bail and, apparently, its ability to detain persons in certain

money bail as a detention mechanism that forces the dominoes to fall leading to the need for a rational, intentional detention replacement.

[322] *See Model Bail Laws, supra* note 23, at 66-86 (providing discussion and legislative histories for the D.C. Act of 1970 and the Bail Reform Act of 1984). A deeper look into the justifications used for these laws provides even more confirmation that the difficulty of prediction requires better detention language than that provided in either the D.C. or federal detention "models." Indeed, the federal system is becoming widely perceived as a system that leads to the "wrong" people in jail, which, in turn, should lead to fixing the abuse causing the need for reform, which is primarily due to a poorly worded bail statute. *See also* CLEBP, *Memo: Information to Help With State Attempts to Change Constitutional and Statutory Right to Bail (Release) and "No Bail" (Preventive Detention) Provisions (appendix),* found at http://www.clebp.org/images/Memo_on_State_Constitutional_Release_and_Detention.pdf.

somewhat rare situations.[323] California is on the cusp of accomplishing it, albeit through a series of significant court opinions building one upon another.

Other states have not accomplished (or sometimes not even attempted) true, historic bail reform. Did Colorado accomplish bail reform (as was reported in the media and in many research papers)? No. Did New York? No. Ohio? No. Wisconsin? No. Alabama? Texas? No. These latter states, and others like them, may have succeeded in enacting certain meaningful pretrial improvements that the media and academics have *called* "bail reform" (depending on how that phrase is defined and the adequacy of the standard used to gauge them), but until they completely eliminate money's ability to detain and replace it with intentional release and detention, bail reform eludes them.[324]

Why Money Bail and Not Some Other Pretrial Abuse?

Comparing true, historic bail reform to some other known pretrial improvement might also be helpful to understanding the difference as well as the inevitability of switching systems due to secured money bond amounts. For example, having defense attorneys at first appearance is a pretrial improvement – and a big one – by any objective standard. Moreover, the states have widely varied over many decades as to whether they have adopted the practice, even after seeing empirical research showing its effectiveness across many measures, including numbers of persons released.[325] Nevertheless, the states never rose up in unison and cried for reform by making sure those attorneys were always present – that is, the lack of

[323] New Mexico has had disputes over certain aspects of the intentional process ever since it was created, likely as a result of deficiencies in collaboration, education, and implementation which were probably inevitable from a top-down replacement process with its genesis found in a supreme court opinion. Nevertheless, because the courts largely dictate bail practices in New Mexico through court rules and opinions, those courts have done well at filling in certain gaps created during the initial process of change.

[324] Moreover, some counties, municipalities, and even single courts within a system have either accomplished or at least aspired to accomplish bail reform, despite having current state laws that hinder the efforts in various ways. Once a state proposes, attempts to accomplish, or even accomplishes true, historic bail reform, we can then assess those intentional systems with more nuance by comparing the various elements necessary for crafting an intentional detention provision, such as the width of the detention eligibility net or the finding of risk within the net. We discuss these elements, *infra.*

[325] *See* Douglas Colbert, Raymond Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail,* 23 Cardozo L. Rev, 1719 (2002).

defense counsel at bail never resulted in true, historic bail reform in a systemic sense. Despite being crucially important, it was always a band aid, and I believe this is due to a few reasons.

First, having or not having defense counsel at bail settings did not make it absolutely clear that we had the "wrong" people both in and out of jail – only the future pretrial research could do that. Like adopting the practice of release on recognizance in the 1960s, the improvement only hinted that perhaps certain people could be set free who would normally be detained. It did nothing to show that the judges' ultimate judgments of who should be in and out of jail might be completely out of sync with pretrial law and research. Second, having defense counsel at bail in certain states did not eliminate the use of secured financial conditions or close the excessive bail loophole in those states, and so there remained generally as much money-based detention in states with defense counsel at first appearance as was found in states with no defense counsel (indeed, no state ever considered a moneyless system due only to defense counsel presence). Finally, we could envision a time in which defense counsel would be present in every courtroom in America, and yet even that thought experiment did not make it clear that this new improvement would absolutely fix the abuse affecting the release/detain decision. Defense counsel at first appearance was important, and implementing the practice meant adding some much-needed fairness to a lopsided system, but it neither highlighted nor sought a meaningful solution to the main abuse.

Rather, only after the pretrial research began to show the wrong people were both in and out of jail did it become clear to the states that the primary abuse was not the sporadic use of defense counsel at first appearance. Instead, secured financial conditions were the abuse, with a sort-of double whammy of research ultimately showing not only that the use of money led to unnecessary detention and unwise release, but also that the money simply did not work to achieve the government's compelling purposes, and, indeed, typically resulted in the *opposite* of those purposes. Put another way, America was used to seeing release orders leading to detention due to secured financial conditions – the only pre-condition

to actual release – and they were given a legal loophole through which these orders were justified. But the social science research ultimately showed that this system caused great harm to society – both short and long-term – and the legal research showed the loophole to be a costly and flawed fiction. Eventually, we reached a tipping point in the states highlighting not only the abuse and its systemic nature, but also its likely replacement, which is intentional release and detention.

Complexities in the American system also show why it has taken so long to remedy this problem beyond what was done in the federal and D.C. systems. For example, bail reform in federal system covering all 50 states could be done through a single move by Congress. During that period of time, though, individual American states were allowed to pick and choose various pretrial improvements from history while avoiding any discussion of the real issue. Specifically, even after the federal government clearly recognized the true "fix" to bail involved moving to intentional release and detention, the states chose mostly to merely layer on additional means for on-purpose detention for public safety, but with no limits on using secured financial conditions. This is especially curious, and from twenty years of studying bail, I can only surmise that either: (1) the foresight of persons in the federal system was simply better than the foresight of persons in the states; or (2) those pushing to keep the status quo had an especially large influence on state lawmakers. Yes, the need for bail reform was masked in both the federal and state systems by a number of legal and historical elements, but somehow those crafting the federal "fix" saw the inevitable future with greater clarity.[326]

The fundamental point is that while true, historic bail reform in this era is also technically a pretrial improvement, it is categorically different than even the biggest of other pretrial improvements, and is the reason why every state is currently looking to change. It is the one pretrial improvement that has been continually confirmed by the pretrial research, and it is the one pretrial improvement that will haunt the states until it is finally addressed. Moreover, it is

[326] *See* notes 524 and 598, *infra* (showing federal recognition of both the problem and solution in 1970).

a pretrial improvement that demands completion – partial and piecemeal measures will only lead to continually revisiting the issue until a complete switch is made.

I re-emphasize this issue because the literature shows not only confusion about "bail reform" versus "pretrial improvements" and "pretrial justice" (*see* discussion, *infra*), but also that the states are currently actively involved – albeit often unknowingly – in making changes that reflect notions of intentionality without the necessary guidance for crafting such provisions and without awareness of the inevitable ramifications of their changes. In sum, once a state begins to add intentionality to its process, it is the nature of this generation of bail reform and its complexities that will cause certain dominoes to fall, forcing the states to ultimately eliminate money that detains and to replace it with some system of intentional detention. The sooner the states recognize what true, historic bail reform is and to see it as a thing they must do in order to stop the current abuses (as well as the increasing pressure to change), the sooner they can learn how to properly do it.

Once a state accomplishes (or proposes or attempts to accomplish) true, historic bail reform, we can then assess how well it was done because it is crucial, but not always a given, that the "reform" be objectively better than that which it replaces. Indeed, simply by poor wording, a state could theoretically create a moneyless, intentional release and detention system that, in fact, detains at much higher levels (and, therefore, with enormous numbers of false positives) than the previous, money-based system, thus completely negating any other so-called "pretrial improvements."[327] Accordingly, debates over the elements of an intentional release and detention provision (and not how "high" or "low" a money condition should have been or whether money should be allowed to detain in some cases versus others) are the true debates. Today, we know how to craft these intentional provisions so that they align with the law and research as well as

[327] For example, an intentional detention provision making it far too easy to detain can easily negate the need for defense counsel at first appearance as the law might leave little room for successful arguments for release.

with any particular jurisdiction's goals, and thus we know how to assess them after they are created or even just proposed.

The Resurgence of Historians Using Primary Sources

Despite some of the unfortunate misunderstandings of history articulated above, I am encouraged to see actual historians publishing papers based on research into primary, rather than secondary sources at bail, so as to confirm certain fundamental historical points. In one such study from 2024, researchers looking at bail practices in Philadelphia between 1790 and 1810 confirmed that: (1) early articulations of bail in America were designed (at least in theory) to guarantee release of "bailable" persons due to important notions of American liberty; (2) there were abuses leading to the detention of "bailable" persons even then (although the use of so-called peace bonds for danger and other practices likely confounded the exact numbers for those detained for appearance); and (3) the bail system was one of unsecured pledges based on "reputational capital," rather than financial capital.[328] Relatedly, we have seen authors focus on histories for specific jurisdictions, such as was done for bail in New Orleans, which, unlike the national treatments, drew a line connecting money bail to slavery.[329]

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[328] *See Founding, supra* note 289; *Second Founding, supra* note 291 (adding nuance to known abuses while describing numerous other abuses, such as "straw bail"). The abuses at those times (many of which led to the detention of "bailable" defendants) still correspond to earlier accounts in England noting the persistent existence of a relatively small percentage of exceptions to the general rule of bail equaling release throughout history as well as the notion that the lack of personal sureties in America and the resulting detention gradually reached a tipping point – with detention likely increasing between 1790-1810, but becoming a serious problem later in the 1800s – led to the use of secured bond amounts, and, soon after, commercial sureties. The discussions of peace bonds (bonds set for possible future danger) should remind the reader that, throughout history, the overall system of bail has always had some tangential process (even if it would be considered unlawful) for dealing with public safety, such as immediate execution centuries ago or, more recently, the misuse of money bond amounts. Thus, it would be improper to say that public safety was "never" a part of bail until 1966 or 1970; indeed, public safety was likely a part of bail since at least the Norman Invasion. The Mayson/Funk document includes many more important findings based on primary sources, and it will likely be mined for other key facts to rebut the inevitable misuse of history we have seen previously.

[329] *See* Flozell Daniels, Benjamin Weber & Jon Wool, *From Bondage to Bail Bonds" Putting a Price on Freedom in New Orleans* (Vera, 2018), found at https://s3.amazonaws.com/gnocdc/reports/Daniels_bondage_to_bail_bonds.pdf.

A Warning About "Alternative" Histories

Due to the flow of billions of dollars from communities to a variety of businesses in the American bail system, it was likely inevitable that those for-profit businesses (or those sympathetic to those businesses) would create or at least fund "alternative" histories of bail, which downplay many of the negative aspects of the secured-money-bail system and the industry profiting from it. At least one of these documents goes so far as to claim that today's bail reform movement is an attempt to "erase" bail from the constitution, which is a patently false historical statement, but which is also indicative of the slanted nature of the document itself. By far, the worst attempts to alter the true history of bail – found in documents titled "histories" as well as court briefs arguing against reform – are those that use wordplay to hint that secured financial conditions at bail have something of a long and respectful history in both England and America. In fact, secured money bond amounts really only began to emerge in the mid to late-1800s, ballooned in the 1900s, and are the primary abuse leading to reform today. The fundamental point is that, like any topic with targeted opposition, people seeking to learn the true history of bail should remember that those who seek to maintain the status quo or who oppose pretrial justice are also producing alternative histories of bail. Thus, the consumer of historical research must read all histories with discernment.

The Legal Foundations and Principles of Bail

> *"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."*
>
> *United States v. Salerno (1987)*

It is important to start this section with a reminder about how the law and the research fit together to help us solve issues at the pretrial phase, just as the law and history fit together to make sense of certain temporal events. In the late 20th Century and early 21st Century, the notion of using so-called "evidence-based

practices" in criminal justice was inspired by its use in the field of medicine, which was used to gauge both safe and effective medical treatments.[330] In *Fundamentals of Bail,* I noted that the phrase "evidence-based practices" was, in fact, common to many professional fields. I illustrated its technical nature by showing a "strength of evidence" pyramid (going from a low level consisting of case studies to the highest level consisting of meta-analytic studies) from the Substance Abuse and Mental Health Services Administration ("SAMHSA"). The premises behind such a pyramid were used, for example, in both SAMHSA's Sequential Intercept Model as well as NIC's Evidence-Based Decision Making Initiative by applying research at each "intercept" or "decision point" – that is, a point of potential diversion or other intervention providing an opportunity to reduce harm. Because the strength of evidence often relies on the amount of evidence, in bail we often use the term "research-based" or "research-informed," which merely reflects the fact that while there may be some research to support or contradict any particular practice (and possibly enough to predict trends), the pretrial research as a whole continues to lag behind other fields (including post-conviction research) despite a rapid increase in studies over the past twenty years. We also occasionally say something is a "best practice," a much broader and informal term to describe a practice that can be based on a combination of research, law, expert consensus, history, and even common sense.

But this is only half of what we need to know when it comes to the law in pretrial justice. Thus, as mentioned previously, the field has relied heavily on Dr. VanNostrand's term, "legal and evidence-based practices"[331] to guide it toward achieving pretrial goals, recognizing the interplay between the research and the law. Specifically, if the law says you cannot do a particular practice, then it does not matter how much research backs that practice up. Likewise, if the research says that a practice does not work, then doing that practice is irrational and thus

[330] *See* JRSA/BJA/NCJA, *An Introduction to Evidence-Based Practices* (2014), found at https://criminaljustice.msu.edu/_assets/pdfs/mjsc/MJSC-IEBP-April2014.pdf.
[331] *LEBP, supra* note 259.

the law, which prohibits arbitrary or irrational acts, would declare it to be unlawful.[332]

Dr. VanNostrand listed six fundamental legal principles in 2007: (1) the presumption of innocence; (2) the right to counsel; (3) the right against self-incrimination; (4) the right to due process of law; (5) the right to equal protection under the law; and (6) the right to bail that is not excessive. When I wrote *Fundamentals of Bail,* I repeated those six with slightly greater detail, but added a few more as well as certain notions that, while not necessarily considered clear, overarching legal “claims," are nonetheless important concepts for the pretrial phase, such as the notion that bail must be individualized (tied to excessive bail), the need for the government to articulate proper purposes for restricting liberty (which goes to all constitutional ends/means balancing tests), and the notion never to use money to achieve public safety.

Overall, I note a significant increase in all constitutional or other legal claims aimed at rectifying various bad bail practices over the last ten years – from suits opposing detention due to money bail, to challenges to electronic monitoring, to opposing the addition in the law of rebuttable presumptions toward detention, to suing particular judges for certain abusive bail practices, and even to less-highlighted topics such as the application of the Fourth Amendment or the Excessive Fines Clause to pretrial commitment as well as the Confrontation Clause to defendant statements pretrial. This is coupled with an increase in associated commentary from bail legal scholars, such that it is much harder today to encapsulate the entirety of the legal research or to anticipate major trends, much

[332] The law and the research primarily form the basis of national standards on release and detention as well as court opinions, and can even serve as personal, objective standards from which to judge pretrial improvements. The phrase legal and evidence-based practices is not only a commitment to follow the law and the research – it is also a commitment to accept the conclusions pointing to inevitable change, whether we like them or not. Today, the law continues to point to using less or no money at bail, and yet we see willful ignorance of even clear-cut legal developments mandating the change. Likewise, research often points to the ineffectiveness or even harms of certain conditions of release, such as money, but we still see an overall reluctance to abandon them.

less to provide the sort of detail necessary to work through some of the important legal issues themselves.[333]

While there are good papers providing ambitious studies of a variety of pretrial legal topics,[334] jurisdictions should know two things: (1) they will likely never fully understand all of the details of any particular legal theory until they are forced to actually undergo litigation; and (2) the litigators to whom I have spoken have committed themselves to a continuation of suing state actors over bail-setting practices – if not solely in federal court, then by teaming up with various local defenders in state court. Until then, the law at bail is still quite like the wild west, with many open questions, and with a variety of decided as well as pending cases in numerous states and federal circuits awaiting decision. The following discussion of the legal foundations focuses broadly on things I believe the pretrial field should know based on what has happened mostly between the years 2014 and today.[335]

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[333] There exist compendiums that attempt to collect the various pretrial justice court opinions, such as that found in the Michigan Law School's Civil Rights Litigation Clearinghouse, found at https://clearinghouse.net/, and they tend to show growing complexity due to the numerous and varying rulings, appeals, and settlements for each case.

[334] *See, e.g., Funk, supra* note 310, at 1106 (explaining various legal theories in the so-called money-bail cases); Jenny Carrol, *The Due Process of Bail,* 55 Wake Forest L. Rev. (2020) (explaining the error of courts not to consider substantive due process in money-bail cases, and the curious tendency to remedy equal protection claims with a procedural due process remedy); *See also,* Shima Baughman, *Taming Dangerousness,* 112 Geo. L. J. 215 (2023); Cong. Res. Service, *U.S. Constitutional Limits on State Money-Bail Practices for Criminal Defendants* (2019). I have seen case compendiums on even more obscure topics, and I once put together a memo annotating nearly thirty cases dealing solely with state supreme court opinions explaining those states' "sufficient sureties" clauses in the constitutional right to bail provisions. Due to the rapid, changing nature of litigation, many of these resources become out-of-date quickly after publication.

[335] In NIC's 2017 *Framework* paper, *supra* note 108, recommendations for the "legal framework" included providing for presumption of least-restrictive nonfinancial release, restrictions or prohibition on the use of secured financial conditions of release, and preventive detention. The current paper, though, aims mostly to teach how to create a moneyless (meaning money cannot keep someone in jail), intentional release and detention provision based on current trends in the law, which would eliminate the need for a variety of "best practice" legal notions supported by a literature that mostly assumes the continuation of money-based detention. For example, with intentional release and detention, you likely do not need to include a presumption for non-financial release. Once the hard work of intentional detention is done, the rest of the statute or court rule can consist of a number of best-practice provisions designed to provide supports for persons released pretrial. A combination of education on legal principles, national standards, so-called "hypothetical" models of release and detention, and pretrial research concerning conditions and risk can all help jurisdictions to fill out the rest of a much-improved legal framework. Nevertheless, if I had to choose a single legal foundation that should be deemed acutely critical, it would be the legal principles involved in crafting (or opposing) moneyless, intentional release and detention provisions to replace money-based detention by understanding what it means for a detention provision to be "carefully limited." The same legal principles providing the legal boundaries for crafting sch a provision can and will be used to potentially

The Presumption of Innocence

This principle continues to cause a great deal of confusion.[336] Accordingly, I merely repeat what was said in *Fundamentals of Bail,* which is that, unlike legal principles such as due process and equal protection, an actual legal claim will likely not be successful if based solely on the "presumption of innocence." Instead, the presumption as applied to bail is better understood as a strong reason for why we have the right to bail to begin with. It is perfectly alright to use the phrase when discussing bail – after all, the United States Supreme Court itself used it in discussing the right to bail in *Stack v. Boyle*[337] – but it is best used as one reason of many for why Americans enjoy a "right to release" and a "right to freedom before conviction" to begin with.[338]

The Right to Counsel and the Right Against Self-Incrimination

These principles are exceedingly important, and must be advanced, but I have already discussed them in the section on public defense as an aspect of collaboration. Of course, there are other issues concerning self-incrimination, such as how to treat defendant information given (or not given) to a pretrial services

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have that same provision declared unlawful. Indeed, because so many states are crafting detention provisions without learning the legal boundaries, I expect many future suits claiming those provisions to be unlawful. *See Model Bail Laws, supra* note 23.

[336] The confusion centers on language from the opinion in *Bell v. Wolfish,* 441 U.S. 520 (1979), which, unsurprisingly, said that the presumption of innocence was not a wining claim in a conditions of confinement case, albeit using confusing language that induces a sort of tunnel vision against using the phrase at bail, thus ignoring the opinions in both *Stack* and *Salerno.* Moreover, authors attempting to use Justice Marshall's dissent in *United States v. Salerno* (based on the presumption of innocence) against widening "no bail" in the same way that one might use due process or equal protection seem strained, and those authors would be better served by using cases such as *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (2014) to argue against widening detention provisions short of denying the right to bail altogether.

[337] *See* 342 U.S. 1, 3 (1951) ("Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

[338] *Id.* at 4. To clear up the overall confusion, I have written*, The Presumption of Innocence and Bail* (CLEBP, 2017)*,* found at http://clebp.org/images/10-30-2017_presumption_of_innocence_and_bail.pdf.

agency, but these can be best handled by providing defense counsel as soon as possible and through adherence to the national pretrial standards.[339]

The Right to Bail That is Not Excessive

There is little to discuss in the way of changes to excessive bail jurisprudence. That jurisprudence – which allows detention with money so long as a judge makes no express record to detain and which merely compares arbitrary numbers to other arbitrary numbers in the substantive determination – is how we came to have out-of-control pretrial detention in America for so very long.[340] Indeed, one can find prior legal annotations discussing "excessiveness of bail in state criminal cases—amounts over $500,000," with literally no questioning of how the numerical line was drawn – that is, why, in particular, it looked at amounts over $500,000 and not amounts over $465,359, and why it used a round number to begin with.[341]

Moreover, excessive bail has a test that makes the claim far too amorphous, with even the Supreme Court using the word "excessive" in part of the test itself, that is, by saying that conditions are excessive if they are "excessive in light of the perceived evil."[342] The only seemingly salvageable part of excessive bail jurisprudence is its tie to using "least restrictive conditions," a reminder that any release condition (including monetary and non-monetary conditions) may be excessive and that setting conditions "just to make sure" that some outcome is

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[339] *See, e.g., NAPSA Standards, supra* note 118, at 86-87.

[340] As I have noted previously, this is not to say that appellate courts let any bail amount stand with no record. *See* note 268, *supra.* Nevertheless, the courts' avoidance of also questioning the core issue of using arbitrary, round numbers in the bail process (even when those courts believe the number to be too "high") is mostly inscrutable.

[341] Fern Kletter, *Excessiveness of Bail in State Criminal Cases—Amounts Over $500,000*, 7 A.L.R. 6th 487 (Originally published in 2005). The use of round numbers alone prompted bail researcher Arthur Beeley to call using standard amounts for specific offenses arbitrary as early as 1927. *See Beeley, supra* note 84, at 31-32. Further illustrating the arbitrary nature of the numbers themselves, jurisdictions have made both blanket increases and decreases to their monetary bail schedules. *See Fewer to Get Out of Jail Cheap,* Colorado Springs Gazette (May 27, 2007) (reporting that the 4th Judicial District was raising the bond amounts for all crimes so that they would be more aligned with those in other judicial districts throughout the state); *see also Supreme Court Lowers Amount Iowans Need to Get Out of Jail*, Des Moines Register (August 16, 2007) (reporting blanket bond reductions for non-violent felonies and misdemeanors with no explanation for the reductions); *see also Lowered Bail Bonds Make System More Equitable*, Quad City Times (Aug. 31, 2007).

[342] *United States v. Salerno,* 481 U.S. 739, 754 (1987). I proposed a better test (akin to the balancing tests for due process and equal protection) in *Model Bail Laws, supra* note 23, at 159-61. Most state courts end up defining excessiveness by using the word "unreasonable."

reached is (or at least should be) excessive per se. Nevertheless, a typical excessive bail case involves a judge looking at a charge and reviewing all of the various past bail amounts set for that same charge so as to determine whether the current amount is "reasonable." There is a good reason for why advocates for the status quo have consistently argued that courts should decide all bail claims (whether pleaded as due process, equal protection, or any other legal theory) as excessive bail claims: under traditional excessive bail analysis, the person accused of a crime will usually stay in jail no matter how high the dollar amount, and the overall arbitrariness and irrationality of using money to begin with will typically go unquestioned.

However, meaningful excessive bail jurisprudence is making a comeback in the sense that states are being forced into making more intentional release and detention decisions, thus triggering an infrequently used aspect of excessive bail analysis. To the extent that a judge decides to make a decision to intentionally detain an accused person, then setting money to do so is typically reversed under excessive bail analysis, which requires – at least – the government to articulate appropriate purposes for limiting pretrial detention. In sum, *setting bail to intentionally detain* is not an appropriate purpose (something I discuss in more detail in *Appendix One),* and any actions tending to show intent to detain followed by the setting of an unaffordable money bond will likely demonstrate that the judge used money to unlawfully detain on purpose.

An important case to watch concerning this issue is currently in the California Supreme Court. In that case, *In re Kowalczyk,* a judge in the California Court of Appeal ruled that California Constitution Sections 12 and 28 can be reconciled and thus used together to determine how to do intentional detention (that is, "no bail"), but then – apparently sua sponte – ruled that despite the constitutional right to bail and a clear eligibility net for detention, a judge may nonetheless use money to avoid the constitutional verbiage altogether.[343] Whenever a state argues that it can create a new detention eligibility net by statute, court rule, or judicial fiat, and literally ignore a more limited net found in the state constitution

[343] *See In re Kowalczyk,* 85 Cal. App. 5th 667 (2022) (review granted, 525 P.3d 263 (2023)).

– as it does in the appellate ruling of *Kowalczyk* – it will likely be excessive bail jurisprudence that will set things straight.

More important than excessive bail, however, is the fact that virtually every state also has some separate "right to bail" jurisprudence governing the way a state can alter bail practices in the future. Right to bail jurisprudence requires deep research, but it leads to many important conclusions. For example, it is the Right to Bail Clause that courts typically use to mandate judges to set a conditional order of release for every "bailable" person. It is the Right to Bail Clause that courts use when defining the word "bail" as release. Finally, it is the Right to Bail Clause that leads to opinions providing ample language and citations showing the importance of the right, which, in turn, guides lawmakers away from ignoring constitutional or statutory right to bail provisions while helping them to craft the language necessary to bring those provisions up to date.[344]

In sum, when discussing a right to bail that is not excessive, it is the right to bail and the examination of proper purposes that are seriously outpacing traditional excessive bail jurisprudence, which, through its long, unfortunate history, has given us the so-called "excessive bail loophole" leading to significant numbers of bailable persons being detained with money. Thus, it is crucial that litigators (and others analyzing the law) consider state right to bail jurisprudence even when suing in federal court with due process and equal protection claims. The principles are connected, and should not be split for the sake of mere simplicity. Federal judges should be told about the hard boundaries found in state right to bail provisions, and state judges should be warned that bail practices violating due process and equal protection will likely directly lead to the need to change those boundaries.

[344] In one state, recommendations included the option of "eliminating the right to bail" altogether, thereby leaving in place only the constitutional Excessive Bail Clause. While this is certainly an option (as is the option to detain literally no one before trial), eliminating the right to bail would likely contradict over 100 years of state jurisprudence articulating the importance of the right, and thus I strongly urge against it its elimination in any particular state. Only one state has ever eliminated its constitutional right to bail, and it was done immediately after the Civil War, thus tainting whatever noble purposes might be used for justification. Theoretically, a state could construct an intentional detention provision that is so wide or so poorly worded as to effectively eliminate a constitutional right to bail, which is why I recommend certain basic guardrails remain in amended constitutions.

Defining the "Right to Bail"

Just as deep research allowed me to craft a national definition of "bail" based on legal and historical data, the precise meaning of the "right to bail" in any particular jurisdiction – and whether the word "bail" itself deviates from the national definition – can be found through deep research tracing the history of any particular state's usage. This is often done by methodically researching "bail" and the "right to bail" through court cases, legislative histories, and constitutional debates often going back to the early 1800s. Having done this sort of deep research for approximately half of the American states, I feel confident that the researcher for any particular state will likely conclude, as I have on many occasions, that bail is a process of conditional release tied to strong articulations of American liberty. Moreover, the researcher will likely also conclude that the right to bail: (1) started off (at least in theory) as a right to actual release and freedom; indeed, as late as 1951 the U.S. Supreme Court itself equated the "right to bail" with "the right to release before trial" and "the right to freedom before conviction;" (2) was upended through the law proclaiming that persons do not have a constitutional right to affordable bail, such that the right became only a right to have one's bail set; but (3) still retains at least one guardrail in the line of cases holding that *intentional* detention of a "bailable" defendant using money (or, theoretically, any other release condition) is unlawful, so that the right to bail can be correctly defined also as the right not to be intentionally detained outside of some existing detention eligibility net, be it found in a constitution, a statute, or a court rule. Even if a right to bail is not expressly articulated (or merely muddied), all states have some right to bail, simply because the Supreme Court has said that pretrial liberty is our American "norm" tied to important notions such as the presumption of innocence.

This deep jurisdictional legal research – in addition to risk research to guide considerations of intentional line drawing – is a crucial first step in any effort to replace money-based detention with intentional detention; indeed, the research is the only way to know whether certain important changes, such as the particular wording of a constitutional right to bail provision, must be changed at all. The fundamental point, however, is that by disallowing money-based detention, and depending on how one crafts the alternative, the current wave of bail reform likely means moving forward by emulating a time when the right to bail in the first instance (based solely on prediction and not as the result of pretrial failure) meant an actual right to release before trial.

Sources: *See* Uniform Law Commission, *The Uniform Pretrial Release and Detention Act* (2020) (calling on states to do research to determine the scope of their constitutional right to bail) and *Determining the Meaning of a State's Constitutional Right to Bail Clause for Purposes of the*

Uniform Pretrial release and Detention Act (2021) (articulating what that research is likely to find), found at http://www.clebp.org/uniformlawrighttobail.html. Kellen Funk & Sandra Mayson, *Bail at the Founding,* 137 Harv. L. Rev. 1816 (2024). *Stack v. Boyle,* 342 U.S. 1, 4 (1951). My glossary, which is old enough to invite updating, but which defines both "bail" and the "right to bail" is called *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release and Detention Decision* (PJI 2015), found at https://www.courts.wa.gov/subsite/mjc/docs/GlossaryofTerms.pdf.

Due Process

While virtually every money bail claim in the past was treated as an excessive bail claim no matter where it was brought or how it was worded, those claims have given way to lawsuits accepted by the courts based clearly on due process and equal protection, both of which deal with fairness of the overall system rather than just a comparison of arbitrary numbers for their supposed "reasonableness." In short, a law or practice that limits the liberty of all persons (i.e., it is unfair to everyone) raises a due process question. A law or practice that treats a person or class of persons differently than others (i.e., it is unfair to this person, but not that person), raises an equal protection question.[345] Moreover, while an excessive bail claim might turn on a judge's intention to detain (with courts rarely finding a sum to be excessive so long as the judge did not expressly articulate an intent to detain, except in the most egregious cases), these new lawsuits say that money-based detention is unfair whether or not the judge intended to detain the accused, thus avoiding the protection afforded by the "excessive bail loophole." The bulk of these cases are decided under equal protection analysis (or a combination of equal protection and due process), but this section discusses

[345] The so-called "money-bail" cases typically turn on the court using a combination of due process and equal protection to rule while often rejecting opponents' claims that the cases are better decided under the Eighth Amendment, the Fourth Amendment, or the Sixth Amendment. Several elements of the cases turn on the pleadings and specific judicial readings of the precedent at various stages of analysis, such as finding an "absolute deprivation of pretrial liberty" or determining which particular level of scrutiny a court should apply. Moreover, the cases are often made more complex through the variety of procedural hurdles, the appropriate remedy, and, occasionally, whether a jurisdiction has already amended its bail law to anticipate a negative ruling. And, of course, there is often reference to *United States v. Salerno,* the United States Supreme Court opinion rejecting a facial challenge against the Bail Reform Act of 1984. To date, the most informative resource on the various claims is found in *Funk, supra* note 310.

substantive due process and procedural due process, albeit with a short excursus to discuss due process fair notice, or vagueness.

Quoting the United States Supreme Court, in 2014 I wrote:

> So called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.' When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process.[346]

As further explained by Professor Kellen Funk,

> Conventionally, substantive due process doctrine recognizes that certain rights are so fundamental to the history and traditions of the United States that the Constitution protects against their deprivation unless rigorous requirements are first satisfied. Under this 'strict scrutiny,' the Fourteenth Amendment [with application to the states] forbids the government to infringe . . . fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.[347]
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> * * *
>
> The unartfully named 'procedural due process' analysis follows a different track from substantive due process. Instead of focusing on whether a right is fundamental and therefore requires strict scrutiny protection, courts understand the Due Process Clause to protect

[346] *Fundamentals of Bail, supra* note 20, at 69 (quoting *United States v. Salerno,* 481 U.S. 739, 746 (internal citations omitted)).

[347] *Funk, supra note* 310, at 1106. In 1999, Professor Chemerinsky noted that "[s]ubstantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation." Erwin Chemerinsky, *Substantive Due Process,* 15 Touro Law Rev. 1501 (1999).

ordinary liberty and property interests by balancing the interests of the individual against those of the state. The leading case of *Mathews v. Eldridge* requires courts to consider three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards; and (3) the Government's interest, including its fiscal and administrative efficiency interests.[348]

The Supreme Court has not given precise direction on which procedures may satisfy this test with respect to pretrial defendants.

* * *

The closest the Court has come to enunciating a list of pretrial process protections was in *Salerno*, but as recounted above, the procedures reviewed in *Salerno* were mandated by the federal bail statute itself; the Court did not consider whether any or all of the procedures were constitutionally required.[349]

Substantive Due Process

Between substantive and procedural due process, it seems that substantive due process in the so-called money bail cases is simply perplexing to the courts,[350] which tend to show an obvious desire to solve most bail claims by avoiding any

[348] *Id.* at 1108.

[349] *Id.* at 1108-09 (internal citations and quotations omitted). Funk emphasizes that "what is *not* required under procedural due process is a substantive finding that no alternative to detention is available to satisfy the state's pretrial interests. If only procedural due process is in view, a jurisdiction could in theory continue to jail three-quarters of its pretrial population on the basis of wealth, so long as timely hearing and nominal consideration of evidence is provided." *Id.* at 1109.

[350] Some judges have opined that *United States v. Salerno* only guides us on procedural and not substantive due process claims. According to one scholar, though, *"Salerno* came right up to the precipice of engaging in a substantive due process analysis without explicitly invoking those terms." *Funk, supra* note 310, at 1106. Moreover, *Salerno's* overarching analysis, while using procedural requirements to make its case, focused on the detention provision being "carefully limited" and "narrowly tailored," which goes to its fairness in its structure as applied to all persons. Thus, *Funk* says, even with money-based detention, "[a] strong reading of *Salerno* thus means that the substantive due process analysis of a money-bail system ends up in much the same place as the equal protection analysis." *Id.* at 1107.

clear-cut substantive due process analysis in favor of providing a procedural due process remedy to an equal protection violation.[351] This may be due to the particulars of the claims themselves, which, while using equal protection or substantive due process as bedrocks, nonetheless typically ask a federal court to force the state court to treat money-based detention the same way it treats intentional detention without money – such as it would treat it under the state's "no bail" provision – thus essentially asking for a procedural remedy. The fact is that if liberty is a fundamental interest, and if money is not "necessary" to achieve the government's interests (the word "necessary" being used under strict or heightened scrutiny of the process), or, indeed, if pretrial liberty is *not* considered to be a fundamental interest but money is not even "rationally related" to either court appearance or public safety (as the research is gradually revealing), then no additional process can make a money bond more lawful. Given the trend in research showing that there are far better alternatives to money bail and that, indeed, money bail seems not even to be a motivator of defendant conduct, I predict that, with experience, more courts will decide these cases with far more clarity than we have received so far.

Moreover, it seems clear that when federal or state courts analyze attempts to change intentional detention provisions – akin to the Bail Reform Act of 1984, which was reviewed in *United States v. Salerno* – versus analyzing attacks on money-based detention, they will be forced to look at whether those provisions are "carefully limited" (or "narrowly tailored") which will then take those courts down a path that is likely only semantically different from substantive due process analysis.[352] The fact is that no one should disagree that *Salerno* analyzed the Bail Reform Act of 1984 on substantive due process grounds; after all, in addition to looking at bail as punishment, the central issue – whether one can detain on purpose for reasons of public safety – was itself a substantive claim affecting all persons (indeed, in a facial challenge), albeit intertwined with some

[351] This is curious as the remedy for money bail that violates either substantive due process or equal protection should be to stop using money bail that detains altogether, and not trying to add a better process for something that simply does not hold up to one or another constitutional balancing test. *See Funk, supra* note 310, at 1110 ("Most importantly, since the Fifth Circuit affirmed the district court's equal protection holding in the same opinion, a substantive rather than purely procedural remedy was clearly appropriate.").

[352] *See, e.g., Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 779 (2014).

procedural due process analysis going to the "narrow tailoring" of the infringement.[353]

Finally, even when federal courts only engage in procedural due process analysis at bail,[354] changes to a typical bail setting are significant and tend to reveal an unintentional glitch that has seemingly been a part of bail litigation since roughly 2015. As mentioned above, in those early bail cases, the typical claim to a federal judge was based on the premise that a money-based detention in state court should be treated as one would treat intentional detention of the sort used in the federal system (or the relevant, intentional "no bail" provision in the state). Federal judges understood this claim, but they apparently did not completely understand state law, especially on two issues: (1) state law on using money to detain on purpose; and (2) state law concerning the right to bail, but specifically "no bail" detention eligibility nets or "exceptions" to bail.

Accordingly, even when federal judges have required more procedural due process for money-based detention, those judges were seemingly unaware that state law might not allow what is, essentially, an intentional detention hearing (with findings supporting detention) leading to an order of *release*, albeit with an intentionally unaffordable money bond made necessary due to the defendant being a "bailable" defendant under state law.[355] In sum, when a federal judge orders that due process procedures be applied to any bail order that results in detention, that judge should realize that only certain charges are typically even eligible for on-purpose orders of detention in the states. This problem is not as complex when a judge rules, for example, that money bonds resulting in detention violate due process or equal protection and must never be used; in those cases, it seems clear that to detain a person pretrial without money, the state might have to amend its constitutional (or statutory) "no bail" provision to

[353] *See Salerno,* 481 U.S. at 746-48.

[354] I note that while I have often pointed states toward the elements articulated in *Salerno* to provide guidance for detention hearings, courts sometimes use different articulations/standards of procedural due process based on a variety of factors.

[355] *See* discussion on the "excessive bail loophole," at *Appendix One.* Essentially, state law would likely require "setting bail" for a bailable defendant, and federal and state law would likely preclude "setting bail" so as to ensure detention. While the loophole would normally allow a judge to achieve intentional detention by making no record, any procedural due process requirements will likely show at least some intent to either release or detain.

allow for it.[356] But the other problem – that is, having a judge say (or infer) that the state can detain a person with money so long it provides adequate procedural due process while ignoring what the state constitution says about intentional detention – has been experienced not only in federal courts, but even in state courts, in opinions written by state court judges who should know better.[357] The fundamental point is that judges who do either of these things – eliminate money as a detention mechanism or merely place certain procedural due process elements on bail settings that use money – must consider (and certainly must not willfully ignore) the hard boundaries in state right to bail provisions, which carve out clear exceptions to release for "no bail" or intentional detention provisions.

The "Sufficient Sureties Clause"

Virtually all right to bail provisions were initially articulated as a right to bail by "sufficient sureties," and this term also causes great confusion.

First, some people who desire keeping the status quo through money bail will cite to a "sufficient sureties" clause to allow the court some basis for affirming what might normally be deemed "excessive bail." Whenever courts have been asked to settle an argument based on a sufficient sureties clause, however, it is typically an argument over whether or not a type of bond is or is not a surety. Questions about excessiveness through that surety are examined through excessive bail jurisprudence, which is a separate question from, say, whether a "cash only" bond, a "ten percent" bond, or even detention is a "surety." Something can be deemed a surety, and then subsequently be struck for being excessive.

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[356] *See O'Donnell v. Harris County, Memorandum and Opinion Setting Out Findings of Fact and Conclusions of Law* (Civil Action No. H-16-1414, April 28, 2017), at 190 (responding to defendants' arguments against disallowing money-based detention for so-called "risky" defendants by correctly calling the use of money to be an "end run" around the clear constitutional "no bail" requirements).

[357] *See, e.g., In re Humphrey* (A152056) (Cal. Ct. App. 1st) (Jan. 25, 1018), in which a division of the Court of Appeal ruled correctly that money-based detention must include certain processes to make it fairer but nonetheless wrote: "If the court concludes that an amount of bail the defendant is unable to pay is required to ensure his or her future court appearances, it may impose that amount only upon a clear and convincing evidence that no less restrictive alternatives will satisfy that purpose," thus opening the door for intentional detention using money outside of the charges found in the state constitutional "no bail" provision in the California Constitution. That opinion led to statewide judicial training that incorrectly taught that it was proper to allow for intentional, money-based detention outside of the constitutional "no bail" net, which then led to the issue being briefed in the California Supreme Court. *See In re Humphrey*, 11 Cal. 5th 135 (2021). The Supreme Court in *Humphrey* ultimately dodged the issue, but now finds itself having to deal with it squarely in *In re Kowalczyk,* which is pending and found at https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2460117&doc_no=S277910&request_token=NiIwLSEnTkw7WzAtSSI9XEhIUFA0UDxTJCMuIztTMCAgCg%3D%3D.

Second, people occasionally attempt to argue in money-bail claims based on due process and equal protection that whatever liberty interest a court might find in a state constitution or statute can be eroded or eliminated through a sufficient sureties clause.

This argument is also flawed. In sum, the history of bail shows that requiring "sufficiency" was never allowed to stand in the way of actual release, and no court has specifically held otherwise. Moreover, and as mentioned above, for a court to consider sufficiency, it would need to respond to an actual claim about whether something is or is not a surety, and not what happens when that surety does not lead to release. The cases discussing whether certain bond types are "sufficient sureties" under various state clauses, while split on certain issues, provide no basis from which to argue that the intentional or unintentional detention of bailable persons is lawful. Most importantly, though, is that the due process and equal protection claims being brought in federal courts are alleging neither excessiveness nor a violation of the sufficient sureties clause, and those two things are simply irrelevant to the main question of whether a condition of release that leads to detention is "necessary" to achieve compelling government purposes.

In sum, once a plaintiff raises a due process or equal protection claim, courts have mostly rejected the government's response that the claim should be treated as an excessive bail claim. Moreover, even if the government raised a proper sufficient sureties clause counter-claim, it would not be decided under excessive bail jurisprudence, and would still likely be deemed irrelevant to the current case. Finally, to the extent that the government means to advance the notion that a liberty interest is somehow eroded due to a sufficient sureties clause, the courts have never so held, and thus they would likely rely on the history of bail showing that findings of "insufficiency" were never meant to lead to detention.

Sources: *Statement on Sufficient Sureties*, found at http://www.clebp.org/helpchangingbaillaws.html.

Due Process Fair Notice

When it comes to crafting intentional release and detention provisions, a previously unused and rarely discussed (at least in bail) element of due process will likely guide discussions: due process fair notice, or vagueness. When I was first made aware of states using actuarial tools and matrices to recommend detention even outside of a clearly articulated state detention eligibility net, I performed deep research into whether that practice would require state constitutional amendment. In particular, based on the way the tools were being

used, state constitutional language describing a right to bail for all but a few persons facing particular charges (along with some finding of risk within the eligibility net) might require constitutional change to provide for, essentially, a right to release for anyone unless they are deemed "high risk" by a tool. After two years of research, however, I concluded that jurisdictions could not use actuarial tools solely to detain, and I and a small team of experts ultimately crafted a better (that is, better than any current state, federal, or D.C. model) intentional "no bail" template that nonetheless still uses a charge-based detention eligibility net, based primarily on due process fair notice.[358]

I have since become even more confident in the necessity of a charge-based net, relying not only on *Salerno,* in which the Supreme Court noted that limiting detention eligibility to "a specific category of extremely serious offenses" helped to strike the appropriate balance between managing pretrial risk and protecting individual liberty,[359] but also on the states' adherence to charge-based nets through history as well as other scholars or groups calling for the retention of charge-based nets as a legal necessity.[360]

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[358] *See Model Bail Laws, supra* note 23; *Changing Bail Laws, supra* note 56. At the time, people were correctly questioning the role of charge at bail, given that the research showed that charge alone was often a bad proxy for risk. Charge alone, however, just happens to be the best way to determine *eligibility to detain*, albeit with a new articulation for finding risk within that charge-based net without a tool. We note that courts are not always in agreement over whether vagueness finds its roots in substantive versus procedural due process, which may be of little consequence given its robust, independent jurisprudence, which ties it to both "due process" and separation of powers. *See* Kelsey McCowan Heilman, *Why Vague Sentencing Guidelines Violate the Due Process Clause,* 95 Or. Law. Rev. 53 (2016-17) at note 20, found at *https://heinonline.org/HOL/LandingPage?handle=hein.journals/orglr95&div=5&id=&page=*. In his dissent in *Dimaya,* Justice Thomas wrote: "That the vagueness doctrine 'develop[ed] on the federal level concurrently with the growth of the tool of substantive due process' does not seem like a coincidence." *Dimaya,* 584 U.S. at 201. Thus, the issue is intriguing but may not matter.

[359] *Salerno,* 481 U.S. at 750.

[360] *See, e.g.,* National Conference of Commissioners on Uniform State Laws, *Uniform Pretrial Release and Detention Act* (2020), found at https://www.uniformlaws.org/viewdocument/final-act-102?CommunityKey=50f7996c-7919-4662-abb6-c77bcebc688e (calling for states to enumerate a charge-based eligibility net); Civil Rights Corps, *Model Pretrial Release and Detention Act*, found at https://cdn.buttercms.com/1ted5IrSx2ynPT8kitB5m (relying on limited, charge-based detention eligibility); ACLU, *A New Vision for Pretrial Justice in the United States*, found at https://www.aclu.org/report/new-vision-pretrial-justice-united-states (same); *NAPSA Standards, supra* note 118, standard 1.6 and 3.4 (recognizing the need for detention eligibility); Arnold Ventures/CEPP Advancing Pretrial Policy and Research Initiative (recognizing existing state charge-based detention eligibility and using *Salerno* as justification and Illinois as an example) at https://advancingpretrial.org/guide/guide-to-the-pretrial-decision-framework/, *ABA Standards, supra* note 118, (recommending limited, charge-based or charge plus pre-condition based detention eligibility nets for detention based on flight and public safety) 10-5.9.

Moreover, Due Process Fair Notice is foundational to American law, and requires that the laws be written with clarity and specificity so that people can walk the streets knowing how they can stay out of trouble – or, in the case of bail – stay out of jail pretrial. And the best, fairest, and most efficient way to do that is to use a charge-based detention eligibility net, so that people fully understand what behavior can lead to pretrial detention before any more amorphous finding of "risk" might be made.

The notion of relying on due process fair notice for eligibility nets has been bolstered recently by both state[361] and federal court opinions,[362] leading me to urge states to retain limited charge-based detention eligibility as outlined in this paper. Accordingly, moneyless intentional detention, when it is done, must adhere to due process, which includes, among other things, articulating a limited, charge-based detention eligibility net so that it: (1) informs citizens of the types of crimes for which they may potentially be detained pretrial; (2) guards against arbitrary detention; and (3) upholds separation of powers notions by requiring the appropriate branch of government to draw such important lines.[363]

[361] *See, e.g., Scione v. Commonwealth*, 114 N.E. 3d 74, 85 (2019) (holding a portion of the Massachusetts pretrial detention statute unlawful based on vagueness, and writing: "We have held other statutes that fail to give notice of conduct to be avoided and provide unfettered discretion to police or the courts to be unconstitutionally vague under due process principles where the defendant's liberty interest is at stake.").

[362] In *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018), a case in which the Supreme Court struck for vagueness the federal definition of a "violent criminal" for purposes of the Armed Career Criminal Act, the Court emphasized the importance of vagueness as providing fair notice, avoiding arbitrary or discriminatory enforcement, and upholding separation of powers by requiring legislators and not judicial or executive branches to define sanctionable conduct even in non-criminal settings. In his concurrence, Justice Gorsuch expanded on these notions and, calling fair notice historically the "most basic" of due process protections and applicable beyond the substantive criminal law, wrote: "From this division of duties, it comes clear that legislators may not abdicate their responsibilities for setting the standards of the criminal law by leaving to judges the power to decide the various crimes includable in [a] vague phrase. For if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large, this would, to some extent, substitute the judicial for the legislative department of government. Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions. *See Grayned v. City of Rockford*, 408 U. S. 104, 108–109 (1972) ('A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.')" (internal citations and quotations omitted).

[363] *See also* pillar number three, *infra,* discussing several reasons for limiting charge-based nets as well as the rest of the elements necessary for creating an intentional release and detention provision.

In sum, while certain aspects of substantive due process might seem foreign or confusing to those persons who have only analyzed cases in which pretrial detention is caused by money bail, substantive due process analysis of whether a detention provision is "carefully limited" as well as due process fair notice (along with the newer iterations of excessive bail and state right to bail jurisprudence) are significantly more relevant to the task of creating or fighting against the contours of intentional release and detention models, and thus these legal principles should not be ignored. Moreover, we must not forget that, at its most fundamental level, due process guards against arbitrary, unfair, or irrational federal or state action, and there is seemingly nothing more arbitrary and irrational than how jurisdictions use secured financial conditions at bail. It seems entirely reasonable that if money bail does not work to motivate defendants even when *released,* then fundamental fairness (the primary hallmark of due process) would require that money bail not be used at all.

Procedural Due Process

Despite whatever hurdles might accompany a substantive due process or equal protection claim, it seems clear that the courts – at a minimum – will require state courts to provide far more procedural due process to bail settings than that provided over the last 150 years. In sum, money-based detention is simple and fast, and one of the reasons for that is because there is typically no requirement for a meaningful due process hearing preceding the detention. The fact that the states have avoided procedural due process for so long is quite astounding, but likely testament to the overall ignorance of bail as well as the accepted fiction that a person ordered released but held on an unaffordable bond is somehow different than a person held with "no bail," simply because the former always has at least some – albeit historically near zero – chance of release.[364]

[364] Brandon Garrett sets out six models of bail reform, with one – the Procedural Due Process Model – providing important detail on various attempts at inserting traditional procedural due process into bail settings. *See* Brandon Garrett, *Models of Bail Reform,* 74 Fla. L. Rev. 870 (2022). My overall definition of bail reform is more streamlined (for example, it always involves eliminating money's ability to detain), with all states essentially aiming toward the same goal – moneyless, safe, fair, and intentional release and detention, which, historically and legally, consists of a detention eligibility net and a finding within the net to determine actual detention. Procedural due process, in my

Again, my main point on this matter is that applying procedural due process provisions to a bail hearing – no matter what standard is used[365] – is a big step toward showing intentionality at bail, so that when a state court judge goes through a hearing (sometimes even called a "detention hearing"), makes findings to support detention, and then sets an unaffordable bail bond simply because the accused person is "bailable" and thus ineligible for "no bail," appellate courts will likely see the bail setting for what it truly is – a judge setting an unaffordable money bond so as to intentionally detain a bailable person in contravention of the state constitutional or statutory net. As noted previously, this is unlawful under federal law and likely unlawful under clearly articulated state law, and thus can be rectified only by overhauling the state's right to bail laws, found mostly in state constitutions.[366]

Specialized Law Necessary for Crafting Intentional Detention

In *Model Bail Laws* and *Changing Bail Laws,*[367] I crafted a moneyless system, meaning that money (or, frankly, any other release condition) could not keep someone in jail. Thus, my model avoids the sort of legal claims aimed to cure laws allowing people who are ordered released only to remain detained based on wealth. Nevertheless, I also learned that there are important rules or boundaries for crafting intentional detention provisions, and that the rules that guide the creation of intentional detention can be used to also have those same provisions declared unlawful later if they are not crafted with care. Thus, in addition to using

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model, is a given, and is likely to be thrust upon all states' bail practices in any event. Of Garrett's models, the closest to what I believe will inevitably be done in all states is his so-called "categorical model," which involves drawing lines of intentionality for release and detention. In addition to the discussion in this paper, I justify my version of that model, provide template language, and discuss the ways in which various drafting problems can be overcome in *Model Bal Laws, supra* note 23 and *Changing Bail Laws, supra* note 56.

[365] In the past, I have recommended states emulate the procedures found in the Bail Reform Act of 1984, which was reviewed by the Supreme Court in *United States Salerno,* 481 U.S. 739 (1987), even though the *Salerno* Court did not find these proceedings to be constitutionally required.

[366] Professor Funk comments that providing only procedural due process could, in theory, still lead to high detention rates "so long as timely hearings and nominal consideration of evidence is provided." *Funk, supra* note 310, at 1109. Consideration of state law makes this considerably harder to do without amending the statute or constitution determining who is, in fact, "bailable."

[367] *See supra* notes 23, 56.

general notions of excessive bail, equal protection, and due process to guide drafting, I believe there is a "specialized" branch of the law that goes directly to making sure that an intentional detention provision is lawful by following *United States v. Salerno*[368] and cases interpreting *Salerno* in federal court*,* like *Lopez-Valenzuela v. Arpaio*[369] or in state court, like *Simpson v. Miller,*[370] (as well as cases that have used those two opinions in the years since). They, in turn, are related to the sorts of cases found in researching the "excessive bail loophole" and reasons for why a state constitutional provision should provide an absolute boundary for intentional detention.[371]

It is a somewhat specialized knowledge, but it is extremely important that persons begin to understand what I have often called the "state constitutional question" in bail. As I have already mentioned, numerous sources of pressure are causing states to analyze and attempt to change their constitutional and statutory right to bail (and preventive detention) provisions, but because they do not understand this specialized branch of the law, they are struggling with the precise language and, indeed, the various elements necessary for coming to a collaborative answer to the detention problem. Helping them requires not only understanding the cases applying *Salerno,* but also having a knowledge of: (1) state constitutional provisions generally; (2) the history of bail and how it influenced various constitutional changes in the past; (3) so-called "categorical" no bail provisions; (4) sufficient sureties clauses and their meaning; (5) how to craft a detention eligibility net and pair it with a common sense finding of risk to detain within the net; (6) how to craft revocation nets and limiting processes (or more novel ways of dealing with pretrial failure); (7) why states desiring to change should do deep research into the current state law so that no obvious mistakes

[368] *United States v. Salerno,* 481 U.S. 789 (1987).
[369] *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 779 (2014). I am aware of, and I continue to watch for potential fallout (at least in the Tenth Circuit) from Judge Tymkovich's proposed substantive due process model to clear up its "messy" jurisprudence as applied to bail, *see* Timothy Tymkovich, Joshua Dos Santos & Joshua Craddock, *A Workable Substantive Due Process,* 95 Notre Dame L. Rev. 1961 (2020) (discussing *Lopez-Valenzuela* and the unpublished Tenth Circuit opinion from *Dawson v. Bd. of Cty. Comm'rs of Jefferson Cty.* 732 F. App'x 624 (10th Cir. 2018), cert. denied, 139 S. Ct. 862 (2019).
[370] *Simpson v. Miller,* 387 P. 3d 1270 (Ariz. 2017).
[371] In California, *see, e.g., In re Humphrey,* 11 Cal. 5th 135 (Cal. 2021), *In re Brown,* 76 Cal. App. 5th 296 (2d Dist. 2022). *But cf. In re Kowalczyk,* 85 Cal. App. 5th 667 (1st Dist. 2022).

will be made;[372] and (8) how to legislatively justify all elements of a detention provision so that the whole of it is "carefully limited." As recently as ten years ago, nobody was specializing in this work, and the states were left almost entirely on their own in drafting new provisions. Now, while there are several national groups and other researchers that have begun offering help in this area, we are still seeing states trying to change without assistance, which often leads to "solutions" that fail in enactment, that are inevitably challenged in court, or that are later recognized as inadequate.

Two Models, Good and Better Outcomes

In 2017, I created a moneyless, safe, fair, and intentional release and detention model based on a limited charge-based detention eligibility net of "violent charges" combined with superior language for finding individual risk within the net suitable to detain that was not based on the results from an assessment tool. It was a risk finding that was far superior to any current state model and any model using an actuarial tool to detain simply by articulating the extent of the risk and answering the question, "risk of what, exactly?" – combined with a finding based on consideration of alternative conditions.

Two years later, using historic New York City data, researchers confirmed the basic structure of my model (albeit perhaps unknowingly) by making predictions about detention and disparity based on three scenarios: (1) business as usual, that is, the status quo, with mostly subjective methods of assessing risk inside of an at least partially money-based system, with some use of a tool, albeit with historic judicial deviations from the tool; (2) a more risk-based approach, solely using a tool to detain but calibrating the tool only to allow detention of the "highest" risk defendants; and (3) adding a charge-based detention eligibility net of violent felonies and domestic violence offenses and then using a tool designed to detain the top two categories on the assessment. Scenario or model number three did the best, showing that adding the charge-based net would result in a 51% reduction of detention from business as usual and would "nearly eliminate disparities in detention." The researchers concluded that "a strategy of

[372] For example, without deep research into Colorado law, lawmakers hoping to change the constitutional provision might miss the need to change constitutional wording to "fix" a particular supreme court opinion rooted in the constitution but dealing with revocation. Missing that one case would cause havoc in a typical moneyless, intentional release and detain system, and therefore proper constitutional change must also account for and rectify the holding in that case. There are several resources to help states changing their laws found at http://www.clebp.org/home.html and at the "Help Changing Bail Laws" tab.

reserving pretrial detention only for defendants facing serious, violent charges and using risk-based decision-making only with those charges—holds significant potential for reducing both unnecessary detention and reducing racial disparities." In theory, a limited charge-based net along with my model's risk finding language designed to avoid the problems of using a tool to detain would do better still, for all the reasons spelled out in *Model Bail Laws*. Moreover, the disparity outcomes based on the addition of the violent felony and domestic violence (which are sometimes charged as misdemeanors) net in the study implies that criminal justice bias resides mostly in the vast majority of misdemeanor and lower-level felony cases, a finding also made by researchers in Texas and academics studying the prevalence of misdemeanor arrests.

Sources; *Model Bail Laws, supra* note 23; *Changing Bail Laws, supra* note 56; Sarah Picard, Matt Watkins, Michael Rempel & Ashmini Kerodal, *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness* (CCI, 2019); Brandon Garrett & Sandra Thompson, *Monitoring the Misdemeanor Bail Reform Consent Decree in Harris County, Texas,* 105 Judicature 40 (Duke L. Sch., 2021) (finding far fewer disparities after changes to misdemeanor bail settings), found at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6788&context=faculty_scholarship. *See also* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice,* 98 B.Y.U. Law Rev., 731, 731-2 (2018) (documenting, among other things, "a profound racial disparity in the misdemeanor arrest rate for most – but not all – offense types . . . [which has] remained remarkably constant over the past thirty-seven years").

At the end of *Model Bail Laws,* I was not completely sure how to assess my so-called "hypothetical" intentional detention provision (especially one that correctly deviated from the federal model and virtually all state models), and so I analyzed the model based on: (1) general narrowing principles; (2) current law; and (3) Andrew Von Hirsch's threshold requirements for predictive models.[373] I still advise jurisdictions to engage in the same basic process.

When they do, they should look at the paper describing my model as one with roughly 200 pages of justification for its various elements. Justification for detention provisions is key; it is simply not enough to claim a conclusory need for pretrial detention and then borrow some other state's intentional detention language with little thought to the law requiring government justification for any

[373] *See Model Bail Laws, supra* note 23, at 153-172.

limitation on pretrial freedom. Accordingly, while states could use my *Model* and *Changing* papers to help with substance, they can also be used as a reminder and as a guide as to how to provide the necessary legislative justification for limiting pretrial freedom.[374]

This is an area in which we need researchers to quickly weigh in. The key to eliminating the evils of the money-bail system is found in what replaces the money-bail system. I have seen outlines of what appear to be excellent papers designed to make the legal case for certain standards for intentional detention, but these are only outlines. In the meantime, organizations can at least consider and either agree or disagree with the various templates for intentional detention that have been surfacing since 2017.

Equal Protection

If the Due Process Clause protects against unfair, arbitrary, or irrational laws affecting everyone, the Equal Protection Clause of the Fourteenth Amendment (and similar or equivalent state provisions) protects against the government treating similarly situated persons differently under the law. In 2007, VanNostrand listed equal protection as an important legal foundation, albeit with citations showing just how easily a bit of complexity could help bad bail practices to survive.[375] By 2014, there were so few attempts to use equal protection at bail

[374] Legislative justification does not necessarily mean empirical justification, even though I used empirical justification to provide a rationale for my detention eligibility net. Legislative justification can likely be shown with less rigorous evidence, but jurisdictions should be warned that people opposing intentional detention provisions are occasionally using convincing empirical evidence showing that the provisions are neither needed nor "carefully limited." It should come as no surprise that many states have changed or attempted to change their pretrial detention provisions with little to no justification at all, making them extremely vulnerable to legal attack.

[375] For example, in *Ackies v. Purdy,* 322 F. Supp. 38 (1970), despite finding a violation of equal protection ("the use of master bond schedules creates two categories of defendants. One group, able to afford the master bond bail immediately secure their release. The second group unable to post the master bond bail, remain incarcerated for extended periods of time"), and despite finding that "money amounts set solely by the charge have no relation to the function of bail," the district court neither eliminated the schedule nor further questioned the use of money later in the process. Instead, it merely allowed defendants to waive any future individualized hearing and pay the scheduled amount, thus leaving a wealth-based distinction in place. In another case, an otherwise important district court opinion using traditional equal protection analysis against money bail was vacated on en banc rehearing based mostly on procedural grounds, albeit with ambiguous language leading to a string of opinions further complicating the issues and making it virtually unusable outside of its own circuit. *See Pugh v. Rainwater,* 572 F.2d 1053, 1058-59 (5th Cir. 1978); *Funk, supra* note 310, at 1099.

that I wrote, "Overall, despite scholarly arguments to invoke equal protection analysis to the issue of bail . . . the courts have been largely reluctant to do so."[376]

This state of affairs quickly changed as various civil rights groups crafted new arguments based on elements used in successful suits challenging so-called debtor's prisons due to unpaid fines and fees. Importantly, these new (mostly class action) bail lawsuits were immediately successful – first against cities, and then against larger jurisdictions, including counties with some of the largest jails in America. As the jurisdictions have gotten bigger, however, the opposition has increased, with both the government and the commercial bail industry fighting anything designed to change the status quo. Nevertheless, there are a few important things to know about these so-called "mainstream" cases against money-based detention.

First, as mentioned above, a major premise behind the suits has been that one should treat an order of release resulting in detention as one would treat an order of intentional detention, and this premise has been easily understood and embraced by most federal courts, which are organized under a law using an intentional detention scheme with no constitutional right to bail. Unfortunately, however, and as I have also stressed above, this has led to a number of opinions that seemingly suggest an allowance of money-based detention despite whatever detention eligibility net might be found in a state constitution or statute. These opinions still represent progress, however, and I simply cannot be sure that requiring a federal court to understand the added complexity of a state's constitutional bail provision would have necessarily led to better outcomes and better-worded opinions.

Second, there has been an apparent slowdown in bringing these cases, but I attribute that perception mostly to certain political issues and the fact that COVID slowed virtually all litigation during that period. Moreover, as mentioned previously, after talking to three of the most active litigators in America, I believe they are ready and willing to increase the numbers and types of cases challenging status-quo bail practices. They are also exploring working with state defense

[376] *Fundamentals of Bail, supra* note 20, at 52-53.

groups to bring cases based solely on state law (or a combination of state and federal law) and broadening the legal claims to include more novel issues.[377] In 2017, the ACLU announced a national initiative to end money-based detention at both the state and federal level, and I take them at their word that the litigation will not end even in the face of bitter opposition.[378]

Third, while there are occasional setbacks, that is, cases that do not necessarily go the way the plaintiffs would hope, those cases are relatively rare, often based on strained reasoning seemingly designed to avoid meaningful discussion of the merits of the substantive claims, and occasionally shock even the most neutral consumers of federal opinions.[379] These somewhat aberrational cases appear to be only delaying the inevitable, as most opinions show judges using the pretrial research to decide – under "strict" or "heightened" scrutiny (while occasionally opining on whether the same system might fail under even "rational basis" scrutiny) – that money is neither necessary nor rationally related to help assure either court appearance or public safety.[380] The more the research continues to show money's irrelevance to the bail process, the more likely courts will find

[377] For example, one group recently demanded the end to costly inmate phone fees based on the extreme prejudice to children, primarily via the Due Process and Equal Protection Clauses. *See* Civil Rights Corps, *Port Huron, St. Clair County, MI: Right2Hug,* found at https://civilrightscorps.org/case/port-huron-michigan-right2hug/.

[378] One can find numerous cases, settlements, and negotiations between ACLU and various states at https://www.aclu.org/issues/smart-justice/bail-reform.

[379] For example, in *Schultz v. Alabama,* 42 F.4th 1298 (11th Cir. 2022), the Eleventh Circuit ignored the district court's finding of facts – including expert testimony on the negative outcomes of pretrial detention, the ineffectiveness of money bail to achieve government interests (which the district court judge called "illusory and conspicuously arbitrary,") *see* 330 F. Supp. 3rd 1344, at 1361 (2018)), and a long list of deficiencies in the county bail-setting process – and then relied on flawed reasoning ("In this way, pretrial detainees who do not secure immediate release are not being discriminated against due to inability to pay—they are being discriminated against for failure to ensure in the first instance their future appearance at trial," which is an offshoot of the, "He's not in jail because he's poor" trope), to avoid the simple fact that money bail is not only unnecessary, it is irrational. In an even more disturbing opinion, the Fifth Circuit Court of Appeals used mootness and a dramatic widening of so-called *Younger* or *O'Shea* abstention to halt what had been county-by-county equal protection and due process claims challenging money-based detention mostly in Texas. This allowed the Circuit Court to avoid the merits, albeit while creating a significant split with five other circuits. *See Daves v. Dallas County,* 22 F.4th 522, 569 (5th Cir. 2023). In a very recent case out of the Tenth Circuit, a district court judge rejecting abstention and reaching the merits wrote that the *Daves* decisions "tell us at least as much about the evolution of a court as they do about the evolution of the law." *Feltz v. Regalado,* Case No. 18-cv-0298-SPF-JFJ (N.D. Okla. Apr. 2024) (Order on Motions for Summary Judgment).

[380] Admittedly, the opinions mostly assess money bail in terms of rationality only as an aside or in a footnote. The pretrial research, however, continues to reveal a trend of showing money not motivating even released persons accused of crimes.

constitutional violations based on any ends/means analysis. And those opinions, we now see, lead to dramatic changes in state bail systems.[381]

Fourth, we should no longer look to these money-bail cases as solely providing the "big, quick national fix" that I once predicted, which was premised on my theory that a number of circuit courts would quickly and uniformly decide fundamental bail issues – a far cry from the reality of confusion and disorder seen, for example, in the Fifth Circuit culminating in *Daves.* I now believe that the cases should be looked at as a steady, longer-termed trend, which, along with the research, will slowly provide the airtight rationale needed to reduce or eliminate the use of money-based detention in the states. Specifically, these cases should be looked at – at least for now – primarily as additional (additional to, for example, grassroots opposition, a desire for intentionality, or even media accounts), albeit powerful sources of immense pressure on the states to change from a mostly money-based detention system to a moneyless, intentional release and detention system.

It is the act of suing with viable claims backed by solid research that is important, and that will continue to force change. Nevertheless, the states should realize that, on any given day, there still exists the possibility that a single case – indeed,

[381] Despite *Daves,* Judge Rosenthal's opinion in *O'Donnell v. Harris County,* 251 F. Supp. 3d 1052 (S.D. Tex. 2017), continues to guide judges across America on how to apply pretrial research to the law, thus setting the stage for more decisions against the use of money bail that leads to detention. In California, a case beginning as a state habeas claim, *In re Humphrey,* 11 Cal 5th 135 (2021), and its progeny threaten to completely eliminate money-based detention in that state. Additionally, in an unreported opinion from *Buffin v. County of San Francisco,* the judge correctly interpreted *Salerno* to find a proper due process and equal protection claim (and thus the potential use of strict or heightened scrutiny) based on the loss of liberty even for the short duration caused by a misdemeanor *and felony* bail schedule. *State v. Brown,* 338 P.3d 1276 (N.M. 2014), relied entirely on state law – as well as the fundamentals of bail – to completely upend the traditional money-bail system in New Mexico. Finally, the same research leading to state court reform will eventually touch the federal system, which suffers from its own set of intentional and unintentional abuses. Despite whatever ultimate resolution (many have been settled), and despite whatever limited reach, these opinions all contain language that should make us focus our attention. *See, e.g., In re Virginia v. Hunter* (letter opinion, Nov. 6, 2020), ("The inherent arbitrariness of the use of the cash bond is as palpable as it is counterproductive . . . There is no 'fair manner' by which to implement the use of the cash bond. Imposition of cash bond terms in this cause would only be a product of resort to 'custom, instinct and anything else arbitrary,' an unconstitutional denial of due process."), found at https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/opinions/km-2020-441-cw-v-corey-hunter.pdf.

a single case that nobody even knows is coming – will completely upend an entire state or group of states' money-bail practices, and knowing this should be incentive enough to begin working now on the replacement for money-based detention. Thus, while the cases might not be the quick, "national fix" to America's harmful use of money, they provide enormous pressure to change, while still resting on the potential to become that fix.

Equal protection continues to be one of the strongest arguments for changing from the current money-based release and detention system. The fact that there is more than a little opposition likely stems from persons not knowing how to craft an acceptable alternative, something I attempt to teach in this paper. Indeed, without the knowledge of an appropriate replacement to money bail, I see judges straining themselves beyond reasonableness, preferring to ignore the following central issue underlying each of these claims: "If you can pay for your crime of arrest, you're free. If you can't, you're not."[382] This straightforward quote, alone, reeks of injustice, and we all intuitively know that the system leading to it must be changed. Add to that injustice the fact that money is not even relevant to the process, that the amounts are typically made up, and that money causes enormous negative outcomes associated with unnecessary pretrial detention, and we can begin to glean the inevitability of true, historic bail reform.

The Three Ms – Maximizing Release, Court Appearance, and Community Safety

This phrase merely represents a simple way to look at the law surrounding a judicial officer's decision making in the pretrial process. "Maximizing release" represents the accused person's liberty interest, and "maximizing court appearance and community safety" are the only two government interests (or purposes) that may be used as a justification for interfering with pretrial freedom. In American bail, we start with a presumption of freedom with no restrictions, and we require the government to justify any increasing interference with that freedom to achieve its two interests. Other articulations of purposes of bail, including "maintaining the

[382] *See Daves,* 22 F.4th 522, 551 (Haynes, C.J. dissenting).

integrity of the court," typically fold into the broader notions of public safety and court appearance.

The Ms represent a legal balance, but can also be used also to represent a bare-bones description of our goals at bail for any stakeholder, which then can be measured as outcomes in terms of release rates, court appearance rates, and safety rates, each of which we aim to keep at their highest levels all at the same time. Nevertheless, the Ms are mainly tied to the law, and although we can re-define terms like "public safety" to better reflect pretrial justice, they do not represent the entirety of what we seek to achieve under the broad umbrella of "pretrial justice." Accordingly, while some have said we should add "maximizing equality" (or empathy or rationality) to the Ms, to the extent that they are not folded into the legal balance, those additional aspirational notions are better left as concepts enveloping the entirety of system action.

Equally important, because the Ms remind us that there are only two constitutionally valid purposes for limiting pretrial freedom, then motive, articulating proper purposes, and providing justification at bail are all crucial to the process.

Sources: *Fundamentals of Bail, supra* note 20; *Money, supra* note 103 at note 127 and accompanying text; *LEBP, supra* note 259.

Other Legal Foundations

Of course, there are other legal foundations/principles with importance in this generation of reform. As briefly mentioned above, one principle is that the government must have proper purposes for limiting pretrial freedom, and currently the only two constitutionally proper purposes are court appearance and public safety (unlike punishment, which likely has at least four, but which can have a dozen or more, including mere retribution, such as are found in a typical probation statute). This means that any other purpose besides the two proper

purposes at bail is unlawful.[383] Thus, one cannot set bail to punish.[384] One cannot set bail to placate public opinion.[385] One cannot set bail to enrich the treasury.[386] And, most relevant to this paper, one cannot set bail to intentionally detain a bailable defendant.[387]

There is probable cause, and individualization, and there are burdens of proof, speedy trial and evidentiary rules as well as rules attending pretrial hearings, trials, and pleas. Moreover, as I already briefly mentioned, the general rule not to use money to protect the public can quickly rise to a level of legal importance equal to the big three – equal protection, due process, and excessive bail – simply because using money for perceived danger is so prevalent. I summarize what I said about the legal foundations in *Fundamentals of Bail:* they provide the framework, the boundaries, the cornerstone for all that we do to achieve pretrial justice. They are a check on bad bail practices and barriers against attempts to move America away from notions of freedom and liberty. They are the

[383] Occasionally, researchers study pretrial detention's effectiveness at "deterrence" or "incapacitation," both more frequently discussed as purposes of punishment. Although one can craft arguments for enacting bail laws or setting bail using these terms, depending on context they are likely the wrong words to accurately describe what is really happening. And because many people sincerely confuse elements of punishment with elements of pretrial release and detention, I advise stakeholders to stay away from using punishment terms even when they seem generally to apply. Keeping bail as far away from punishment as possible should be foundational to any discussion of pretrial justice. After all, punishment is focused on a real, concrete thing that happened in the past, while bail is mostly focused on prediction of things that may or may not happen at all.

[384] *See Bell v. Wolfish,* 441 U.S. 520, note 16 (1979) ("Due process requires that a pretrial detainee not be punished."). Pretrial limitations based on punishment frequently come to light when doing legislative histories of various bail statutes or constitutional amendments, but we have seen video tapes used as evidence in money bail cases showing judges setting bail clearly to punish. For the differences between the purposes of bail and the purposes of the punishment of probation, *see* Timothy R. Schnacke, *Pretrial Release and Probation: What's the Same and What's Different?* (NAPSA, 2018), found at https://drive.google.com/file/d/1Dzg4KMGrRzZ76N_d19hK5dcIVdY5WG2W/view?pli=1.

[385] Given the ineffectiveness of money for public safety, it is arguable that any bond amount in the millions of dollars was set, at least in part, either to detain or to send some sort of message to the public about the perceived seriousness of the crime. The ABA Standards, *supra* note 118, make clear that "financial conditions should not be set . . . to placate public opinion." Std. 10-5.3 (c).

[386] I have witnessed numerous stakeholders argue to keep money bail due, in part, because it helps to pay for things, which, even if allowed by state law, would violate federal law. In addition to abuses with collecting fines and fees, the Department of Justice's *Investigation of the Ferguson Police Department,* found at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf, at 59, noted abuses in municipal bond practices, including practices designed to "bring in some extra monies."

[387] *See* discussion of the legal foundations under the pillar of education, *supra,* and the excessive bail loophole in *Appendix One.*

aspirational goals and guardrails for good bail processes. Their importance is unquestioned, and we must never ignore them.

In sum, the legal foundations tell us not only why the traditional money-bail system is in need of change, but also how it should change as well as how to oppose efforts to change that are, themselves, unlawful. Since 2014 (and especially since 2017), the topics in the overall category of the legal foundations has exploded with legal claims and research supporting those claims, each of which can result in the erosion or complete elimination of money bail resulting in detention. Moreover, this trend will likely continue, as the law and supporting research can also be used to oppose other bail practices or conditions of release, even when they do not result in detention.

Keeping up with the myriad legal cases concerning bail today can be daunting, as each opinion typically spends half or more of its space focusing on procedural issues, over which only lawyers representing a billion-dollar industry can afford to assert and repetitively argue. Nevertheless, one need only to back up and ask the most general of questions to foresee the future of the money-based bail system.

Is it fair to keep people in jail due to poverty when money is not necessary, when money does not motivate even released persons to return to court or remain crime-free, and when there are other less-restrictive ways to achieve those goals? If not, it is because we are a country that values substantive due process. Is it fair to set a money-bond leading to detention with no notice, no hearing, no record, and no ability for the accused person to argue for release? If not, it is because we are a country that values procedural due process. Is it fair for one person to be let out of jail simply because he has money (and despite knowing that money does not work) while another stays in jail for lack of money? If not, it is because we are a country that values equal protection. Is it proper to use money to detain someone on purpose? If not, it is because our country values a prohibition on excessive bail that relies on setting bail for "proper purposes." Is it right to intentionally detain someone for a charge not delineated as eligible for "no bail" or detention in a constitution or statute? If not, it is because our country values our state right to bail provisions and federal due process fair notice. Very few

systems have so much of the law going against them as does the money-bail system. To use a basic law school analogy, money bail is a buggy whip. And yet, it is not a buggy whip made obsolete merely because people would rather have cars. Rather, it is a buggy whip made obsolete because of the unlawfulness of horses, buggies, and whips.

When I attended my first bail setting in county court in Colorado, I noticed two things that left an indelible imprint on my future work in this field. The first was that the bail setting was incredibly lopsided, with the person accused of a crime at a clear disadvantage in a system that had grown to facilitate quick and unquestioned pretrial detention. The second thing, though, was more important, because over the course of these and other hearings, I quickly came to realize that the money amounts – i.e., the central focus of bail at the time – were completely made up; arbitrary, irrational. No judge wants to hear that he or she acted in an "arbitrary and capricious" manner simply because that label typically precedes the word "reversed." And yet, each of these bail settings resulted in an amount of money that could, in theory, have been any other amount for any other reason – or for no reason whatsoever. At the very minimum, the legal foundations tell us that a system that bases everything on an arbitrary act cannot last, and thus it is inevitable that money-based detention will end.

The Pretrial Research

> *"[L]egal and evidence-based practices are interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods that research has proven effective in decreasing failures to appear in court and danger to the community during the pretrial stage."*
>
> *Marie VanNostrand*

In 2014, I wrote that pretrial research had contributed to advancements in bail for centuries, whether that research was legal, historical, empirical, opinion, or done

through any other, better way of knowing things. In this generation of reform, we see all of these types of research, and findings from each category have shaped legislation, court opinions, and even grassroots groups' organizational strategies. Nevertheless, I highlighted social science research because it is that sort of research that gives us "incremental explanations that simplify a complex life, and thus allows us to solve confounding issues such as how to reduce or eliminate unnecessary pretrial detention."[388] Essentially, social science research tells us "what works" (such as, "does money work?" or "does EM or GPS monitoring work?")[389] to achieve our goals at bail, which we have already written to be: (1) maximizing liberty; while (2) maximizing public safety: and (3) maximizing court appearance. At the time, I lamented the lack of that sort of research, and especially research that showed interventions addressing all three goals at the same time. Today, there is still less research than that dedicated to post-conviction interventions, but the amount of social science research has grown exponentially since 2014, and indeed, even since 2017.

In sum, the field is growing so rapidly that it is becoming very difficult to summarize the state of the literature except by narrowing the task by examining the research concerning one small topic at a time. Nevertheless, if a collaborative group requires education on the pretrial research – whether that research be legal, historical, social science, opinion, computer science, or statistics – that group is advised to find some academic or specialist who can summarize the literature at some point in time – broadly or narrowly -- while keeping up with the near-daily additions. In the short time between the writing of this paper and the decision of some jurisdiction to study bail, the literature will have grown – in

[388] *Fundamentals of Bail, supra* note 20, at 64.

[389] The research used to determine "what works" can often be mixed, depending on the study, jurisdiction, and goals and outcomes. For example, jurisdictions continue to test the even "judicious" use of EM, albeit noting both positive and negative real and potential outcomes thus leading to caution over how, exactly, EM will be used. *See* Karla Sainju, Stephanie Fahy, Katherine Baggaley, Ashley Baker, Tamar Minassian, & Vanessa Filippelli, *Electronic Monitoring for Pretrial Release: Assessing the Impact* (Fed. Prob, Dec. 2018), found at https://www.academia.edu/74028884/Electronic_Monitoring_for_Pretrial_Release_Assessing_the_Impact?email_work_card=view-paper; Given the minimal impact of EM on public safety and the likelihood of revocation due to technical violations, stakeholders would be wise to examine other, less restrictive conditions and strategies to raise appearance rates. *See, e.g., Statewide Court Appearance Project Final Report: Recommendations to Address Court Appearance Issues in North Carolina* (2025) (examining a broad array of strategies and policy recommendations – all less restrictive than EM – to maintain high appearance rates).

some cases, dramatically – and so this is a topic that requires constant vigilance and review.

There are two main categories of information concerning the pretrial research that I believe require slightly more in-depth treatment in this paper. The first deals with risk and prediction generally, the essence of the bail decision. The second deals with a more nuanced view of conditions of release, given what we know about "what works" in the literature.

Risk and Prediction

At an annual state judicial conference many years ago, the Chief Justice began the proceedings by promising his fellow state judges that they would not be forced to hear or digest any "new" information because, he said, he knew that their brains were "already full." The statement received smiles and a few laughs, but it could not have been further from the truth, given that I sat patiently awaiting my chance to discuss something that no law school had taught, that no continuing legal education program had explained, and that perhaps very few, if any judges had ever considered: bail.

Today, bail demands that we make space in our brains for new information, and nothing is more persistently demanding to the essence of bail (release) and "no bail" (detention) than the topic of risk and prediction.[390] Indeed, the relevant research now spans multiple disciplines, including law, economics, social science,

[390] In 2020, esteemed Professor Christopher Slobogin called for a "jurisprudence of risk" for post-conviction assessments, *see Primer on Risk Assessment Instruments for Legal Decision-Makers,* Vand. L. School, found at https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2203&context=faculty-publications, and we are beginning to see various authors more thoroughly explain pretrial prediction and risk to legal audiences. *See, e.g.,* Sarah Desmarais & Evan Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors and Defense Attorneys* (2019), found at (Pretrial Risk Assessment Primer Feb 2019.pdf (safetyandjusticechallenge.org) (McArthur Safety & Justice Challenge); Cristopher Moore, Elise Ferguson & Paul Guerin, *How Much Risk and Risk of What? A Closer Look at Pretrial Rearrest and Risk Assessment,* Santa Fe Inst., found at How Much Risk, and Risk of What? A Closer Look at Pretrial Rearrest and Risk Assessment by Cristopher Moore, Elise Ferguson, Paul Guerin :: SSRN; Sandra Mayson, *Bias In/Bias Out,* 128 Yale L. J. 2218 (2019); Brandon Garrett & John Monahan, *Judging Risk,* 108 Cal. L. Rev. 439 (2020); Matthew DeMichele, Ian Silver & Ryan Labrecque, *Smart Decarceration: Are Pretrial Assessments an Effective Strategy to Detain Fewer People and Reduce Arrests?* (2023), found at Smart Decarceration: Are Pretrial Assessments an Effective Strategy to Detain Fewer People and Reduce Arrests? by Matthew DeMichele, Ian Silver, Ryan Labrecque :: SSRN.

computer science (including aspects of AI), psychology, ethics, and statistics. And today, knowing the importance of that varied research in finding practical solutions to problems in the pretrial phase, we are likely acting irresponsibly if we do not enlist outside help from professors at local colleges and universities to attempt even the most modest of pretrial improvements that require a knowledge of risk and prediction. There are, however, certain tenacious misconceptions about risk and prediction, and so, for purposes of this section, I focus on definitional and philosophical aspects of the topic with the aim of providing important background perspective for pretrial justice having four main points: (1) "risk" in context; (2) prediction as foundational to American liberty; (3) risk and prediction at this time in American history; and (4) prediction with and without an assessment tool.

Background Perspective: "Risk" in Context

First, the reader should note that the word "risk" is entirely appropriate when talking about bail and "no bail," but people often fail to think of the word in its proper context and thus fear using it when needed even when it is the most appropriate word. I and my colleagues were some of the first persons to be apprehensive about handing every judge in America a piece of paper (that is, a risk assessment tool) to be used at bail settings with the word "risk" at the top. After all, we had created a statewide tool, and we knew that persons accused of crimes were simply not very risky, even when the tool measured extremely broad outcomes, such as missing court for any reason whatsoever, being arrested for any new crime, from traffic to murder, and without the inclusion of so-called "protective factors" designed to lessen risk.[391] Indeed, as Spurgeon Kennedy, Tara Blair, and Robin Wosje reported in 2022, while the *perception of risk* can impede

[391] Because of that, the Colorado tool eschewed labels such as "high risk," and used only numbers to differentiate one group from another in the cutoffs. I have also written that we could have accurately articulated the resulting categories used in the accompanying matrix as "extremely low," "low," and "medium low" risk. *See Model Bail Laws, supra* note 23, at 101. Since then, scholars have called for more detailed and specific quantitative outputs, such as percentages of probabilities. *See, e.g.,* Computing Community Consortium, *Input on Section 7.1(b) of Executive Order 14110,* found at https://cra.org/ccc/wp-content/uploads/sites/2/2024/05/CCCs-Response-to-the-National-Institute-of-Justice-RFI.pdf.

meaningful improvements, *true* pretrial risk is simply "not prevalent in most defendant populations" [as] "most defendants assess at low-to-moderate-risk levels."[392] Moreover, they report, re-arrest for a violent crime and willful flight while on pretrial release are also quite rare, meaning that assessing risk through a statistical assessment tool – a tool that typically measures missing court for any and all reasons and re-arrest for any and all crimes – vastly overstates the risk for which America has traditionally allowed pretrial detention.[393]

The background knowledge of this overall "lack of defendant riskiness" – as well as our general inability to accurately and fairly engage in statistically predicting the sorts of things for which pretrial *detention* might be appropriate – were paramount considerations guiding me to craft the precise language of my limited, moneyless, intentional release and detention model in 2017. Moreover, I knew about the self-fulfilling nature of words, the concept of negativity bias (our tendency to focus on bad versus good risks and to overemphasize potentially negative outcomes), and the media's overwhelming focus on aberrational cases amplifying even the rarest of pretrial failures. Thus, I, too, have looked at the word "risk" with extreme caution.

Additionally, I had come to learn that the risks people typically considered at bail often obscured the *true risks* that they *should* have been considering at bail due to ignorance of a bigger picture. For example, there are really two fundamental risks at bail of which we must be aware. The first is the risk that must be shown in order to do things to people who will be *released* pretrial. The Supreme Court has said that when release is involved, we can set conditions (or provide supports) to achieve "reasonable assurance" (not guaranteed assurance, or to ensure)[394] of

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[392] Spurgeon Kennedy, Tara Blair & Robin Wosje, *Court Nonappearance and New Case Filings: Redefining Pretrial* Misconduct, at 3 (NIC, 2022), found at https://s3.amazonaws.com/static.nicic.gov/Library/033626.pdf.

[393] *Id., passim.* The authors correctly call for jurisdictions to re-define pretrial misconduct to better reflect reality, and, doing so, some groups articulating models of detention have proposed forbidding detention for flight risk in the first instance based solely on prediction, and allowing detention for flight only through a fair and transparent revocation process – based primarily on overall *lack* of risk of flight.

[394] "Reasonable assurance" has its genesis in language from *Stack v. Boyle,* 342 U.S. 1 (1951). In an unfortunate error, the ABA Standards uses the mostly obsolete word "ensure," a word typically defined as providing "certainty," and that is not used (except once in passing in the federal law) in either the federal or D.C. Statutes.

either court appearance or public safety.[395] We are given more latitude for conditions of actual release because although we care about every missed court appearance and every new crime, the predicted risk of missing court for any reason or committing any crime whatsoever is simply not something that should lead to detention.

The second is the risk needed to *detain*, which, because it is based solely on prediction and results in a complete deprivation of liberty, involves a finding of substantial or extreme risk ("how high?") to do a very bad thing ("risk of what?"), such as to willfully flee or to commit a serious or violent crime while on release.[396] This is why we should never use a statistical tool solely to detain; these tools typically measure only the first risk (risk during release) because the base rates for such things as flight and violent crime on release are extremely small.[397] It is also why we should never use various detention templates with inferior language – like the detention language in the federal or D.C. statute – to replace money-based detention; they use, among other things, "release language" mirroring *Stack's* "reasonable assurance" of "court appearance" and "public safety" template, and not the more appropriate "detention language" that I describe here.[398] Because prediction is so hard, and because detention only proves itself – that is, an incorrect prediction that someone poses a risk leading to detention is not falsifiable – we must be ever mindful to limit our detention provisions to require

[395] 342 U.S. 1, 9 (1951).

[396] My use of the word "extreme" comes from its usage in the various so-called "detention cases" during America's struggle with how to deal with "intentional" and "unintentional" detention, and is found in *Model Bail Laws, supra* note 23, at 48-66. In sum, when American courts have allowed intentional detention based solely on prediction, they have most often said that there must be "extreme" risk.

[397] While the Public Safety Assessment includes a "flag" for potential violent behavior, base rates as well as other legal and research-based considerations lead me to warn states not to use that flag solely to detain. For a discussion of base rates and false positive issues found in actuarial tools, *see Model Bail Laws, supra* note 23, 103-114. Moreover, violent crime is extremely hard to predict because it is both rare and situational, meaning that the chance of violence does not adhere to any particular person, but, instead, violence can happen with any person based on a number of characteristics of that and other relevant persons as well as the events surrounding them. *See Andrew von Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons,* 21 Buff. L. Rev. 717, 733 (1971-71).

[398] *Model Bail Laws, supra* note 23, passim; *see also* CLEBP, *Information to Help With State Attempts to Change Constitutional and Statutory Right to Bail (Release) and "No Bail" (Preventive Detention) Provisions* (appendix) found at http://www.clebp.org/images/Memo_on_State_Constitutional_Release_and_Detention.pdf.

substantial or extreme risk to do something very bad before subjecting a person to something that looks and feels exactly like punishment.

As I have already mentioned, in addition to false positives, there is an exponentially growing literature showing that pretrial detention applied randomly leads to whole communities actually being *less safe* and experiencing more harms on a number of metrics than if certain accused persons had been released.[399] Accordingly, when thinking about assessing the risk needed to detain, we should also assess the risk to the community at large of *not releasing* (or delaying the release of) persons who need not be detained, which, as shown by least one "moneyless" intentional release and detention system, can be as high as 94% of persons accused of crimes.[400] Focusing solely on the risk presented by the accused to others while ignoring the known risk to communities caused by the needless detention of the accused seems obviously incomplete.

Nevertheless, I also knew that we had been assessing risk for a process that ultimately became what we know as the English and American "bail" system since roughly 400 A.D., a system that has often changed to accommodate more accurate and fair methods of risk assessment.[401] Moreover, United States Supreme

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[399] *See* note 40, *supra,* and accompanying text. A recent rigorous study citing prior research found additional support for the notion that pretrial detention leads to the exact opposite of what supporters of pretrial detention intend to achieve, which is typically public safety. *See Locked Up, supra* note 266.

[400] Not long ago, Washington D.C. – with thirty years' experience with a moneyless, intentional release/detain system – achieved a release rate of 94%, including arrests and citations and with roughly 90% court appearance and public safety rates. Unfortunately, in 2023 and 2024, the D.C. Council passed two acts creating rebuttable presumptions toward detention that were justified, according to some sources, on general and not pretrial crime rates as well as what the Council thought victims wanted, which ultimately led to lower release rates. If true, then the laws were based on erroneous assumptions and justifications. Moreover, a recent report evaluating the new laws included so many limitations as to swallow up any findings. Those limitations included an inability to tell who was subject to the rebuttable presumptions, whether changes in the law changed numbers of persons detained, and whether the presumptions affected public safety. The report was clear, however, that only 1% of all released persons (over all three time periods studied) had an arrest for a violent offense, a base rate so low as to make me question still more of the overall justification for the legislation to begin with. *See* D.C. CJCC, *An Analysis of Pretrial Detention Before and After Secure DC* (2025), found at https://cjcc.dc.gov/sites/default/files/dc/sites/cjcc/Public%20Report%20CJCC%20Pretrial%20Detention%20Report%205-7-2025.pdf. As mentioned previously and described in more detail, *infra,* rebuttable presumptions toward detention are not "pretrial improvements" under any objective standard, and there are far better ways to change laws to better protect the public when provisions are properly justified.

[401] It is sometimes helpful to think of risk assessment in terms of "risk based on what?" After Rome's exit from Britain in the 400s A.D., persons assessed risk based on the ability of family members to be substituted for the

Court jurisprudence speaks to "risk" being inherent in the bail process,[402] and the word appears fairly entrenched in the literature. But that does not mean that a word like "prediction" might not serve us better. After all, we make predictions all the time in our own lives, and not every prediction, such as a prediction as to when the sun will rise, involves a requirement to meaningfully consider risk.[403] Prediction is simply making a forecast of what will happen in the future, which can easily be focused on success rather than failure, and which thus emphasizes "managing" or "minimizing" risk by intervening to prevent harm rather than "taking" risks. Essentially, predicting that an accused person will succeed on release (focusing on the reward), and only considering supports or conditions to help achieve that success, better reflects the overall research concerning pretrial defendant risk showing that the vast number of accused persons typically succeed. Indeed, based on that research, if you predicted that everyone you released pretrial would succeed with no intervention whatsoever, you would be very nearly right. Adding personal supports will only bolster your prediction of success, and using other strategies – such as not requiring so many "attendance mandatory" court dates or using speedy trial rules for higher-risk but released persons will help even more.

In sum, the word "risk" is not inappropriate, but it requires discussion, education, and context before a collaborative group can begin to see more generally how bail both in the first instance – that is, based solely on prediction – and bail re-assessed or modified for purposes of responding to pretrial failure must be accompanied with the risk research to be used as background information and

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accused, even for punishment. For centuries, in both England and America, risk was based mostly on charge. Most recently, we see risk based on actuarial assessment as a replacement for risk based on charge, risk based on charge plus preconditions, risk based on untested legislative factors, risk based on unvalidated lists of "risky" elements, risk based on purely subjective notions such as how a particular person "looks," and risk based on the accused's lack of financial resources.

[402] *See Stack v. Boyle, ,*342 U.S. 1, 8 (1950).

[403] While admitting the difficulty of prediction, the U.S. Supreme Court has expressly endorsed prediction of future conduct to be "essential" in bail. *See Jurek v. Texas,* 428 U.S. 262, 274-75 (1976); *Barefoot v. Estelle,* 463 U.S. 880, 897 (1993); *see also United States v. Salerno,* 481 U.S. 739, 751 (1987) ("there is nothing inherently attainable about a prediction of future criminal conduct"). In the book *Against Prediction* (Univ. of Chicago Press, 2007), at 222, author Bernard Harcourt makes a strong case for replacing prediction with randomization in all areas of the criminal law except bail, largely because "the outcome is precisely the prediction."

perspective to guide actual bail settings. Based on that research, predicting that someone will succeed on pretrial release will be correct most of the time.

Background Perspective: Prediction as Foundational to American Liberty

In this same sense, "prediction" leads to the second element of background perspective necessary for bail setting, which is that American law (and history and research) is such that we should always default to release and not detention, and that we should thus start by predicting success and only change that liberty-affirming default prediction when faced with substantial or clear and convincing evidence. When Justice Jackson wrote, "Admission to bail always involves a risk . . . a calculated risk which the law takes as the price of our system of justice,"[404] he meant a system that clearly articulates laws, but that allows Americans to walk free and unmolested, relying, instead, on the moral and deterrent effect of those laws, rather than on more intrusive means, to protect society. It is a system in which liberty is always the default, and in which liberty is only eroded for cause and with due process. In short, it is a system that *embraces* risk[405] and that understands that some amount of failure – either in the substantive law or in bail – is simply the price of being American. There is no doubt that a less complicated bail system would avoid prediction altogether by immediately detaining everyone pretrial until disposition, but that is simply not who we are.[406] While the Supreme Court has cautioned us that liberty is the American "norm,"[407] we should remember that, more importantly, liberty is the default, the starting point.

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[404] *Stack v. Boyle,* 342 U.S. 1, 8 (1951) (Jackson, J., concurring).

[405] Another reminder of the notion is found in Blackstone's ratio, which states, "It is better that ten guilty persons escape than that one innocent suffer," which has been recognized by the Supreme Court as a seed leading to the presumption of innocence, which is tied to the right to bail. Its essence is that we must embrace risk. *See Model Bail Laws, supra* note 23, at 24. If the phrase "embracing risk" seems too radical, then one could use the term "embracing liberty," meaning that we recognize America's founding in liberty, allowing the government to restrict that liberty only after justification and due process.

[406] In *Carlisle v. Landon,* Justice Douglas opined that absolute discretion to hold everyone without bail would make America "our own model of a police state." 73 S. Ct. 1179, 1182 (1953). In such a system, the government might avoid prediction, but would not avoid the ultimate risk to communities found by research due to unnecessary detention.

[407] *United States v. Salerno,* 481 U.S. 739, 755 (1987).

Accordingly, the fundamental principle is that the act of embracing risk – indeed, the fact that we would even care about risk and prediction at all – should remind us of the country in which we live and the principles, such as liberty, through which our country is defined.

A profound quote on this issue – a quote that should be regarded by all judges and understood and embraced by all citizens – is found in *State v. Brown,* the New Mexico Supreme Court opinion that completely changed pretrial release and detention and nearly achieved complete bail reform in that state. After explaining how the traditional money-based system violated existing New Mexico law, Chief Justice Daniels wrote the following:

> We are not oblivious to the pressures on our judges who face election difficulties, media attacks, and other adverse consequences if they faithfully honor the rule of law when it dictates an action that is not politically popular, particularly when there is no way to absolutely guarantee that any defendant released on any pretrial conditions will not commit another offense. The inescapable reality is that no judge can predict the future with certainty or guarantee that a person will appear in court or refrain from committing future crimes. In every case, a defendant may commit an offense while out on bond, just as any person who has never committed a crime may commit one.[408]

As a country, we used to know and accept this. In a hearing on preventive detention in 1970, Senator Sam Ervin said, "If America is to remain a free society, it will have to take certain risks. One is the risk that a person admitted to bail may flee before trial. Another is the risk that a person admitted to bail may commit a crime while free on bail."[409]

[408] *State v. Brown,* 338 P.3d 1276, 1283 (N.M. 2014),
[409] *See* Wayne Thomas, *Bail Reform in America*, at 230 and Chapt. 20, notes 6, 11 (Univ. of Cal. Press, 1976).

Then, as now, freedom and liberty demand that we take risks, and thus to be an American is to embrace risk. Accordingly, every time we are required to make a pretrial prediction, we should recognize that the requirement is due to our American system of justice and our adherence to our founding documents based on liberty. But to be an American is to also embrace progress, which means using the most current developments in the law and research to understand prediction, identify the relevant risks, and design methods to assess that risk so that we can make accurate predictions and thus decisions through a fair, transparent, safe, and intentional release and detention process. Importantly, it does not mean allowing money to make those decisions for us.

Background Perspective: Risk and Prediction at This Time in American History

The third element of background perspective is to acknowledge where we are right now in American history, which is in a period of massive over-detention. Realize that things could have been the other way around. Indeed, we could easily have entered into a period of forced bail reform due to the need to jail substantially *more* persons pretrial, but that is absolutely not where we are, and we must constantly keep this in mind. As mentioned previously, after roughly 150-200 years of money-based detention, we have the "wrong" people both in and out of jail. And while both of these situations need correction, the acute problem is due to an overwhelming amount of unnecessary detention – that is, the wrong people *in* jail. Quite simply, because of our recent history of over-detention, we should not be surprised that any attempt to bring rationality and intelligence to bail setting in America is bound to end up with far more released persons than before.

Indeed, virtually every paper in the current literature spends much space on "mass incarceration," and for good reason. The latest statistics from the Prison Policy Initiative have shown through staggering graphics that in America, *"every single state* detains more people in prisons and jails per capita than most

nations."[410] To provide perspective, consider this. In 1980, America incarcerated at a rate of only 220 per 100,000 persons (versus 531 per 100,000 persons today). If we set out to reduce our current general incarceration rate to that lower 1980 rate, a time at which the *crime rate was actually much higher than today,*[411] we would reduce the number of persons currently incarcerated nationally from roughly 1,700,000 people to 700,000 people, an eye-opening difference of one million persons released rather than detained.[412]

When focusing more specifically on jails and the pretrial population, the Bureau of Justice Statistics recently reported 664,200 persons in local jails, of which 467,600 of those persons were unconvicted.[413] If, instead of the status quo, we were to use a safe and fair method to intentionally detain only 10% of the current annual 7.5 million arrestees,[414] then given a 60-day length of stay, we might see only 123,000 unconvicted inmates nationally on any given day, a percentage reduction of 73%. The difference – the roughly 350,000 persons currently deemed "risky" and jailed

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[410] Emily Widra, *States of Incarceration: The Global Context* (PPI, 2024), found at https://www.prisonpolicy.org/global/2024.html (italics in original). The Prison Policy Initiative just released its "Whole Pie" document for 2025, and it contains more than enough reasons – including correcting various myths – for why America must reduce its incarceration rate, and jurisdictions should look at this document first before even thinking about the scope of solutions. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025* (PPI, 2025), found at https://www.prisonpolicy.org/reports/pie2025.html. There have been relatively few studies comparing pretrial practices between countries, but one such study of ten countries concluded with two "overarching points:" (1) laws that make pretrial detention an exceptional measure are belied by actual practice, in which pretrial detention is common; and (2) pretrial detention is "part of a wider problem of over-reliance on custody and on criminal justice interventions." Catherine Heard & Helen Fair, *Pre-Trial Detention and Its Over-Use: Evidence from Ten Countries* at viii (ICJ Pol. Res, London, 2019), found at https://eprints.bbk.ac.uk/id/eprint/30084/1/pre-trial%20detention%20final.pdf. In another study, graduate students from the John Jay College of Criminal Justice searched for alternatives to detention both in the United States and abroad that met five of eight agreed-upon criteria, such as "respects human life" and "ensures public safety." *See* CUNY, *Alternatives to Pretrial Detention: Pre-Global Best Practice Catalog* (2017), found at https://academicworks.cuny.edu/jj_pubs/260/.

[411] It would be a mistake to believe that an increase in incarceration is the reason for lower crime rates today. *See, e.g., The Prison Paradox: More Incarceration Will Not Make Us Safer* (Vera Inst. of Just. 2017) (finding that over the last twenty years, nineteen states have successfully decreased both imprisonment and crime rates), found at https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-prison-paradox_02.pdf.

[412] Many of the calculations come from data found at the World Prison Brief, found at https://www.prisonstudies.org/.

[413] BJS, *Jails Report Series: 2023 Preliminary Data Release,* found at https://bjs.ojp.gov/preliminary-data-release-jails-2023.

[414] As I have noted, *supra,* and will explain with slightly more detail, *infra,* although we can (and should) aim for particular release/detain ratios, such as 90/10, it would not be wrong to simply create a safe, fair, and transparent detention process and allow the "correct" ratio to emerge, with the understanding that it can always be improved.

mostly due to their lack of money – will undoubtedly return to live as our neighbors in any event, as those most likely to serve an actual prison sentence would in many cases be part of the same, smaller percentage of defendants found in the "detained" category consisting of the 10%.[415] The questions we must answer are whether we want our neighbors to return better or worse than they were when they were first incarcerated, whether we want safer communities or more dangerous ones, and whether we want to spend money on pressing societal needs or on merely building new jails.

Finally, this time in history of American over-incarceration shines a bright light on the not-so-subtle reminders that we can do better in a moral sense as Americans and as human beings. Consider these facts: the Supreme Court has called the pretrial period the "most critical" part of a criminal proceeding, but that period continues to be the least understood and the most abused; we have clear evidence of the detriments of using money at bail, but states have recently amended their constitutions to actually make it easier to detain using money at bail; we know that the Supreme Court has said "liberty is the norm" and that restrictions on pretrial liberty should be individualized, but we still see jurisdictions detain 80% of all arrestees and use blanket (non-individualized) money-bail schedules; our Constitution pushes us toward equality, but we still see people of color and impoverished populations adversely affected at dramatically higher rates than others; we believe in the "presumption of innocence," but we habitually ignore it as we continue to detain so-called "risky" persons pretrial only to release them after dismissing their case or agreeing to probation;[416] we believe in a right to trial by jury, but we now see a causal (and not just anecdotal) link between money-based detention and pleading guilty;[417] the courts tell us there are only two proper purposes to erode pretrial liberty, but we continue to see

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[415] *See Fundamentals of Bail, supra* note 20, at 26 ("Indeed, only a small fraction of jail inmates national (from 3% to 5%, depending on the source) are sent to prison.").

[416] In one recent study, the researcher documented a 51% pre-adjudication, post bail-setting case dismissal rate *See* Wendy Calahan, *Probable Cause as Bail Reform,* 67 St. Louis Univ. L. J. 295, 308-09 (2023).

[417] *See, e.g.,* Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence From Judge Randomization, 45 J. of L. Studies,* found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2774453#:~:text=Using%20a%20large%20sample%20of%20criminal%20cases.

judges set high money bail to achieve other purposes, such as to punish persons or to show that they're "serious" about crime; we see countless courts declare that using money to detain a "bailable" defendant intentionally is also an improper purpose of bail, but the ability to do so is a primary reason that states hold onto secured financial conditions; and we declare "life" and "liberty" to be unalienable rights in our founding documents, but we still see in-custody deaths of persons held on unaffordable money bond amounts despite having good arguments that virtually all money-based detention currently violates state and/or federal law.[418]

Background Perspective: Prediction With and Without an Assessment Tool

The fourth element of background perspective is that jurisdictions need not use an actuarial pretrial assessment tool to make pretrial predictions, but tools like these can certainly help, albeit with a few important caveats. Indeed, authors outside of criminal systems have written best-selling books containing tips on how to be better individual "forecasters" without such tools,[419] and some of these tips could be easily applied to bail.

For example, these authors list certain biases and fallacies prone to individual predictions, and simply learning to identify those things can help with bail setting. Moreover, Philip Tetlock and Dan Gardner created a list of so-called "ten commandments for aspiring superforecasters," six of which could quickly be adapted to bail predictions without tools, including: (1) using background information (called an "outside view," including understanding base rates for

[418] Providing bare statistics on this particular issue tends to diminish its horrific nature, and case-by-case examinations show graphically the possibility for ever-egregious examples. *See, e.g.,* Eric Ferkenhoff, *Starved to Death in an American Jail: The Man Who Couldn't Pay $100 Bail,* Newsweek Mag., Jan. 13, 2023), found at https://www.newsweek.com/2023/01/20/starved-death-american-jail-man-who-couldnt-pay-100-bail-1773459.html. It should be enough merely to say that nobody should die in jail, and especially when they die in jail while likely held pursuant to an unlawful bail setting.

[419] *See, e.g.,* Nate Silver, *The Signal and the Noise: Why So Many Predictions Fail – But Some Don't* (Penguin Books, 2015); Philip Tetlock & Dan Gardner, *Super Forecasting* (Broadway/Crown/Penguin, 2015) [hereinafter *Superforecasting*].

various events); (2) using more precision, nuance, and granularity in prediction (such as using quantifiable probabilities versus terms like "high risk"); (3) obtaining feedback (analyzing errors or using de-briefs in bail settings); (4) using Bayes' Theorem (understanding how new information changes predictions and to what degree); (5) using collaborative teams (for example, bail-setting teams with defense, prosecution, and judge participation); and (6) understanding "black swans" (extreme outliers) and false positives and negatives and their costs (which is necessary to fully understand the ramifications of bail setting). These things would obviously help judges making so-called "clinical" predictions at bail, but it's likely that few judges use them. Moreover, they do not help with other drawbacks in the current system, such as statutes forcing the use of money, statutory factors for bail setting with no predictive validity, and the intractable notion that criminal charge is an accurate proxy for risk. And thus, Tetlock and Gardner write: "[t]he point is now indisputable: when you have a well-validated statistical algorithm, use *it.*"[420]

This conclusion is supported by "decades of research across diverse domains,"[421] and the notion is repeatedly echoed by bail scholars, such as Matthew DeMichele, Ian Silver, and Ryan Labrecque, who write:

> Our findings demonstrate that pretrial assessments have the potential to improve court decision making [and, in turn, reduce mass pretrial incarceration that hides a true lack of risk]. This is not to suggest the last word on assessments. Rather, the findings are plausible given the mountain of behavioral economic findings that have routinely shown that even high-stakes decisions are predicated on intuitive decision-making faculties (Thaler, 2016) and post-assessment validations finding reductions in pretrial outcomes (e.g., new arrests) and jail populations (Lowenkamp, et al., 2022). The decision-making literature has made clear that humans make a series

[420] *Superforecasting, supra* note 419, at 21 (emphasis in original).
[421] Sarah Desmarais, John Monahan & James Austin, *The Empirical Case for Pretrial Risk Assessment Instruments,* 49 Crim. Just. & Beh. No. 6, 807 (2021).

> of systematic errors in judgment due to weak assessment of base rates, limited understanding of probabilities of outcomes, and poor understanding of the influence of irrelevant information (e.g., mood and context).[422]

Using a statistical tool, however, brings with it a host of issues requiring deeper education, which should be *in addition* to general bail education and preferably provided by someone steeped in knowledge of the art and science of tool development or validation. Since the confusion over this topic is persistent, I will try to be brief with the understanding that jurisdictions should at least commit to: (1) embracing education to help them fully understand tools; and (2) not merely plug one into their systems through what we might call a traditional technical assistance approach; instead jurisdictions need help based on adaptive leadership and implementation principles, with the knowledge that merely introducing a tool means traveling down a road toward intentionality, which, in turn, can cause a cascade of events leading inevitably to "true, historic bail reform."

Risk Assessment Tools

"Risk assessment" is broadly defined as "the process through which risk factors [in bail, factors associated with an increased likelihood of failure to appear for court or new arrest] and protective factors [factors associated with a decreased likelihood of FTA and new arrest] are used to estimate the likelihood that an outcome will occur."[423] Despite the nuance between varieties, a typical actuarial

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[422] Matthew DeMichele, Ian Silver & Ryan Labrecque, *Smart Decarceration: Is It Possible to Detain Fewer People and Reduce Arrests?,* Crime & Delinquency (RTI, 2023) (citing Richard Thaler, *Behavioral Economics: Past, Present, and Future,* 106 Am. Econ. Rev. 1577 (2016)), found at https://www.rti.org/sites/default/files/publications/b1e91630-2e57-4167-a7e7-c436db96f09e/versions/SSRN-id4503667.pdf.

[423] Sarah Desmarais & Evan Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys* (SCJ, 2019), found at https://www.ncsc.org/__data/assets/pdf_file/0023/52448/Desmarais-Lowder-Pretrial-Risk-Assessment-Primer-Executive-Summary.pdf. There are more detailed definitions describing various elements differentiating between "clinical" risk assessment, "checklist" risk assessment, "structured professional judgment" risk assessment, "adjusted actuarial" and "stand-alone actuarial" risk assessment. *See* Christopher Slobogin, *Primer on Risk Assessment for Legal Decision-Makers, Vand. L. School,* found at https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2203&context=faculty-publications.

assessment tool (sometimes called an “RAI” or “ARAI” for actuarial risk assessment instrument, and occasionally subtly denigrated through the acronym “RAT”), have evolved from earlier forms of risk assessment – typically, so-called “clinical” or subjective risk assessment – and attempt to provide a more objective way to make predictions surrounding the only three legal outcomes we are constitutionally allowed to consider and are forced to balance at bail: (1) release or liberty; (2) court appearance; and (3) community safety.[424] I and others (especially) have written at length about the process of creating such tools, which can seem simple or complex depending on how that process is described.

What is Being “Tool Neutral?”

Readers of this paper should know that I consider myself to be what some people might call actuarial assessment tool “neutral,” which simply means that I can speak to people about the various reasons to use or not use actuarial tools as well as help jurisdictions make pretrial improvements either with or without them. In short, despite their many benefits, a tool is likely not *essential* for pretrial improvements or even true, historic bail reform. Indeed, true, historic bail reform requires a far better articulation of the risk necessary to detain than that found through the use of an assessment tool. I lean toward using assessments to help with certain decisions, however, but with knowledge of all the caveats and perspectives illuminated by the very research used to craft and implement the tools. Indeed, I relied heavily on the "risk research" to guide me with decisions on verbiage for my intentional model, and seriously doubt that a jurisdiction could craft such a model without relying on that same research. Essentially, it is my assumption that jurisdictions will create intentional detention provisions that allows me to then help those jurisdictions with using (or not using) a tool thereafter.

Some jurisdictions have adopted a local or state validated actuarial tool first, only to realize that they can or should implement other pretrial practices to help them achieve their goals. In those places, the actuarial tool helps begin the conversation about broader system improvements, including, most importantly, making an intentional release or detention decision that reflects

[424] As explained more fully in note 500 and accompanying text, *infra,* New York is the only state that prohibits consideration of safety at bail. I have been given no satisfactory explanation for this, especially given that it appears that the state still allows money to lead to the detention of persons facing certain serious charges that are apparently assumed to show “inherent risk” of danger. Compared to the risk to public safety due to new criminal activity, actual flight at bail is the phenomenon that is so rare and yet comparatively less harmful as to invite states to rationally eliminate it as a basis for detention in the first instance (that is, not through revocation due to failure on pretrial release) based solely on prediction.

more complex system objectives. Others have recognized the value of tools for helping with various aspects of prediction, for sorting released defendants due to diminished resources, for guiding certain policy decisions such as early, delegated release prior to first appearance, or even for accelerating trial dates based on risk categories of released persons.

Some jurisdictions, however, have chosen not to incorporate a tool, but have still adopted certain pretrial improvements to their systems, which have, in turn, helped them to achieve their particular goals and desired outcomes. Some of these improvements, of course, have come from expert recommendations based on actuarial tool risk research. For example, by simply understanding the scope of defendant risk (which is gleaned from that risk research), jurisdictions can implement policies to combine more citations or release on recognizance with court notifications, thus leading to the achievement of various system goals as well as better pretrial outcomes. Some improvements might be dictated mostly by the law, such as forbidding the use of monetary bail schedules, while others – such as providing defense counsel at first appearance – can be based mostly on common sense despite variations or deficiencies in the law.

Such a neutral stance is not unique. After nearly a year of study, the Uniform Law Commission wrote that it "neither requires nor prohibits the use of actuarial risk assessment instruments," but notes many of the same caveats of using tools, such as inappropriately using those tools as the sole basis for detention. As the rest of this paper makes clear, this does not mean that a jurisdiction will be skipping prediction if it has chosen not to use a tool; indeed, the articulation of language designed to help predict the risk needed to detain will still be one of the most important projects that a jurisdiction can undertake. Moreover, as mentioned in the text, above, even so-called clinical prediction can be vastly improved through the use of various tactics articulated by authors such as Silver, Tetlock, and Gardner.

In sum, a jurisdiction can realize better pretrial outcomes either with or without implementing an actuarial pretrial assessment tool, and, by providing necessary background perspective, it is primarily the research going into the creation of tools that is most useful to crafting an intentional release and detention model.

Sources: *Model Bail Laws, supra* note 23, at 89-126; National Conference of Commissioners on Uniform State Laws, *Uniform Pretrial Release and Detention Act,* commentary at 24, (2020).

Jurisdictions have three choices when they consider assessment tools. First, they can decide not to use one at all. Do recall, however, that doing so does not

eliminate the need to predict, and thus will leave in place whatever method of prediction currently exists, including purely subjective or intuitive prediction (which can be both biased and non-transparent) or a process based of assessing success or failure built around wealth, which is likely the most biased method of determining release or detention of which I can conceive. While I continually recommend never using a tool solely to detain (and, indeed, it could be left out of a detention or revocation provision altogether just as it could be used to form intelligent arguments about lack of risk in a detention hearing), I recognize that jurisdictions will need to also make certain predictions about *released* persons, such as to whom they should offer supports given limited resources that would benefit from a statistical tool used to sort one defendant from another.

Second, jurisdictions can decide to build a custom tool. I watched closely those who developed a statewide tool for Colorado, which still serves the state well, and while it has been improved through re-validation, there is clearly room for significant further improvement. Creating a tool from scratch can be a long and sometimes complicated process; nonetheless, it is an option that can provide a valuable way to educate persons on the fairly misunderstood process that goes into tool creation.

Finally, jurisdictions can borrow a tool, which is mostly what is happening now in America. These days, the borrowed tool of choice is Arnold Ventures' Public Safety Assessment (PSA), which has now been adopted by over 250 jurisdictions and has an initiative with dedicated resources to help with implementation. The PSA does well in various, scattered American jurisdictions mostly due to being both constructed and subsequently validated (making sure the tool is accurate and reliable) on very large numbers of court cases, making it far more likely to be successfully validated on any new local population. It is also a tool that can be used without having to interview defendants.[425] Validation to the local population

[425] The NAPSA Standards continue to recommend conducting interviews for all accused persons prior to first appearance, but by crafting an intentional release and detention provision the need to actually interview every defendant (versus to merely sort persons via a tool to then decide who to interview) becomes less acute. There is also a trend toward pretrial services to include attempts to assess defendant needs so as to provide more supports

is crucial when borrowing any tool, and, for a number of reasons, routine re-validation is considered a best practice for any jurisdiction using any actuarial tool.[426]

Unfortunately, this choice has been made difficult – and, in many cases, put on hold – due to a mostly in-house (that is, among those of us seeking pretrial justice) debate over whether actuarial pretrial assessment tools are in any way biased. Understanding this debate helps us to determine whether this controversy has run its course and, if not, whether it should be allowed to hinder other efforts to improve the pretrial process.

The Bias Debate

The "replace money with risk" and "risk tools are the panacea" era of this wave of bail reform (building off of earlier reforms implementing evidence-based sentencing practices) was in full bloom in 2017, when I published my intentional release and detention model. Before that, the field benefitted from the work of persons like Cynthia Mamalian, who looked at a variety of assessments in 2011 to compare risk factors, but who did not focus on potential bias and, instead, discussed broad but pertinent legal and research-based issues surrounding the tools. Most relevant to the future debate, however, Mamalian queried whether America might not benefit from a "universal risk assessment instrument" – that is, one that could be adopted by every state and that could be easily validated locally.[427] Two years later, in 2013, the Arnold Foundation (now Arnold Ventures) created such an instrument, and that, in turn, gave a sense of urgency to do

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(versus traditional court-ordered pretrial conditions) to help people succeed in the pretrial phase. Many of these needs can only be ascertained through an interview.

[426] *See* APPR, *Research Summary on the Pretrial Assessment Tools,* (2023), found at https://cdn.filestackcontent.com/security=policy:eyJleHBpcnkiOjQwNzg3NjQwMDAsImNhbGwiOlsicGljayIsInJlYWQiLCJ3cml0ZSIsIndyaXRlVXJsIiwic3RvcmUiLCJjb252ZXJ0IiwicmVtb3ZlIiwicnVuV29ya2Zsb3ciXX0=,signature:9df63ee50143fbd862145c8fb4ed2fcc17d068183103740b1212c4c9bc858f63/wNGeL8FXS7OCTcH7l9eF. There is also a growing body of literature dedicated solely to the PSA, which can be found here: https://advancingpretrial.org/psa/research/#other.

[427] Cynthia Mamalian, *State of the Science of Pretrial Risk Assessment* (PJI/BJA, 2011), found here https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PJI_PretrialRiskAssessment.pdf.

research concerning: (1) the accuracy and fairness of that tool and others like it; and (2) how the notion of "risk" might fit into our mostly charge-based legal structures.

To be brief, the overall research found a variety of reasons (based on the law, the history of bail, and the pretrial research) for why an actuarial tool should never be used *solely* to detain a person pretrial. That research, however, never said to abandon the tools; instead, it found numerous benefits for using the assessments as a release tool by sorting defendants, such as early release or providing supports and applying release conditions, but after a jurisdiction had already created an intentional detention process that included better language to guide the prediction related to the risks relevant to detention with adequate due process.[428] Unfortunately, a number of pretrial reform advocates – undoubtedly with good intentions – used the reasons for not using a tool *to detain* to argue that the tools should not be used *at all*. This argument was bolstered by a now infamous ProPublica article,[429] which looked at a tool for assessing persons at sentencing and found what it called "significant racial disparities" stemming from the use of that particular proprietary and nontransparent tool.[430]

The field was soon awash with both high and low quality research papers, media accounts, and other documents addressing the now popular issue of bias in risk

[428] *Model Bail Laws*, *supra* note 23, at 115-127; *Changing Bail Laws*, *supra* note 56, at 1-3, and *passim.*
[429] Julia Andwin, et al., *Machine Bias* (ProPublica May 23, 2016).
[430] The ProPublica article has since been shown to be flawed, although the field likely significantly benefitted from working through the issue that was presented by that publication. *See* Sarah Desmarais, John Monahan & James Austin, *The Empirical Case for Pretrial Risk Assessment Instruments,* 49 (6) Crim. Just. & Beh., found at https://multco-web7-psh-files-usw2.s3.amazonaws.com/s3fs-public/Pre-Trial%20Risk%20Assessments%20Predictive%20Aspects%20090721.pdf ("Several studies have since shown that ProPublica's analysis was flawed and its conclusion misleading in various ways."). That the overall confusion over the issue during this debate was rampant, however, is perhaps best demonstrated by all of the major American criminal defense organizations "strongly" endorsing tools in all jurisdictions in 2017, *see* American Council of Chief Defenders, Gideon's Promise, NACDL, NAPD, and NLADA, *Joint Statement in Support of the Use of Pretrial Risk Assessment Instruments* (2017, with support continuing in somewhat dampened form in 2019), but with the Leadership Conference of Civil and Human Rights strongly calling for their disuse, even while articulating two good reasons to use them. *See* Leadership Conf. on Civ. & Hum. Rights, *The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns,* found at https://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf. The confusion was exacerbated by low quality research documents misinterpreting cites, which occasionally caused states to slow down or even to completely stop progress toward bail reform.

assessments. Unfortunately, the best papers (often from fields outside of traditional criminal justice) were complicated, using mathematical formulas, unfamiliar terms and processes (including the aptly-named "confusion tables") to make various points, while the worst of them contained mere stances, citing to documents that were either irrelevant or even contrary to the papers' main positions.[431] In hindsight, I learned that the high quality papers actually contained the answer to the debate, but they were simply hard to digest by the typical person interested in pretrial justice, mostly because addressing accuracy and fairness in actuarial tools is a more complicated task than, say, taking a stance against something as blatantly egregious as money bail.

Overall, however, the message from these early "good" documents was clear: developers of tools could employ a number of safeguards against bias in tool creation, and whatever perceived bias that might be reflected in a tool (and likely coming from some very real bias in the system) could be fixed. Doing so, however, involved understanding the interplay and balancing a variety of equality metrics, some of which simply could not function at the same time. The best analogy provided to the field was that the tools were like mirrors in that they simply reflected whatever data (biased or not) was fed into them.[432] And, indeed, when one understands the process of creating a tool, he or she can then understand that its creation can help root out actual discrimination that would normally be hidden *but for the tool*.[433] Finally, and most importantly, the authors of these better papers confirmed the notion that while we must strive to understand and,

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[431] *See* Megan Stevenson, *Risk Assessment in Action,* 103 Minn. L. Rev. 303, 305-06 (2018) (correctly noting the "heated rhetoric" at this time, with persons citing studies using so-called "facts" produced by tool developers themselves or even conclusory arguments, bolstered, in at least sone instance, by "a single slide in a Power Point presentation"). One so-called "data-driven" stance for eliminating tools included 48 cites, only four of which were empirical studies, and those four all argued that the primary flaw in assessment tools was found in how they were being used, not in accuracy or fairness in creation or validation.

[432] *See generally,* Sandy Mayson, *Bias In, Bias Out,* 128 Yale L.J. 2218 (2019) (also representing a paper that is one of the first to try to explain the issue, including using a statistical "mirror" as a diagnostic tool, to a broader audience).

[433] *See* Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Cass Sunstein, *Discrimination in the Age of Algorithms,* 10 J. of Legal Analysis, 113 (2019) (concluding that the use of algorithms "offers far greater clarity and transparency about the ingredients and motivations of decisions [than does human decision-making], and hence a far greater opportunity to ferret out discrimination" which can "turn algorithms into a powerful counterweight to human discrimination and a positive force for social good of multiple kinds") [hereinafter *Kleinberg*], found at https://academic.oup.com/jla/article/doi/10.1093/jla/laz001/5476086?ref=akusion-ci-shi-dai-bizinesumedeia.

indeed, improve assessment tools, they should not be abandoned. In one of the best papers illustrative of this initial phase, Professor Richard Berk and others noted that "rhetoric too often substitutes for careful analysis," and wrote three sentences accurately summing up these early papers and the nature of the debate at the time:

> [C]riminal justice risk assessments have been undertaken in the United States since the 1920s. Recent applications of advanced statistical procedures are just a continuation of long-term trends that can improve transparency and accuracy, especially compared to decisions made solely by judgment. They also can improve fairness. But *categorical endorsements or condemnations serve no one*.[434]

Fortunately, the field soon benefitted from authors producing documents for more general audiences that were designed to cut through the initial confusion with pretrial assessment tools,[435] such as those written by Sandra Mayson,[436] Sarah Picard and others,[437] Megan Stevenson,[438] Brandon Buskey and Andrea Woods,[439] Sarah Desmarais and Evan Lowder,[440] Alexandra Chouldechova and

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[434] Richard Berk, Hoda Heidari, Shahin Jabbari, Michael Kearns & Aaron Roth, *Fairness in Criminal Justice Risk Assessments: The State of the Art,* 50 Soc. Methods and Res., at 34 (2018) (citations omitted) (emphasis added).
[435] Of course, prominent authors, such as Kristin Bechtel, Thomas Cohen, Alexander Holsinger, and Christopher Lowenkamp have been attempting to explain various aspects of the research to jurisdictions for quite a long time.
[436] Sandra Mayson, *Bias In/Bias Out,* 128 Yale L. J. 2218 (2019).
[437] Sarah Picard-Fritsche, Michael Rempel, Jennifer Tallon, Julian Adler & Natalie Reyes, *Demystifying Risk Assessment: Key Principles and Controversies* (CCI, 2017), found at https://www.innovatingjustice.org/sites/default/files/documents/Monograph_March2017_Demystifying%20Risk%20Assessment_1.pdf.
[438] Megan Stevenson, *Assessing Risk Assessment in Action,* 103 Minn. L. Rev. 303 (2018), found at https://heinonline.org/HOL/LandingPage?handle=hein.journals/mnlr103&div=16&id=&page=.
[439] Brandon Buskey & Andrea Woods, *Making Sense of Pretrial Risk Assessments* (NACDL, 2018), found at https://www.nacdl.org/Article/June2018-MakingSenseofPretrialRiskAsses.
[440] Sarah Desmarais & Even Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors and Defense Attorneys* (MacArthur SJC, 2019), found at https://safetyandjusticechallenge.org/wp-content/uploads/2021/06/Pretrial-Risk-Assessment-Primer-February-2019.pdf.

Kristian Lum,[441] Laurel Eckhouse and others,[442] Colin Doyle and others from Harvard Law School,[443] and, most recently, Matthew DeMichele and others at RTI[444] and Cristopher Moore and others at the Santa Fe Institute and the University of New Mexico.[445] Authors are now presenting feasible solutions to seemingly complex problems in tool construction,[446] and the field is benefitting from researchers (and various groups and initiatives)[447] writing summaries of the literature in annual reviews,[448] chapters of books,[449] and even entire books[450] about all aspects of bail that include sections on prediction and assessment tools.

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[441] Alexandra Chouldechova & Kristian Lum, *The Present and Future of Pre-Trial Risk Assessment Instruments* (MacArthur SJC, 2020), found at https://safetyandjusticechallenge.org/resources/the-present-and-future-of-ai-in-pre-trial-risk-assessment-instruments/.

[442] Laurel Eckhouse, Kristian Lum & Julie Ciccolini, *Layers of Bias: A Unified Approach for Understanding Problems with Risk Assessment,* 46 (2) Crim. Just. & Beh., found at https://journals.sagepub.com/doi/abs/10.1177/0093854818811379.

[443] Colin Doyle, Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers* (Harv. L. Sch. Crim. Just. Pol'y Prog. 2019), found at https://static.prisonpolicy.org/scans/Harvard%20Guide%20to%20Bail%20Reform.pdf.

[444] *See* Various publications found at https://www.rti.org/publications/search?expert=Matthew+DeMichele&page=2. An excellent recent publication authored by RTI's Kristin Bechtel and others provides an overview of risk assessment as well as conditions and interventions. *See* Kristin Bechtel, Thomas Cohen, Alexander Holsinger, Christopher Lowenkamp & Charles Robinson, *Evidence Over Imitation: Developing Research-Informed Strategies for Pretrial Decision-Making,* 88 (2) Fed. Prob. 4 (2024), found at https://openurl.ebsco.com/EPDB%3Agcd%3A1%3A34789185/detailv2?sid=ebsco%3Aplink%3Ascholar&id=ebsco%3Agcd%3A186177652&crl=c&link_origin=scholar.google.com.

[445] Cristopher Moore, Elise Ferguson & Paul Guerin, *Pretrial Risk Assessment on the Ground: Algorithms, Judgments, Meaning, and Policy* (2023), found at *https://mit-serc.pubpub.org/pub/czviu6qc/release/2*. Christopher Slobogin has also published a helpful resource on the use of postconviction tools, which, he stresses, has many points applicable to the pretrial debate. *See* Christopher Slobogin, *Primer on Risk Assessment for Legal Decision-Makers,* Vand. L. Sch., found at https://scholarship.law.vanderbilt.edu/faculty-publications/1182/.

[446] *See, e.g.,* Richard Berk & Ayya Elzarka, *Almost Politically Acceptable Criminal Justic Risk Assessment,* 19 Crim. Just. & Pub. Pol'y, 1231 (2020), found at https://onlinelibrary.wiley.com/doi/abs/10.1111/1745-9133.12500; Crystal Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework,* 119 Mich. L. Rev. 291 (2020).

[447] For example, both the Arnold/CEPP Advancing Pretrial Policy and Research Initiative and the MacArthur Safety and Justice Challenge have summaries of various research topics (including research on tools) on their websites found here: https://advancingpretrial.org/announcement/pretrial-research-highlights-in-2024/, and here: https://islg.cuny.edu/resources/tag/Safety+and+Justice+Challenge.

[448] Joshua Page & Christine Scott-Hayward, *Bail and Pretrial Justice in the United States: A Field of Possibility,* 5 Ann. Rev. of Crim. 91 (2022), found at https://www.annualreviews.org/content/journals/10.1146/annurev-criminol-030920-093024; Jenny Carroll, *The Ever-Shifting Ground of Pretrial Detention Reform,* 19 Ann. Rev. of L. & Soc. Science (2023), found at https://www.annualreviews.org/content/journals/10.1146/annurev-lawsocsci-120122-092655.

[449] *See, e.g.,* Smantha Zottola, Sarah Duhart Clarke & Sarah Desmarais, *Bail Reform in the United States: The What, Why, and How of Third Wave Efforts*, Handbook of Issues in Crim. Just. Ref. in the U.S., at 143 (2021).

[450] Shima Baradaran Baughman, *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System* (Camb. Univ. Press, 2018).

The latest research, including very recent summaries and systematic reviews from the National Association of Pretrial Services Agencies (NAPSA), Pretrial Research Associates (PRA), the Research Triangle Institute (RTI), the MacArthur Safety and Justice Challenge Research Consortium, Arnold Ventures/CEPP's Advancing Pretrial Policy and Research (APPR) Initiative, Luminosity, and scholars from other institutions and university programs (and citations found therein)[451] bolters my earlier suggestions on how to successfully use "good" assessment tools, while generally providing justification for the four key findings presented in the APPR's research summary that: (1) actuarial tools can reliably predict future outcomes (validity); (2) actuarial tools can vastly improve pretrial decision making over decisions based on "clinical" or professional judgement; (3) actuarial tools, in combination with other pretrial improvements, shows promise for safely reducing over-detention; but (4) actuarial tools need quality implementation (indeed, I believe that reflecting on the literature explaining how a jurisdiction should use a tool is crucial to whether it should even be deemed a "pretrial improvement").[452]

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[451] *See, e.g.,* Sarah Desmarais, John Monahan & James Austin, *The Empirical Case for Pretrial Risk Assessment Instruments* (SJC, 2021); APPR, *Pretrial Assessment Tools* (2023) [hereinafter *Empirical Case*], found at https://multco-web7-psh-files-usw2.s3.amazonaws.com/s3fs-public/Pre-Trial%20Risk%20Assessments%20Predictive%20Aspects%20090721.pdf; NAPSA, *Pretrial Assessments – Bias & Disparities? Staying Grounded in the Research* (2024), found at https://napsa.memberclicks.net/assets/Pretrial%20Assessments%20-%20Bias%20and%20Disparities_.pdf [hereinafter, *NAPSA Grounded*]; Policy Research Associates, *Bringing Data to the Debate on Risk Assessments* (2025), found at https://www.umassmed.edu/globalassets/law-and-psychiatry-program/hosted-files/risk-assessment-instrument-brief-final.pdf [hereinafter *PRA Debate*]; Spencer Lawson, Emma Narkewicz & Gina Vincent, *Disparate Impact of Risk Assessment Instruments: A Systematic Review* (2024), found at https://psycnet.apa.org/record/2025-29709-001; Matthew DeMichele, Ian Silver, Ryan Labrecque, Debbie Dawes, Pamela Lattimore & Stephen Tueller, *Testing Predictive Biases at the Intersection of Race-Ethnicity and Sex: A Multi-Site Evaluation of a Pretrial Risk Assessment Tool* (2024) [hereinafter *Testing Predictive Biases*], found at https://journals.sagepub.com/doi/abs/10.1177/00938548241233934; Sarah Desmarais, Samantha Zottola, Sarah Duhart Clarke, Evan Lowder, *Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature* (2020), found at https://journals.sagepub.com/doi/abs/10.1177/0093854820932959; Sarah Picard, Matt Watkins, Michael Rempel, and Ashmini Kerodal, *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness* (CCI, 2019), found at https://www.innovatingjustice.org/wp-content/uploads/2019/07/Beyond_The_Algorithm.pdf; Luminosity & Univ. of Chicago's Crime Lab New York, *Updating the New York City Criminal Justice Agency Release Assessment,* (2020), found at https://www.nycja.org/assets/downloads/Updating-the-NYC-Criminal-Justice-Agency-Release-Assessment-Final-Report-June-2020.pdf.

[452] APPR, *Pretrial Assessment Tools (a Pretrial Research Summary),* found at https://advancingpretrial.org/improving-pretrial-justice/appr-resources/pretrial-research-summaries/, (2023). The NIC weighed in on risk assessment in 2017 with the publication of Cara Thompson's *Myths and Facts: Using Risk and Need Assessments to Enhance Outcomes and Reduce Disparities in the Criminal Justice System,* making similar

And again, based on my own research, a tool should never be used solely to detain.[453]

When it comes to the debate over bias, Sarah Desmarais, John Monahan, and James Austin wrote in 2022 that risk tools "can be an effective strategy to help achieve pretrial system change, including reducing pretrial detention for people of color and white people, alike, when their results are actually used to inform decision-making."[454] In 2024, Policy Research Associates published a systematic review of papers written between 2000 and 2023 concerning the effects of risk tools on racial/ethnic disparities and found that they "showed little evidence of differential treatment by the legal system for different racial or ethnic groups as a result of risk assessment use."[455] Likewise, reviewing the research to date, the National Association of Pretrial Services Agencies concluded in early 2024 that although the tools should be locally validated and checked for bias and disparities, "[b]ased on the empirical research currently available, NAPSA continues to support the position that pretrial assessments, if used properly, are a positive advancement in the field of pretrial justice."[456]

Moreover, in March of 2024, RTI International conducted multi-site analyses to test for evidence of bias across six groups, and concluded, among other things, that "the analyses showed a lack of evidence suggesting differential prediction for the three PSA tools across the six racial-ethnic and sex groupings [and that the] regression models failed to produce evidence of predictive bias when testing for moderation."[457] Also in 2024, Shamena Anwar, John Engberg, Issac Opper and Leah Dion concluded that among randomly assigned judges, those judges who

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findings albeit for postconviction as well as pretrial tools. *See* at https://s3.amazonaws.com/static.nicic.gov/Library/032859a.pdf.

[453] This issue can seem complex only because using a tool to detain would still be deemed an improvement over using subjective or clinical judgment to detain. Nevertheless, based on what the tools measure, it would still lead to a great deal of unnecessary detention, and thus false positives, as compared to an articulation of risk to detain focusing on how high the risk and "risk of what, exactly," such as that provided in my and other hypothetical models.

[454] *Empirical Case, supra* note 451, at 1.

[455] *See PRA Debate, supra* note 451, at 2.

[456] *See NAPSA Grounded, supra* note 451, at 7.

[457] *Testing Predictive Biases, supra* note 451, at 16.

followed the recommendations of a risk assessment tool greatly increased release rates with "no offsetting public safety impact" and "racial disparities in pretrial detention rates decline as the rate at which judges follow the pretrial risk assessment recommendations increases."[458] And most recently, Spencer Lawson, Emma Narkewicz, and Gina Vincent authored a systematic research review, which found that although many factors will influence any particular tool's impact, the current study, like previous studies, "revealed no strong or consistent evidence that risk instruments are having widespread disparate impact by racial/ethnic groups or worsening existing disparities in the legal system."[459]

I find much of this unsurprising. Indeed, even if there were no studies concluding that using statistical risk assessment is superior to the prediction methods inherent in the traditional money-bail system, it takes only a little common sense to recognize that *any* advancement toward a more intentional and fair release and detention system will outdo a clearly biased money-bail system based on random release and detention.[460] Even without implementing any actual changes, researchers in one study estimated the potential benefits of moving to a more intentional release and detention process as guided by a tool "by detaining fewer

[458] Shamena Anwar, John Engberg, Isaac Opper & Leah Dion, *What Happens When Judges Follow the Recommendations of Pretrial Detention Risk Assessment Instruments More Often?* (Rand, 2024) ("If judges who follow the risk assessment recommendations at a low rate followed the recommendations more often, more individuals could be released, racial disparities would decline, and there could be no impact on public safety."), found at https://www.rand.org/pubs/research_reports/RRA3299-1.html.

[459] Spencer Lawson, Emma Narkewicz & Gina Vinent, *Disparate Impact of Risk Assessment Instruments: A Systematic Review,* 48 L. & Hum. Beh. 427 (2024), found at https://psycnet.apa.org/record/2025-29709-001. Bolstering this overall consensus, Lowenkamp and others recently published a report examining the federal system and showing that "a marker of achieving full pre-hearing PTRA [the federal risk tool] implementation in 2011 robustly predicted both a drop in racial disparities in detention recommendations and a subsequent decrease over time." They concluded: "These results are also consistent with the results of most other studies that have examined whether risk assessment instruments (RAIs) increase disparate impact by comparing outcomes before and after RAIs have been adopted (Lawson et al., 2024). The consistency of this finding across jurisdictions and across methodological approaches should mitigate concerns about relying on risk assessment as a foundation for pretrial reform." Christopher Lowenkamp, Jennifer Skeem & Lina Montoya, *Racial Disparity in Federal Pretrial Detention Recommendations: Trends Over Two Decades and Association with Risk Assessment Implementation,* 88 (2) Fed. Prob. 35 (2024), found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4984568.

[460] *See* Zottola & Demarais, *supra* note 49 ("Our findings do not support the use of money bail for ensuring that people return to court and avoid rearrest. Instead, our findings suggest that using pretrial risk assessment instruments could result in more accurate and appropriate release decisions.").

people and decreasing new arrests."[461] Likewise, in another study researchers used data analysis to compare hypothetical outcomes for persons under three release scenarios (business as usual, risk tool only, and violent charge eligibility net plus risk tool), and concluded that detaining persons using a hybrid violent-charge-net-and-risk approach – as you will see, *infra,* the essence of an intentional detention provision that uses a charge-based net and a good articulation of risk within the net needed to detain – "would cut overall pretrial detention compared to business as usual and nearly eliminate disparities in detention" along with "largely alleviat[ing] racial disparities in false positives."[462]

I do not now declare an end to the debate (although I would not be surprised if an end were so declared) as the research will continue, along with attempts to ferret out and eliminate whatever actual bias in the system a particular tool (or research surrounding a tool) might unearth.[463] Moreover, I can likely never predict what sort of iterative tool might be pushed upon the field and thus require an entirely different stance. Nevertheless, with the ProPublica article discredited and the serious research pointing in a single direction, the fundamental point is that

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[461] Matthew DeMichele, Ian Silver & Ryan Labrecque, *Smart Decarceration: Are Pretrial Assessments an Effective Strategy to Detain Fewer People and Reduce Arrests,* at 1 (RTI, 2023), found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4503667.

[462] Sarah Picard, Matt Watkins, Michael Rempel & Ashmini Kerodal, *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Radical Fairness* (CCI, 2919), found at https://www.innovatingjustice.org/sites/default/files/media/document/2019/Beyond_The_Algorithm.pdf. The notion that a detention eligibility net of violent offenses might be a key to reducing disparity implies bias being most prevalent in misdemeanor or other lower-level cases. This surmise seems supported by findings by Garrett and Thompson that certain changes to the misdemeanor bail process in Harris County, Texas, dramatically reduced racial disparity in ability to bond out of jail. *See* Brandon Garrett & Sandra Thompson, *Monitoring the Misdemeanor Bail Reform Consent Decree in Harris County, Texas,* 105 Judicature 40 (Duke L. Sch. 2021), found at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6788&context=faculty_scholarship. Other researchers studying the prevalence of misdemeanor cases have seen "a profound racial disparity in the misdemeanor arrest rate for most – but not all – offense types . . . [which has] remained remarkably constant over the past thirty-seven years." Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice,* 98 B.Y.U. Law Rev., 731, 731-2 (2018).

[463] In June 2024, the MDRC looked at seven jurisdictions and reported that racial and ethnic disparities were common at various pretrial decision points and recommended strategies to mitigate those disparities, such as reducing arrests, increasing diversion and community-based supportive services, considering a wider array of factors in release-condition decisions, diversifying legal system staffing, and even improving translation services. *See* Chloe Anderson, Brit Henderson, Lily Freedman, Kasey Eickmeyer, David Selby, Cassandra T-Pederson & Sarah Picard, *Racial and Ethnic Disparities in Pretrial Processes* (Rand, 2024), found at https://www.mdrc.org/sites/default/files/Racial_and_Ethnic_Disparities_in_Pretrial_Processes.pdf.

phrases such as "biased risk tools" are over-simplified, misleading, and based on little to no evidence.

Nevertheless, I do not mean to ignore what are clearly legitimate claims of historic and current bias found in the criminal system. Such bias – whether intentional or not – is unconscionable and must be eradicated, even if that eradication means forcing what may look like radical transformation to the system. Also, I acknowledge that even a well-designed actuarial tool (or, more likely, a decision-making matrix associated with a tool) may be used in an egregiously biased manner when implemented with no guardrails. Moreover, even the best tools can be improved, such as by inclusion of protective factors or through the variety of both procedural and substantive methods used, for example, to recently update the tool used in New York City.[464] And finally, I admit the existence of "bad" risk tools, such as opaque, proprietary tools or tools using untested predictors based on some single criminal system actor's notions of risk. But to the extent that a good tool can help lead to release and ferret out bias that has been previously shielded by subjectivity, then I see very good reasons for their use. The fundamental point is that however a jurisdiction decides to engage in prediction (because even without a tool, the need for prediction remains), it must commit to consciously searching for and eliminating any real or perceived bias found along the way.

All of this, however, merely bolsters my argument that the issue is complex and that the literature on risk tools must be examined carefully, through a deep, continuing education. That continuing education should include not only general training on where tools fit in the overall discussion of bail, but also more specific training by experts to include, for example, definitions of terms such as artificial intelligence ("AI", both narrow and general) and machine learning (or even "algorithm" and "actuarial"),[465] explanations of how to develop a tool using

[464] *See infra,* note 467 and accompanying text.

[465] A good overall definitional resource that provides the basis for understanding tools as well as calming many fears surrounding their use is Alexandra Chouldechova & Kristian Lum's, *The Present and Future of AI in Pre-Trial Risk Assessment Instruments* (SJC, 2020), found at https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/06/AI-in-Pre-Trial-Risk-Assessment-Brief-June-2020-R2.pdf.

equality metrics (both treatment and impact) and different statistical models, teachings on how to judge more complex models than regression and how to interpret the various research studies associated with assorted tools under various legal or policy structures,[466] explanations of the pros and cons of matrices and findings on how best to use tools, explanations of strategies for better conveying "risk" (or the lack thereof) either by word or number, showing how to distinguish a "good" from a "bad" tool (because there are both), and emphasizing why pretrial risk assessment tools should never be used solely to detain. In short, traditional technical assistance does not always include the sort of education and adaptive implementation necessary for successfully adopting pretrial improvements, and especially an improvement so central to the essence of bail as a predictive tool. Accordingly, I caution jurisdictions implementing any pretrial improvement – from an assessment tool to a new constitutional provision – to slow down and to do so only after receiving technical assistance that includes thorough education concerning risk, risk tools, and prediction.

This type of education is truly unique and can span many disciplines. Accordingly, when it comes to implementing a tool, the education is best done by someone steeped in an understanding of risk and prediction as well as the intricacies of various current tools and the legal structures surrounding their use. Moreover, jurisdictions should add to this specialized education a deeper knowledge of bail in general to fully understand the background perspective on risk and prediction necessary to achieve anything worthwhile in pretrial justice.

While unique, this type of education is entirely possible, and, indeed, has been done recently in at least one jurisdiction. When researchers updated the New York Criminal Justice Agency assessment tool, those researchers (including an

[466] For example, in addition to more general papers on assessment, Professor Evan Lowder and others have amassed a significant body of important research on the IRAS-PAT, the pretrial tool used in Indiana. Understanding that research in context involves learning the differences between a particular tool versus other tools as well as assessing Indiana's mix of legal sources for setting bail, which may not be generalizable to other states. As another example, researchers evaluating use of the PSA in a midwestern county had to take into account that the tool was examined when used primarily to set money bonds, which made it difficult to measure whether the tool had any benefits at all.

additional expert research advisory council) engaged in significant collaboration and education for stakeholders and members of the public, to, for example, review and settle on an agreeable statistical model as well as equality metrics to address perceived racial disparity. Those researchers educated persons on transparency, model construction, and prediction, with the end result being an assessment tool that: (1) was more accurate by using predictors with greater granularity; (2) was more transparent by using research oversight and community engagement; (3) actually reduced detention, "substantially reduc[ed]" disparities, and "dramatically reduced" the magnitude of false positives; and (4) led to other successful outcomes.[467]

Important Caveat Based on Recent Trends

This deeper education will help persons not only with the inevitable change that I see coming to all jurisdictions but also with the ramifications of two important pretrial trends I see across America: (1) the growing amount of research showing the possible ineffectiveness of traditional conditions of release; and (2) the need to focus more on helping released persons by addressing behavioral needs through more untraditional and less-restrictive supports.

Indeed, in two 2022 documents written for NIC, Tara Blair, Spurgeon Kennedy, and Robin Wosje concluded that "there is no firm grounding in research for commonly imposed pretrial conditions,"[468] and that because "more can be done at the pretrial stage to identify needs and help supervised individuals down a path that supports their success," a new model to foster success with needs assessments leading to defendant supports is likely appropriate.[469] The authors correctly note

[467] *See* Luminosity and the University of Chicago's Crime Lab New York, *Updating the New York City Criminal Justice Agency Release Assessment: Maintaining High Court Appearance Rates, Reducing Unnecessary Pretrial Detention, and Reducing Disparity,* found at https://www.nycja.org/assets/Updating-the-NYC-Criminal-Justice-Agency-Release-Assessment-Final-Report-June-2020.pdf. Among other things, the researchers helped the community to understand notions found in *Kleinberg, supra* note 433, which included equality metrics as well as regression and other machine learning techniques.

[468] Tara Blair, Spurgeon Kennedy & Robin Wosje, *Incorporating Services and Support Into Pretrial Supervision; Is There a Best Model?* at 2 (JMI/NIC, 2022), found at https://s3.amazonaws.com/static.nicic.gov/Library/033627.pdf.

[469] Spurgeon Kennedy, Tara Blair & Robin Wosje, *Promoting Pretrial Services: A New Model for Pretrial Supervision*, at 2 (JMI/NIC, 2022), found at https://s3.amazonaws.com/static.nicic.gov/Library/033628.pdf. A "Pretrial Support

that "needs" must still be related to the two constitutionally valid government purposes for imposing limits on pretrial liberty – that is, court appearance and community safety – and, if so, and so long as the supports or treatments do not result in detention or infringe on any other constitutional right, it is likely that they will pass constitutional muster (so long as they do not lead to detention) as being at least rationally related to those legal outcomes. Nevertheless, this raises an important question: if traditional conditions are ultimately found to be ineffective, and if our primary use for a risk assessment instrument is to assign traditional conditions, and if, instead, we should be assessing for so-called needs, then for what use is a traditional risk assessment instrument?[470] If we reach a point at which the research shows traditional conditions to be altogether ineffective and we have developed structural release/detain systems that result in limited and fair detention leading to automatic release of a wide swath of individuals despite their risk, are risk tools – as opposed to needs tools – worth keeping, despite their importance in the history of bail reform and despite their use in moving states away from its money-based traditions?[471] This is a question the field must soon answer, but the following paragraphs list just a few early proposals.

Assuming that a jurisdiction has crafted a properly limited intentional detention provision, I have heard proposals that would merely assign everyone released pretrial to something called pretrial services, where they would each be given a

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Team" funded by the Unitarian Universalist Congregation of Cleveland and the Cuyahoga County Public Defender's Office recently reported helping 25 persons through the pretrial period, with a 96% court appearance rate (for 66 total hearings) and with 100% of participants staying arrest-free. *See* description at https://advancingpretrial.org/story/a-community-engaged/.

[470] A similar but more acute dilemma emerges when states choose to use the "federal detention model" template language for on-purpose detention, which allows detention "when no condition or combination of conditions suffice" to assure safety or court appearance. Essentially, if the research ultimately shows that no traditional conditions work, then allowing detention when "no conditions suffice" will lead to massive pretrial incarceration rates. That is, the research finding that conditions do not work to achieve their objectives automatically provides the "clear and convincing" evidence that they do not "suffice" to achieve those same objectives. The answer to this dilemma is clear: never use the federal "no conditions" limiting process by itself; that is, only use it as an add-on to a well-crafted statement of risk found within an eligibility net that already looks for the extent of the risk and the answer to the question, "risk of what." State legislators should examine the evidence to see which of their more restrictive potential conditions should be dropped in favor of listing less-restrictive supports. And even when a line expressing that judges should look to less restrictive alternatives when imposing release conditions or as the add-on to the detention risk statement, that line would likely be better expressed as "conditions or other pretrial interventions."

[471] *See Changing Bail Laws, supra* note 56, at 2.

quick needs screen or even a needs proxy to sort released individuals for potential interviews and/or voluntary interventions. We have also heard of hybrid proposals to use risk tools to sort, and then needs tools to further sort among those deemed "higher risk."

In a 2020 paper published by the UCLA School of Law, the authors articulated a model of intentional release and detention that includes: (1) a limited, safe, and fair intentional detention provision and process (much like the one I discuss later in this paper), which focuses on template language to make predictions based on (a) how high the risk, and (b) risk of what, along with appropriate due process protections; (2) no use whatsoever of an actuarial risk tool and no use of traditional supervision-based conditions of bail; (3) creation of a community care and support agency, which would assess both released and detained persons for strengths and needs, and which would provide supports and other resources through interventions and non-punitive responses shown to effectively address those needs.[472] The authors describe this model as a "paradigm shift," and they suggest pilot projects to gauge effectiveness, but I see it more as a prophesy – possibly the unavoidable result of a culmination of trends caused by the law and pretrial research leading rapidly and inevitably to a system coming ever closer to true pretrial justice.

Traditional and Non-Traditional Conditions and Supports

Because so much of this research focuses on "what works" in the way of various traditional conditions of release (including money), I believe there is also a need to quickly summarize a few general points about those conditions.

In 1966 the federal government changed the bail statute for the first time since 1789 to "assure that defendants 'shall not needlessly be detained' prior to trial in

[472] Alicia Virani, Rodrigo Padilla-Hernandez, Tali Gires, Kaitlyn Fryzek, Rachel Pendleton, Ethan Van Buren & Maximo Langer, *Creating a Needs-Based Pre-Trial Release System: The False Dichotomy of Money Bail Versus Risk Assessment Tools* (UCLA L. Sch., 2020) [hereinafter *UCLA Model*], found at https://law.ucla.edu/sites/default/files/PDFs/Academics/CJP%20Pretrial%20Proposal%20-%202020.pdf.

federal criminal courts."[473] To rectify decades of abuse due to money bail, the 1966 Act created a presumption of release on recognizance to be followed by release on various conditions if the judge believed recognizance was not sufficient to reasonably assure appearance. Judges were to impose "the first of the following" (or a combination of) conditions from a list of five alternatives, showing a clear intent to reduce cash and surety bonds, which would have been last but for a "catch all" provision allowing for any condition "deemed reasonably necessary to assure appearance."[474] In 1979, the American Bar Association Standards separated financial from non-financial release (thus requiring nonfinancial conditions to be exhausted before financial conditions were even considered) and provided nonfinancial conditions in a list similar to that found in the 1966 Act.

Both Freed and Wald in 1966 as well as the 1979 ABA Standards made it clear that these early lists of conditions were not exhaustive. As written by the ABA, the list of conditions found in that set was "designed only to provide examples of the kinds of conditions that will be appropriate in many cases."[475] In sum, conditions were to be based on their rationality at helping to achieve the proper purposes of bail. This is crucial to point out because conditions that *do not lead to detention* could, theoretically, be supported merely by reason or rationality based on the fact that any constitutional balancing test for a condition not leading to an absolute deprivation of liberty would likely only require the government to show that the condition is "rationally related" to either flight or safety. Indeed, Freed and Wald admitted to the lack of research showing that any particular condition worked at that time, and wrote that "the success or failure of imaginative

[473] Patricia Wald & Daniel Freed, *The Bail Reform Act of 1966: A Practitioner's Primer,* 52 ABA J. 940 (1966) [hereinafter *Freed & Wald II*], found at https://dcchs.org/wp-content/uploads/2018/11/Judge-Wald-on-Bail-Reform-Act-33-JBDC-1966.pdf.

[474] *See* Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat, 214, Section 3146 (a) (1966). It is my surmise that probation served as an early model for a system of release that included pretrial services supervision as envisioned by the various "bail projects" of the day, and the early lists of conditions focusing on third-party supervision are evidence of that. Of course, in 1966 the federal system and the states had not yet attempted to grapple meaningfully with the notion of providing express provisions dealing with public safety for non-capital defendants.

[475] *See* American Bar Association, *Pretrial Release,* Std. 10-5.2, at page 10-71 (1979). The current Standards state that the illustrative list of potential conditions was "drawn from existing statutes addressing the use of conditional release and reflects practices used in a number of jurisdictions." *ABA Standards, supra* note 118, at 108-09.

conditions" might one day form a more exacting basis needed to allow outright detention.[476]

The fundamental point is that early on, the states were told that lists of conditions could be "imaginative." Moreover, because release conditions were not supposed to lead to detention, then so long as they had some rational basis aimed at either flight (or later, safety) and were paired with probable cause, they would be legally acceptable. And the states took advantage of this, in some cases enacting long lists of possible conditions based on no research and occasionally threadbare but nonetheless sufficient reasoning.[477] Secured financial conditions, typically being the only precondition to release, were placed on these lists due to their potential (and lawful) use as an actual release condition – that is, as a condition put upon an accused person to provide motivation to return to court *after his or her release.* Even after they were seen clearly to lead to detention, they were justified by both their use as an actual release condition as well as the legal fiction that so long as they were tied to an order of release, the defendant could theoretically find liberty at any time if he or she merely found the requisite money.[478]

We now know what is happening to financial release conditions leading to detention.[479] Because a complete deprivation of liberty requires more justification for using money than just a "rational basis" (indeed, it typically requires the government to show that money is "necessary" – that is, it *must* use money to assure court appearance and public safety), the pretrial research going to whether money bonds actually work has become crucial in determining whether the use of those bonds is lawful.

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[476] *Freed & Wald II, supra* note 473, at 638-39.

[477] For example, some states have listed a possible condition of release for a defendant to be placed in so-called "work release," which allows the defendant to work or go to school during the day and forces him to spend nights in jail. Even if work release were not considered to be detention, the rationality of this particular condition – based on the assumption that a person is apparently at higher risk only at night – is absurd.

[478] That rationality was quite simple: since money motivates persons to do so many other things in life, it likely motivates persons to return to court. The most recent research on money indicates that even this justification is likely wrong. Moreover, the legal fiction is strained at the very least.

[479] Interestingly, even without social science or other research, the law – by itself – could be used to argue for massive overhauls of most money-bail systems. To have the research also show that money bail is not only unfair, but it is also ineffective, only speeds the process of change.

But there is also a growing literature looking at whether traditional conditions of release work, even if those conditions do not typically lead to detention.[480] And this literature is also crucial because once enough research shows that a condition of release *does not work*, courts will likely begin finding those conditions to lack any rational basis and thus begin declaring them unlawful, requiring states to eliminate them from their statutory lists. To expand on my seemingly outlandish but truthful (at least in theory) prior analogy, there may come a time when the research looking at GPS monitoring so overwhelmingly shows its ineffectiveness that the courts will deem the setting of a GPS condition to be no different than setting a condition that a defendant wear a certain color of tennis shoes. Neither condition would be rational (indeed, we would actually have more research on GPS than on tennis shoes), and so neither condition would be lawful.

This, in turn, would trigger a cascading series of events that – given enough conditions facing similar scrutiny – would threaten to upend the field of

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[480] In addition to studies examining the types of conditions imposed, *see, e.g.,* Ross Hatton & Jessica Smith, *Research on the Effectiveness of Pretrial Support and Supervision Services* (UNC, 2021), found at https://www.pretrial.org/files/resources/research-on-the-effectiveness-of-pretrial-support-supervision-services-5.28.2020.pdf, at least two recent studies have examined the number and combination of conditions imposed on both federal and state defendants and examined outcomes. The authors in the first study found that released federal defendants received an average of nine conditions (with negligible differences in numbers when compared to risk scores), that lower-risk defendants with more conditions were more likely to be re-arrested compared to lower-risk defendants with fewer conditions, that higher-risk defendants with more conditions were equally likely to be re-arrested as higher-risk defendants with fewer conditions, and that the probability of having bail revoked increased with the number of conditions for all risk levels. The authors conclude: "If anything, assigning more conditions creates a situation in which officers focus their efforts on detecting infractions of these conditions and removing noncomplying defendants from pretrial release through revocations [and] creates a situation in which defendants might lose the benefits inherent in being released by having their release status revoked for no other reason than that they are being watched more closely. In other words, more intense scrutiny rather than actual misconduct creates the context for the loss of freedom." Thomas Cohen & William Hicks, Jr., *The Imposition of Pretrial Conditions on Released Federal Defendants: The Overuse of Conditions Without Providing Any Measurable Benefits,* 50 Crim. Just. & Beh. 1852 (2023), found at https://journals.sagepub.com/doi/abs/10.1177/00938548231206829. In the second study, the authors showed that different combinations of state conditions "could differentially affect new criminal arrests during pretrial," thus requiring nuance and more intentionally so as to match conditions to risk and needs. Specifically, they noted, "[s]ome combinations of pretrial conditions were forecasted to increase the probability of an individual experiencing a new criminal arrest, while other combinations of conditions were forecasted to decrease the probability of an individual experiencing a new criminal arrest in comparison to not being supervised during pretrial release and not having any special conditions during pretrial release." Ian Silver, Matthew DeMichele, Kristin Bechtel & Pamela Lattimore, *The Potential Effects of Combining Pretrial Supervision Conditions,* 88 (2) Fed. Prob. 76, 79 (2024), found at https://openurl.ebsco.com/EPDB%3Agcd%3A9%3A34789193/detailv2?sid=ebsco%3Aplink%3Ascholar&id=ebsco%3Agcd%3A186177660&crl=c&link_origin=scholar.google.com.

traditional pretrial supervision. Just as risk assessment tools shined a bright light on the lack of predictive validity of various statutory "factors" to be used to estimate risk of FTA or new crime, so too the research on conditions might force legislatures to amend their lists of suggested conditions, perhaps opting to allow only conditions supported by sufficient research. When enough conditions fall to the rigors of research, we may begin to ask why there are any suggested conditions at all, why we should continue to assess risk for the purposes of assigning conditions that do not address that risk, [481] and why we should not be methodically changing our statutory lists to provide far-less restrictive supports for released defendants.

Again, I reiterate that the research going to whether conditions "work" is also crucial for states to understand when they are working to change their constitutional or statutory intentional detention (or "no bail") provisions. This is especially true for states wanting to copy the so-called "federal process," which allows for detention when "no conditions suffice" to assure appearance or safety. As I previously noted, if the pretrial research shows, in fact, that traditional conditions clearly do not work to achieve appearance or safety, then the constitutional standard for allowing pretrial detention for those states using the federal process will always be met.[482]

We are certainly not there yet, although the best storehouses of information concerning research on various conditions of release, including the CEPP/Arnold Ventures APPR website (with research summaries and yearly research highlights) and the MacArthur Foundation Safety and Justice Challenge and its SJC Research Consortium (with similar resources),[483] show that much of the research is mixed, and in most cases favoring findings that show the ineffectiveness of many of the traditional conditions (or particular dosages of conditions) of release. Thus, this seems to be the proper time to begin stepping back from those traditional

[481] In addition to their historic value, we mention certain benefits of risk tools that might lead states to keep them despite any research showing a lack of effectiveness of interventions, such as the desire to sort defendants for needs-based interventions, early delegated release, or novel speedy trial rules based on risk.
[482] *See* pillar number three, *infra,* in which I set out more detailed reasons for avoiding sole use of the so-called "federal process."
[483] *See* at https://advancingpretrial.org/improving-pretrial-justice/appr-resources/pretrial-research-summaries/; (CEPP/Arnold); https://safetyandjusticechallenge.org/ (MacArthur SJC).

conditions – and primarily so-called coercive or restrictive conditions done under the guise of "supervision" – and to begin using our reasoning to craft rational supports that infringe less on pretrial liberty while actually helping persons succeed on release. The research may tell us that court date reminders work and that weekly drug testing does not work, and that, therefore we should use the former and not the latter. Nevertheless, we should not need research to tell us that even "mixed" results for significant infringements upon a person's liberty should be discarded for more rational "innovative" supports that do not so infringe. Assuming the person will actually be released (which a jurisdiction will largely know due to the creation of an intentional release and detention provision), innovative supports based on rationality that do not infringe on pretrial liberty seem far better than traditional supervisory conditions that demonstrate even "mixed" results in the literature.

Numerous national organizations are already making this switch, and researchers are beginning to study the use of "needs" tools designed to help identify noncoercive supportive services that hold the potential to work even better than traditional supervisory conditions. Others are applying behavioral science to criminal justice issues, and still others, such as the UCLA School of Law, [484] mentioned above, the Vera Institute of Justice,[485] and, most recently, Justice System Partners,[486] have advanced whole "needs-based" frameworks based on the backbone of a moneyless, intentional release/detain structure.

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[484] *See UCLA Model, supra* note 472. The UCLA model detention language is nearly identical to the language of my model (and others like my model, such as the language enacted in Illinois). While the UCLA model allows for defense counsel to provide evidence of negative outcomes due to detention that a judge "should weigh," that evidential inquiry could also be added as a mandatory part of the overall finding of predicted risk in the constitution or statute.

[485] The Vera Institute of Justice has been a leader in the field since the early 1960s, and has numerous relevant documents and summaries on its website, including, *Reforming Pretrial Justice to Reduce Incarceration and Advance Equity,* found at https://www.vera.org/ending-mass-incarceration/reducing-incarceration/reducing-jail-and-prison-population/beyond-jails-initiative, (including a section on reducing excessive supervision and monitoring by "focus[ing] on support, not punishment in addition to elimination of wealth-based detention).

[486] Justice System Partners has developed an entire framework dedicated to helping jurisdictions move from traditional pretrial practices (sometimes even called "best practices") to a more support-oriented system through a series of broad, guiding principles, inclusion of "enhanced practice recommendations," and even changes in language. *See* Marijana Kotlaja, Rebecca Stone, Shannon Manguson, Lore Joplin, Zach Dal Pra & Kimberly Richards, *First Step Forward: Transforming the Pretrial Period From Compliance to Support* (JSP, 2025), found at

Readers of the current paper should realize just how close we are as a nation to switching to exactly what UCLA proposes. Indeed, the authors of that proposal write things that align perfectly with the present paper on a number of issues. For example, they write that the current bail system has followed "largely unevaluated and harmful logics for generations,"[487] and I agree, proposing my own helpful logics to proceed toward pretrial justice. They write about the need for a better articulation of the language necessary to detain, and I agree, proposing my own language and justification in this paper and others, such as *Model Bail Laws*. They write that the best way to ensure success during release is to determine what accused persons need and to provide it to them, and I agree simply by following the current research and common sense. They write of providing immediately responsive support for victims and survivors of crime, and I agree, proposing that systems listen to the victims and survivors themselves to determine what they want not only during criminal episodes, but also in the development of entire intentional processes. Finally, they write that the switch represents a paradigm shift, and I agree, which lends support to the notion of using a far more effective form of adaptive leadership and implementation than that currently used in the states.

Summary: Pretrial Research

In sum, as in 2014, the pretrial research is still crucially important to law and policy makers. Moreover, while we are still mostly research consumers and not producers, the exponential growth in the pretrial literature means that consuming the research is now such a daunting endeavor that CJCCs will likely require at least some expert help to understand and use that literature for guidance. Accordingly, collaborative groups should team with persons who keep track of the pretrial research, or at least be open to finding experts on any particular topic to

https://justicesystempartners.org/wp-content/uploads/2025/10/First-Step-Forward-Transforming-the-Pretrial-Period.pdf.

[487] *UCLA Model, supra* note 472, at 22.

help explain the current research behind it.[488] As mentioned above, the research on risk and assessment tools, in particular, requires expert assistance to avoid the many misconceptions about risk we see in bail, and the best collaborative groups doing work toward pretrial justice understand this and have taken advantage of expert help.

Again, all pretrial research – historical, legal, opinion, social science, etc. – is important to the process of understanding both bail reform and pretrial justice. Nevertheless, despite risk and prediction being inherent to the decision to release or detain a person pretrial, much of today's confusion at bail surrounds those very things: risk and prediction. Accordingly, it is fortunate that we now have a fast-growing literature on the topics most intimately connected to risk and prediction, and thus I believe that confusion over the topic can be cleared up through education, albeit more than many jurisdictions assume they need, and certainly more than that typically given by traditional technical assistance providers. Beyond more generalized bail education based on the fundamentals of bail, education specifically directed toward risk and prediction can at least provide the crucial background perspective necessary to understand, craft, and implement *any* pretrial improvement up to and including true, historical bail reform. Its necessity for the latter project – that is, switching systems to intentional release and detention – should be self-evident; a jurisdiction with an understanding of how often and for what things someone fails on pretrial release will create a model that is far different than one created in a jurisdiction having no knowledge of base rates and is inundated with skewed and misleading media reports on violent crime from around world.

Thus, to summarize for emphasis, the research on risk and prediction – at the very least – provides crucial background perspective that can guide virtually every decision during the pretrial phase of the case. In particular, it allows jurisdictions to understand the context of risk, including the fact that when there is meaningful

[488] My colleagues and I once scheduled a special meeting of our local CJCC to train on basic statistical concepts so as to help the group to understand the findings from a quasi-experimental study done on court date notification. Various states, including Indiana, Kansas, Missouri, and New Mexico, have benefitted greatly from partnering with even a single professor on pretrial matters.

risk, it falls under one of two categories: (1) risk allowing the government to adopt interventions for *released* persons, and (2) risk allowing the government to actually *detain,* which must be articulated differently and must not be measured solely by an actuarial tool. It allows jurisdictions to understand through base rates and pretrial crime that most persons accused of crimes are simply not very risky, certainly not risky to do the kinds of bad things that historically have led to pretrial detention (that is, willful flight and risk to commit a very serious or violent crime), and that those very bad things, in any event, are themselves very hard to predict. Importantly, it allows jurisdictions to understand that our historic practices of arbitrarily jailing most defendants actually *increases the risk* that the whole community will be harmed both short and long-term.

The background perspective also reminds us of our American roots, which require government officials to make predictions and to embrace certain risks simply because of our founding documents' emphasis on liberty and freedom. This is not to say that we must release and embrace risk thoughtlessly; indeed, thoughtless release and detention along with ignorance of risk is already achieved through the traditional money-bail system. Instead, it is to say that if we can adequately justify it, we may detain a small number of persons through a carefully limited, safe, and due-process laden intentional detention provision following commonsense templates based on the law and the pretrial research.

Moreover, the background perspective shows us that we just happen to be in a period of over-detention in America caused by a bail system based on wealth and not reason or logic. Accordingly, jurisdictions can take comfort in knowing that any system designed to take advantage of even the smallest bit of rationality – such as, for example, following the research and seeking to make the release or detain decision intentionally – will likely not only reduce detention, but will do so without any significant reduction in public safety or court appearance rates, thus living up to our aspirational legal principles.

And finally, the background perspective reminds jurisdictions that anytime they find some objectively better way to help them with prediction, they should use it,

but with a number of caveats that take time and effort to learn. For those who choose to implement an actuarial assessment tool, they are not, as some have said, "moving from money to risk." Instead, they are moving from one type of risk assessment to another, which should always be different for release versus detention. Moreover, jurisdictions will likely be moving from random money-based systems to an intentional ones. This latter move – the so-called "adaptive change" of shifting to an entirely new system of bail (a more amorphous and complex challenge that necessarily requires time and collaboration) – requires not only deep education but also a method of implementation designed specifically to overcome adaptive challenges. Merely changing from one form of assessment to another is a so-called technical issue in that we know how to do it and we can do it fairly easily. But what changing to a tool signifies – and, indeed, what merely learning about a tool, risk, and prediction does – is to move us toward the adaptive challenge of intentionality at bail, which, in turn, starts a domino process of a complete system transformation.

National Pretrial Standards

> "*We can use the standards to improve outcomes for people by having a more just and equitable decision-making process. That process should honor constitutional safeguards and make decisions case by case instead of doing the same thing with everyone."*
>
> Elizabeth Simoni

In 2008-09, my colleagues and I were fortunate to have the newly minted American Bar Association Standards on Pretrial Release (2004, commentary 2007),[489] which, along with the existing National Association of Pretrial Services Agencies' Standards[490] and the then-current National District Attorneys Association's expansive language on pretrial release and detention in its Prosecution Standards,[491] helped guide us in crafting a series of bail

[489] *ABA Standards, supra* note 118.
[490] *NAPSA Standards, supra* note 118.
[491] National District Attorneys Association, *National Prosecution Standards* (2nd Ed. 1991).

recommendations for one jurisdiction in Colorado.[492] The breadth of those standards caused me to list them as one of the six "fundamentals" of bail in 2014, simply because they took the history, law, and the pretrial research, and combined those things into tangible recommendations covering the entirety of the pretrial phase.[493]

Unfortunately, since 2009 (and as I have discussed briefly in the section on collaboration/prosecutors), the NDAA Prosecution Standards have been drastically pared back, and now provide little meaningful guidance when looking at pretrial issues in total. Moreover, although we held up the ABA Standards for special recognition in 2014, and although they can still be quite helpful in determining at least the starting points for discussion on virtually any pretrial issue,[494] the fact is that they have simply not kept up with the rapidly evolving research in bail. In particular, they are too far out of date to provide meaningful guidance on risk research and actuarial tools. Moreover, their recommendations on intentional detention are based on 2004 thinking and mostly recommend adoption of the "federal process," which, as I have stressed many times, would likely be disastrous if used by the states. Indeed, while certainly done with good intentions and evidently after a significant amount of study, even a relatively recent ABA policy resolution includes pretrial recommendations that would likely not be included in any comprehensive revision of those Standards.[495]

Fortunately, however, NAPSA has updated its standards twice since 2014 (and indeed, since 2017) – once in 2020, and, most recently in 2024. According to

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[492] *See Jeffco Proposal, supra* note 117.

[493] *Fundamentals of Bail, supra* note 20, at 87-89.

[494] For example, I once created a checklist of various statutory provisions based on the ABA Standards, from which one could provide a rating as to how close any particular state might come to mirroring the Standards. Whenever there is some seemingly arcane question at bail, such as what should the time limits be to initiate temporary and complete intentional detention processes, one can look to the Standards and typically find an answer from which to begin discussions. In many ways, the ABA recommendations have been ahead of their time, recommending the elimination of bail schedules and commercial sureties, things that most states simply have not done. In other ways, however, the ABA Standards have fallen behind and likely require at least some overhaul on the crucial issues facing the field today.

[495] *See* American Bar Association, *Resolution 112C,* discussed at https://www.americanbr.org/groups/legal_aid_indigent_defense/resources/covid-19-resources/expanded-pretrail-release/, and with text and accompanying report found at https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/ebook-of-resolutions-with-reports/2020-annual-electronic-resolution-book.pdf.

NAPSA's past president Spurgeon Kennedy, "The purpose of the Standards has always been to illustrate what effective practice is, not only for pretrial services agencies but also for a well-functioning pretrial system."[496] This broad scope, coupled with the most recent legal and research-based updates, means that the current NAPSA Standards are now far superior to the other sets, especially when making recommendations about money bail, intentional detention, post-COVID protocols, and actuarial assessment tools. In a field that is evolving as rapidly as bail, groups that can keep up with comprehensive and current recommendations based on a burgeoning literature are the most helpful, and NAPSA is one such group.[497]

Pretrial Terms and Phrases

"Bail is not money."

Anonymous

As in 2014, we still suffer from misconceptions over the definitions of terms and phrases used in the pretrial phase of a criminal case. I list five such terms and phrases as needing further explanation: (1) bail; (2) bail reform; (3) pretrial improvements; (4) pretrial justice; and (5) public safety.

"Bail"

It may be surprising for readers to learn that the paper, *Fundamentals of Bail,* came about as a result of NIC merely asking me to define the word "bail," which was defined differently by persons in different parts of the country. It turned out that to unearth the proper definition of bail – that is, the legal and historical definition that could be applied throughout the country despite local variations –

[496] Michael Friedrich, *New Standards, Stronger Justice* (APPR, 2024), found at https://advancingpretrial.org/story/new-standards-stronger-justice/.

[497] While not technically in the realm of "national standards," certain groups have put together enough recommendations on enough topics for the entirety of those recommendations to be considered nearly equal to the sets of traditional standards. *See, e.g.,* CEPP/Arnold Ventures, *Pretrial Roadmap,* found at https://advancingpretrial.org/?code=JreTrm1OaaY4sRzM&state=87cac165a06d8b49147872f72ff19bcf.

one must know and understand the other fundamentals of bail, for they, together, point to the proper definition: bail is a process of conditional release. "No bail," on the other hand, is a process for potential intentional detention. The purpose of bail is to provide a mechanism for release, and the purpose of "no bail" is to provide for a mechanism for potential detention. Even though "bail reform" only technically references the release side of the equation, it is "no bail," or detention, that defines the scope of release; accordingly, "bail reform" today works mostly on detention in order to give life to the Supreme Court's mandate that release (or "bail") be the American norm.

I re-emphasize these definitions simply because I continue to see confusion over the word "bail" in even the most recent literature.[498] Moreover, after my colleagues and I published our initial glossary of pretrial terms and phrases,[499] we have seen the publication of many more pretrial glossaries, and often the best way to decide whether a glossary is at least on the right track is to see how it defines the word "bail." If a glossary purports to define terms for a national audience, and if it defines bail as money or as security, then the rest of the glossary is suspect and should be read with caution.

While some jurisdictions have replaced the word "bail" with "release" in many important sources (including in constitutions and statutes, as was done in the federal statute), I recognize that other jurisdictions still define "bail" as money or security in the law, and that therefore certain glossaries are written merely to reflect that situation.[500] Nevertheless, understanding the legal and historical definition of bail (along with how your particular state may define it through

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[498] Misuse of the term by experts exacerbates confusion by the general public. *See* Times Editorial Board, *You Think You What Bail Is? You're Probably Wrong,* L.A. Times, Sept. 24, 2023).

[499] *See* PJI, *Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision* (2011, updated 2015) found at https://www.courts.wa.gov/subsite/mjc/docs/GlossaryofTerms.pdf.

[500] Indeed, much confusion has been traced to groups, research papers, and media accounts based mostly in New York and focusing on aberrational New York bail law, in which the statute defines "bail" as money, consideration of public safety is not allowed, and the constitution has no right to bail. It was this persistent confusion due to New York advocates calling for an "end to bail" or "eliminating bail" (meaning an end to money, a phrase that would be perplexing to any of the 41 states with a constitutional right to bail) that led the pretrial field to urge those in New York to begin calling the subject of reform "money bail" or "cash bail." Technically, the true evil in the American pretrial system is the use of secured financial conditions (including cash, surety, and even property bonds or, indeed, any release condition leading to detention), and so even these compromise phrases tend to suffer from too little detail.

statute, court rule, or court opinion) will clear up the inevitable confusion that occurs when your definition seems to conflict with the meaning of bail found in opinions of the United States Supreme Court,[501] large portions of the national pretrial standards, or even early supreme court opinions from your own state. I am not saying that a jurisdiction must use my glossary (after all, it is dated),[502] or that people cannot come up with their own. I am merely saying that you can surmise a great deal about the quality of research, media accounts, legislative hearings, court opinions, etc., simply from how they use the word "bail." When they use the word "bail" to mean money, it is a red flag that should alert jurisdictions and individuals that that the need for bail education is likely great.

"Bail Reform"

There is similar confusion with the term "bail reform," with a variety of sources, including academic authors, courts, and journalists affixing the label to virtually any and every change done to a jurisdiction's pretrial system, whether objectively good or bad. Accordingly, even though I have explained in some detail how "true, historic bail reform" has certain historical markers and thus typically means only one thing at any given time based on the law and history, I re-iterate it in the following paragraphs simply because "bail reform" is far more important than any other "pretrial improvement." In sum, while true historic bail reform – that is, the switch from a money-based system to an intentional release and detention system – is certainly a pretrial improvement, it is the biggest pretrial improvement there is, affecting every state at the same time and pushing those states toward complete overhaul of their laws, policies, and practices. Moreover, it is inevitable; if states do not choose to do the project of bail reform voluntarily, bail reform will force itself on them and will not relent until the perceived abuse is entirely fixed.

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[501] In *Stack v. Boyle,* 342 U.S. 1, 4 (1951), the Court equated the "right to bail" with the "right to release before trial" and the "right to freedom before conviction."

[502] A very good glossary crafted for the Arnold Ventures' APPR Initiative is found at https://cdn.filestackcontent.com/security=policy:eyJleHBpcnkiOjQwODAxNDY0MDAsImNhbGwiOlsicmVhZCIsImNvbnZlcnQiXX0=,signature:bf9d04ed62530c164d6fed395e4f74c04e606b95f4b72448ff976857a1e3a5f5/BCaHDSVdTYOtsLsYLC1a.

As I mentioned briefly above, throughout history bail reform is typically triggered whenever a society (or, in some cases, a monarch) perceives the "wrong" people to be either in and/or out of jail and it knows the pervasive or systemic abuse causing that perception. This is the one common theme found in every era of bail reform in both England and America. In this current era of reform, not having defense counsel at first appearances (an objective pretrial improvement) did not trigger bail reform. Not having experienced prosecutors screen cases early (an objective pretrial improvement) did not trigger bail reform. Not having judges make clear records and review unaffordable bonds after some period of time (both objective pretrial improvements) did not trigger bail reform. Instead, bail reform in the current era was triggered when people became acutely aware of having the "wrong" people both in and out of jail due to the misuse of secured financial conditions – also known as "money bail" or sometimes "cash bail."[503]

This latest awareness of the systemic abuse was likely triggered when multi-jurisdictional risk assessment tools made it possible to clearly see – this time primarily in the states, which had clung to the money-bail system despite the changes in the federal and D.C. systems – the wrong people both in and out of jail.[504] Historically, bail reform is the precise fix for a widespread, systemic abuse causing a particular situation at a particular time, which today in America means switching systems by creating a process of safe and fair intentional release and detention to replace the random, unfair, typically unlawful, and unsafe system in

[503] As noted previously, "money bail" and "cash bail" were gradually adopted as a compromise between those of us trying to get jurisdictions to understand the nuances of secured financial conditions and others who believed, incorrectly, that "bail" was defined as money. More importantly, however, is that while secured financial conditions including cash, surety, and property bonds are the typical culprits causing the wrong people to be both in and out of jail, any condition of release can be abused to the point of causing the same basic problem. Accordingly, states attempting to address the central problem of having "bailable" defendants in jail by merely addressing money should, instead, broaden the language to make clear that *any* condition of release should not lead to the detention of any person accused of a crime.

[504] In the mid-2000s, people vocally opposed my use of the phrase "unnecessary pretrial detention," simply because they believed that having followed the law as written, everyone who was in jail belonged in jail. It was only when researchers began using assessment tools to analyze jail populations that it became abundantly clear that both unnecessary pretrial detention and unwise pretrial release were even real.

which secured financial conditions can lead to unnecessary pretrial detention and unwise pretrial release.[505]

Thus, a new law releasing large swaths of persons without money may be a pretrial improvement, and it may be working at the edges of bail reform, but it will not be true, historic bail reform (and thus eliminate the need for further reform) until money-based detention is absolutely removed for both low and high-risk persons, and replaced with intentional release and detention.[506] Likewise, states that are widening detention eligibility to their constitutions, statutes, or court rules, but keeping money in the process, are working only at the edges of true, historic bail reform. In true, historic bail reform, intentional release and detention must be crafted *at the same time and must entirely replace money-based detention.* Allowing, as some states have done, two separate paths toward pretrial detention at the same time – one with limits and due process and one without – is simply bewildering and short-sighted.

In sum, bail reform is inevitable, and persistent, and the "fix" – intentional release and detention – is the only alternative to the problems of money-based release and detention that have occurred in this country since sometime in the 1800s. Nevertheless, the only large American jurisdictions that have fully engaged in the project of true, historic bail reform are: (1) the federal system (although I would never suggest using its precise language template as a model), (2) Washington D.C. (same); (3) New Jersey (same); (4) New Mexico (same); (5) Illinois; and (5) California (which is slowly moving toward a complete system-switch through litigation rather than legislation). Of those states that have overhauled either statutes, court rules, or constitutions, we must understand that those models can

[505] As mentioned briefly in the text, above, media accounts of events centered on bail frequently expose the fact that, despite using words seemingly divorced from intentional release and detention, various arguments are – at their core – arguments for a more intentional system. For example, when people say that bail is a "catch and release" system or that the amount "was too low," what they really mean is that they would like to have some mechanism to intentionally detain. Likewise, when people say that "money bail is unfair" to accused persons or that the amount "was too high," they mean that those persons should be released through an intentional process.

[506] Theoretically, a state could create an intentional release and detention process while keeping money bail as a true condition of release and not a mechanism of detention. Doing so, however, would require laws to make the money condition affordable (able to be paid by the accused him or her self within some brief amount of time) and would disregard the mounting evidence that money does not work as a motivator for defendant behavior while released.

still be used for certain propositions in bail, but, with the exception of Illinois, I am simply not willing to recommend using their precise template language because that language can lead to a moneyless pretrial system no better than the money-based system it was designed to replace.

Moreover, while I understand that some groups avoid using the word "reform" as seemingly controversial,[507] I believe the word "reform" might actually not be strong enough given the breadth of abuse, and I remind the reader that the field was once reluctant even to use the word "bail" due to its confusion with money. The fact is that right now the term "bail reform" is ubiquitous in scholarship and the media and almost certainly going to persist, and so it seems necessary not to avoid the term, but rather to understand its proper meaning when held up to the history of bail.

For much of that history, American law evolved to shield money-based detention from reform, [508] but today a variety of factors have combined to erode that shield so that it is now clear that every state will have to deal with the problem. In short, whenever a state is: (1) working to eliminate or erode money's ability to detain; and/or (2) trying to bring intentionality into the pretrial system, that state is engaging in the project of "bail reform," which inevitably causes certain dominoes to fall ultimately leading to the need for a complete switch from money-based release and detention to intentional release and detention. Because of this inevitability, and because bail reform requires a complete switch, one of the worst things that a jurisdiction can do is to engage in the project of bail reform without collaboration and education because there is a specific way to create an intentional release/detain system, discussed *infra,* which requires addressing

[507] There are now many resources based on polling to help "message" what any particular jurisdiction is doing. *See, e.g.,* Vera Inst. of Justice, *Messaging Research and Polling Library,* found at https://veraaction.org/messaging-research-and-polling-library/#:~:text=Since%20December%202022,%20Vera%20Action%20has; APPR, *Reframing Pretrial Justice,* found at https://advancingpretrial.org/announcement/reframing-pretrial-justice-3/.

[508] I have written that the biggest legal shield to reform has been American case law saying, essentially, that defendants do not have a constitutional right to bail they can "make," and that judges may set unaffordable financial conditions leading to detention so long as they do not make a record of intentional detention. I have termed this notion the "excessive bail loophole," because it is found in excessive bail jurisprudence and is a loophole to the historic notion that bailable defendants were expected to be released as well as to any need to follow any existing intentional release and detention provision. *See Changing Bail Laws, supra* note 56; CLEBP, *The Biggest Issue in Bail Today* and *Memo on Constitutional and Statutory Bail and "No Bail*) detailing the loophole found at http://clebp.org/home.html. I provide a summary of the excessive bail loophole in *Appendix One*.

multiple elements at once to succeed. More particularly, those elements can help to ensure that jurisdictions will not switch to an intentional system that is objectively worse than the money-based system it seeks to replace. Indeed, if the intentional system is too loose – that is, if it makes it far too easy to detain – it simply will not matter whether the jurisdiction has enacted other objective pretrial improvements as they will be rendered superfluous and effete.[509]

"Pretrial Improvements"

"Pretrial Improvements," on the other hand, can include actions taken to achieve bail reform (with the warning that incomplete or uninformed actions toward bail reform can fail or cause persons to perceive a need for larger reforms), but they can include other things as well. In short, anything deemed to improve the pretrial phase of a criminal case at any particular time is a pretrial improvement, with a few caveats.

First, there must be an objective standard to tell us if the "improvement" is truly an improvement. As mentioned previously, the pretrial field produced the latest wave of "lists" of concrete elements deemed to improve the pretrial system throughout the 2010s. These lists were mostly based on the national standards at the time and often reflected some main responsibility given to a particular stakeholder, such as having police officers issuing citations or having experienced prosecutors screening cases early in the pretrial process.[510] Even though persons might still debate whether these things were actually "improvements," the objective standard – i.e., the national pretrial standards, the independent measures of legitimacy – told us that they were. Thus, we learned that as long as we have some objective standard as a backstop, we can avoid the debates and

[509] Based on the fact that America is in an era of significant over-detention, it is fairly safe to say that if a state's efforts at bail reform do not lead to some reduction in pretrial detention, it will likely not be deemed bail reform at all. Nevertheless, such a conclusion can only be drawn from carefully examining not only the structure of the legal changes but also the system both pre and post-change.

[510] Some lists were, and are today, better than others, with the better ones addressing the most current and acute issues – such as risk and prediction, replacing money-based release and detention, and the resulting state constitutional issue – facing the American bail system.

differentiate between things like "adding an express presumption for release on recognizance to the law" (a pretrial improvement based on an objective standard) from "adding requirements for specific amounts of money bail for 'bail restricted' offenses" (which was obviously thought by some in Georgia to be an improvement, but which actually runs counter to any objective standard). One can use the ABA or NAPSA recommendations[511] as objective standards (with some caveats, *see National Standards as Measures of Pretrial Improvements, infra)*, but one can also use general knowledge from a combination of the history, law, research, and national standards for the same purpose.

Second, a pretrial improvement can be transitory or not even work. For example, having defense counsel at first appearances is, objectively, a pretrial improvement, but not if defense counsel does nothing but ask for "reasonable amounts" of money bail. Likewise, despite having so-called "progressive prosecutors" seek pretrial release with less reliance on money, various authors have documented ineffectiveness caused by a variety of things, including dissention within the prosecutor's own office. In Alaska, certain pretrial improvements (including efforts working at the edges of "bail reform") were enacted and ultimately repealed within only a few years. Technically, if you have deemed some new intervention to be an "improvement" based on some objective standard, but it does not lead to the objective outcome, you may still call it a "pretrial improvement," but you must nonetheless assess it for failure in implementation or for the possibility that other parts of the system are reacting in a way to counter the intended effect. Each of those things (or any number of unintended consequences) may then cause you to add new improvements to combat the various abuses/failures. This is also true of true, historic bail reform, as moving from a random, money-based detention system to a safe, fair, and intentional detention system is objectively a "pretrial improvement," but a later assessment (or even prospective analysis prior to enactment based on draft language) may find that it was done poorly or that its objectives were ultimately thwarted by some counter-reaction.[512]

[511] *See ABA Standards, supra* note 118; *NAPSA Standards, supra* note 118.

[512] Again, I note that doing true, historic bail reform can also eliminate the need for certain practices deemed improvements in the past. For example, once you have a fair, safe, and transparent intentional detention provision,

Third, the number of pretrial improvements is clearly growing and the need to improve exists now and will continue long after any particular state does true, historic bail reform. Using court date reminders, creating novel ways to deal with FTAs, providing transportation assistance and child care, crafting better language on summonses, educating the public and the media, working on procedural fairness, creating needs assessments, creating specialty courts, adding non-financial conditions reviews, mandating data collection, eliminating costs for certain conditions (or, for example, costs for other "services," such as inmate phone usage), educating judges, revising arrest standards, educating the media, focusing on equal justice, redefining "public safety," working to shrink the pretrial period, mandating change from advances in the law and research, and simply not asking for (defense counsel or prosecutors) or setting (judges) secured money bonds are all improvements that were not necessarily on many of the original lists from the 2010s. Future and yet-to-be defined improvements, of course, are inevitable.[513]

The National Standards as Measures of Pretrial Improvements

When I and my colleagues wrote our first major bail paper in 2007-08, we merely held up our local system practices to three sets of national pretrial standards crafted by three national groups – the American Bar Association, the National Association of Pretrial Services Agencies, and the National District Attorneys Association – and made recommendations based on analyzing each set. That was entirely appropriate, as the most recent versions of the ABA and NAPSA Standards had been published in 2007 and 2004, respectively, and each contained detailed discussions of all issues surrounding pretrial release and detention. We chose to

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then the need for sequential bail review for money-based decisions (though not for purposes of changed circumstances leading to release or a ratcheting back of conditions) will likely disappear. In theory, other changes made in the name of "pretrial justice," such as implementing programs to attack the root causes of crime, *see infra,* can reduce the need for a variety of improvements deemed essential in the past. For example, two studies with "lists" in the 1920s recommended eliminating commercial bail bonding, and because Illinois did eliminate commercial bail bonding in the early 1960s, more recent lists in that state were able to avoid the numerous recommendations one often sees in lists coming from states with a thriving industry presence. Virtually all states with a commercial bail component tend to dedicate large amounts of space in their laws simply to deal with money.

[513] Civil Rights Corps has a "holistic framework" for pretrial justice that includes many improvements not found on any original or many current lists, found here: https://civilrightscorps.org/wp-content/uploads/2021/10/H1fmZHQMuJb771jysKSw.pdf. These and other improvements are discussed in some detail in the section of this paper on collaboration, *supra.*

include the NDAA Standards primarily because they were similarly comprehensive (in many ways mirroring the scope and substance of the ABA Standards), and included seemingly relevant recommendations for our biggest local opponents to pretrial system improvements at the time.

Today, however, it seems unwise to use most of these and other sources for comprehensive and up-to-date recommendations on our most pressing pretrial topics, and thus equally unwise to use most of them as any standard for pretrial improvements. For example, the ABA Standards on Defense and (separately) Prosecutor Functions are non-comprehensive and lack the kind of detail necessary for anything more than the most general guidance. While comprehensive and still valuable for certain topics (and, indeed, ahead of its time on other issues), the ABA Standards on Pretrial Release are now too outdated to provide decent guidance on things like intentional detention provisions, the use of actuarial assessment tools, and the use of secured money bonds, even with a significant and well-intended but relatively minor attempt to emphasize certain stances in 2017. Finally, over the years the NDAA pretrial recommendations have moved from comprehensive treatment of the pretrial phase to, most recently, treatment spanning only two pages, much of it discussing factors for "determining the proper amount" of bail.

One can still find stances concerning current pressing pretrial issues online from various groups and associations, such as groups representing defense attorneys and prosecutors, but today the only comprehensive and up-to-date set of written standards for pretrial practice – and thus, the important exception to my warning against using most sets of standards to gauge pretrial improvements – are the recently published NAPSA Standards (2024). Those Standards, like the ABA Standards, use the law and the research to make recommendations, but by keeping up to date, they have come far closer to tackling the most important issues facing American jurisdictions concerning bail today, including well-reasoned recommendations for things like intentional detention, money bail, and actuarial tools.

Sources: American Bar Association, *Criminal Justice Standards on Pretrial Release, 3rd Edition* (ABA, 2004 black letter, 2007 commentary), found at https://www.americanbar.org/groups/criminal_justice/resources/standards/pretrial-release/. ABA resolution 112C, summary at https://www.abajournal.com/news/article/aba_house_supports_bail_reform_other_criminal_justice_measures. The ABA has also issues a recent report concerning plea bargains, found here: https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf. American Bar Association, *Criminal Justice Standards on the Defense Function* (2017), found at https://www.americanbar.org/groups/criminal_justice/resources/standards/defense-function/.

American Bar Association, *Criminal Justice Standards on the Prosecutor Function* (2017), found at https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/. National Association of Pretrial Services Agencies, *Standards on Pretrial Release* (2024), found at https://napsa.memberclicks.net/assets/NAPSA%20Pretrial%20Standards%20Revised%202024.pdf. National District Attorney Association, *National Prosecution Standards,* https://ndaa.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition_January-2023.pdf. Both NAPSA and the ABA have standards on diversion, found here: https://napsa.memberclicks.net/assets/NAPSA%20Standards%20on%20Diversion%20and%20Intervention%202008.pdf; and here: https://www.americanbar.org/groups/criminal_justice/resources/standards/diversion/#:~:text=Community%2DFirst%20Programs-,Standard%203.1%20Summary,in%20conjunction%20with%20Part%20II.

"Pretrial Justice"

The term "pretrial justice" is an aspirational term, much like the phrases "form[ing] a more perfect union" or "establish[ing] justice" are aspirational in the preamble to the Constitution, which was drafted – and likely continues – to operate at a time of clear injustice and inequality for many persons. "Pretrial justice" is broad, capable of guiding both traditional and out-of-the-box discussions of *anything* remotely related to the pretrial phase of a criminal case. It is pretrial justice that allows us to directly question the status quo, and that opens the door to listening from groups not typically heard in government bodies, such as survivors of violent crime and persons affected by current bail practices. It is pretrial justice that allows discussion of the root causes of crime, holistic care and solutions, harm reduction, and possible prevention programs that show significant promise, but with results expected possibly only years after implementation. It is pretrial justice that allows discussion of many previously ignored issues, such as re-defining concepts as "public safety" (or "community safety") and "risk," as well as considering how to formally adopt empathy (as advocated by faith-based groups) as a government strategy to advance the American ideals of freedom and liberty. Every pretrial improvement, including the improvement that is being forced upon the states as "true, historic bail reform," is a part of pretrial justice,

but this list only scratches the surface of what a collaborative group can do when seeking to advance the notion.

Because "pretrial justice" is aspirational, it is thus a moving target requiring constant vigilance and criminal system management to maintain. When I suggest that jurisdictions look into "anything remotely related" to pretrial justice, I do not mean to imply that there is some clear, rank order of voluntary improvements. Years from now, a jurisdiction might assess that creating jobs was far superior to achieving pretrial justice than simply bolstering the efficiency of its pretrial services program. Indeed, attempts to judge or grade jurisdictions based on traditional, concrete lists of improvements (including items such as implementing a risk tool or enacting an express presumption for release) without looking at such important things as crime prevention or reduction programs, diversion at various decision points, and addressing the root causes of crime simply misses the mark. Put another way, a highly effective pretrial system is unlikely to be one that merely checks off certain singular improvements from a pre-determined list; rather, a highly effective pretrial system is one that continually questions the status quo, searches for answers "out of the box" of typical pretrial reforms, and strives, ultimately, to eliminate rather than merely respond to crime.[514] In sum, as long as

[514] The actual term "pretrial justice" itself has an interesting history. Older documents from the 20th Century never use the term, instead linking the term "bail reform" to "the administration of justice," and occasionally saying that the bail system provides a vehicle for injustice. This continued well into the 1960s, and my searches for the term "pretrial justice" in various documents from that time (including court cases, legislative histories, and other research documents) were mostly fruitless. It is likely that the trend toward applying "evidence-based" practices to various system-wide decision points gradually led to people viewing the pretrial phase as having its own set of decisions, beyond what had typically been called the "bail (or release/detain) decision." Nevertheless, in 2007, Marie VanNostrand and Gena Keebler noted that "the term 'pretrial justice' has been used for decades and can be found in print as early as 1973," but concluded that the literature had never defined it. *See* Marie VanNostrand & Gena Keebler, *Our Journey Toward Pretrial Justice,* 71 Fed. Prob. No. 2, at note 2. Accordingly, the authors defined the term broadly as follows: "The honoring of the presumption of innocence, the right to bail that is not excessive, and all other legal and constitutional rights afforded to accused persons awaiting trial while balancing these individual rights with the need to protect the community, maintain the integrity of the judicial process, and assure court appearance." I and my colleagues included this definition in our first glossary, as well as a similarly broad definition by another practitioner, who confirmed that the term "pretrial justice" should be looked as something much bigger than the historical release and detain decision (with efforts to make it more equitable often called throughout the century "bail reform") and, instead, should include all decisions occurring during the pretrial phase. *See Transcript: Justice Matters – Pre-Trial Justice and the Crucial Rold Reentry Programs Play in the Justice System: An Interview With Tim Murray,* found at https://bja.ojp.gov/sites/g/files/xyckuh186/files/publications/podcasts/multimedia/transcript/Transcripts_Justice_Matters_508.pdf. My definition in this paper is broader still, incorporating holistic solutions like decriminalization, housing, and healthcare to help reduce the need for a criminal case, and thus, a pretrial phase to begin with. My

there is a pretrial period of a criminal case, we strive to make improvements – both big and small – to constantly move toward and ultimately attain "pretrial justice." But we will be forced to do "bail reform," and if we do it wrong, it has the potential to render useless virtually any other pretrial improvement that we can imagine, thus stalling any meaningful attempt to ultimately achieve pretrial justice.

"Public Safety"

Another interesting development since 2014 has been the pretrial field gradually crafting better definitions for ubiquitous terms such as "public safety." Twenty years ago, it was actually rare to find a bail-setting judge who knew the proper purposes for allowing the government to limit pretrial freedom, let alone to expressly apply them properly in practice. As persons became more aware of public safety at bail, those persons gradually began to associate it with public safety solely defined and measured by the accused person potentially committing another crime while on release. Today, however, persons are recognizing the other side of the coin; that is, the harm to the public from unnecessary pretrial detention. The phrase that seems to sum up this attempt to apply a new, broader definition to public safety – that is, a definition that looks not only to the potential harms coming from the person accused, but that also looks at the myriad harms done to all members of the public due to unnecessary detention – is "community safety." Those harms are significant, and so jurisdictions should recognize the benefit of adding consideration of them to, for example, a statutory list of factors judges should or must consider for any release or detention decision.[515]

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own way to articulate the notion of "thinking out of the box" to eliminate crime and thus the need for any response to crime, is to say that if we practitioners are not striving to actively eliminate our own jobs in an unnecessarily engorged criminal system, then we are likely not focused on the right things. It is not necessarily an abolitionist stance in the traditional sense; rather, it is an optimistic stance that recognizes that if we can drastically reduce crime, then police, jails, and criminal courts will naturally become less necessary.

[515] As mentioned previously, given its importance, a broader definition of public safety might even be appropriately added to the "further limiting process" (or, finding of risk within the detention eligibility net), as a part of a constitutional or statutory articulation of bail and "no bail."

In a very recent document designed to help states prevent and reduce violence in the face of elimination of federal funding, the authors define "community safety" as,

> [A] framework for public safety that centers upstream investments in the social and community factors that prevent violence and harm, as well as community-based responses to crises. It contrasts with other frameworks that rely primarily on policing and the criminal-legal system to address crimes, usually after they have already taken place. . .. Besides being our most impactful and cost-effective way of addressing violence, community safety avoids the collateral consequences of policing and incarceration, including family separation, lifelong labor force participation reductions, and widening life expectancy gaps across communities.[516]

Such a definition has the potential not only to guide broad jurisdictional discussions designed to achieve pretrial justice, but also to help with crafting particular template language for use in statutes and constitutions laying out the boundaries of what may or should be considered prior to resorting to pretrial detention.

Summary

The fundamental point of this entire section is that bail education remains the true and attainable panacea to virtually all confusion and complexity currently found in America's system of pretrial release and detention. The same six topics first articulated in *Fundamentals of Bail* remain the substantive topics necessary for understanding pretrial justice today, although the rapid increase in the literature – and its likely continuation – means that each of these topics require constant vigilance and curation to add new knowledge to that which we have already learned. The first thing a collaborative body should do when it is formed and tasked with looking at achieving pretrial justice is to seek out broad education

[516] Thea Sebastian & Hannah Love, *How States Can Lead on Community Safety: Five Recommendations For Preventing and Reducing Violence* (Brookings Inst. 2025), at 3, found at https://www.brookings.edu/articles/how-states-can-lead-on-community-safety-five-recommendations-for-preventing-and-reducing-violence/.

on each of the fundamentals of bail simply because without such education, any attempt at improving the system is likely to fail. In sum, like collaboration, bail education is important for making pretrial improvements, but it is crucial for doing the project of bail reform and thus a pillar of pretrial justice.

Pillar Number Three: Creating an Intentional Release and Detain Pretrial System

> *"It is inconceivable that for decades de facto detention through high money bond and absent any procedural protections could avoid constitutional condemnation, while a measured response to bail recidivism fully surrounded by due process protections, the net result of which will guarantee the release of many persons wrongfully detained, will not pass Constitutional muster."*
>
> U.S. Congressional Committee Print, 1970

I have defended the argument that a collaborative group with ample bail education can quickly move through a planning process that involves identifying important issues or problems, collecting data, forming hypotheses, selecting a course of action, and then working on concrete solutions. As I have mentioned above, a jurisdiction might find that certain issues are vastly more important than others, which might form the basis for more immediate action. On the other hand, a jurisdiction might decide to follow a more formal process of moving chronologically though decision points – for example, following the points listed in Cushman's CJCC Guidelines,'[517] or NIC's EBDM decision points,[518] or even those found in the SAMHSA's Sequential Intercept Model[519] – recognizing that working on a downstream decision point might not be the most efficient means of achieving success across the system.

Nevertheless, I have also argued that true, historic bail reform is likely an inevitability, and so whatever else a jurisdiction might decide to do, it is imperative that it proceed as if money bail leading to detention will be either eliminated or eroded so as to begin to engage in the project of moving to a more effective model and to be ready for rapid change.

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[517] *CJCC Guidelines, supra* note 102.
[518] *See id.* at 16; *EBDM Initiative, supra* note 105, at 19.
[519] *See SAMHSA Model, supra* note 145.

Whether the group is small and local or large and statewide, that means working to replace the random, unsafe, and unfair money-bail system with a safe, fair, and moneyless (meaning money cannot lead to detention) intentional release and detention system. I have worked on this project for both sized groups, and I believe the overall goals and intertwined variables for achieving those goals are roughly the same – there are only minor differences based on a group's ability to change certain laws found to hinder the intentional (primarily detention) process. Again, this is the one project – the one topic, issue, or solution – that is likely unavoidable, that likely requires immediate attention, and that, if ignored, is likely to be forced upon a state or local jurisdiction without any warning.[520] Accordingly, it rises to the level of a pillar of pretrial justice. On this topic, I have seen a great deal of confusion in the literature, and so I will discuss each of the following component parts in some detail: (1) moneyless; (2) intentional; (3) detention; and (4) release. I discuss detention before release merely because crafting a safe, fair, and transparent detention process with adequate due process protections largely defines the population to be released; that is, as it has done throughout history, the scope of a state's right to bail (or release) is largely determined by whom it can and does detain.

Nine States With No Constitutional Right to Bail

The issue of how, exactly, a detention provision should be crafted is primarily focused on the forty-one states with constitutional right to bail provisions, which necessarily include express exceptions or preventive detention provisions based on history and the law. Nevertheless, all states moving from a random, money-based system to a safe, fair, and intentional release and detention system will follow the same basic pattern of creating detention eligibility and then finding risk within the eligibility net to actually detain. Thus, even the nine states without constitutional provisions will likely want to (or be forced to) change their statutes or court rules

[520] The likely starting point for the project of bail reform is for the group merely to ask itself what the system would do in the event that money was altogether removed from consideration in the release or detain decision. If the group believes that it can hypothesize a fact pattern showing the need to detain even one person pretrial, then the group must point to a suitable alternative to money-based detention. In 41 states, that alternative will likely already be found in the language from their constitutional "no bail" provisions. In nine states, that language, if it is adequately expressed, will be found in statute or court rule. In either case, in my opinion, collaborative groups will quickly see that some legal overhaul will be needed. It is no surprise that only one state has eliminated its existing intentional system, as eliminating what is, typically, a constitutional right would likely always be controversial.

based on the current law and research. Based on my experience, most of those state statutes need a complete overhaul, as the money system and thus legal language attempting to deal with it tends to be pervasive. The main difference between the two groups of states, of course, is in the ease in which a state without a constitutional provision can make the change (or fix an erroneous change). Those states include Georgia, Hawaii, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Virginia, and West Virginia.

Sources: *Model Bail Laws, supra* note 23; *Changing Bail Laws, supra* note 56. The document *Guidelines for Analyzing State and Local Pretrial Laws* (PJI, 2017), spelled out the various state groups, but now needs some alteration due to the increase in states currently changing their constitutional bail provisions. *See* at https://documents.ncsl.org/wwwncsl/Criminal-Justice/Guidelines%20for%20Analyzing%20State%20and%20Local%20Pret_Alyssa%20Vigil.pdf.

Moneyless

The word "moneyless" is likely better articulated as "no money-based detention" because it is mostly unnecessary money-based detention (more so than unwise money-based release) that is driving American bail reform. As already mentioned, a jurisdiction may – despite the growing research – choose to keep affordable money as a motivator for persons who are *actually released*, but true, historic bail reform means switching from a system in which money can unfairly detain or unwisely release persons who should otherwise be released or detained on purpose.

Indeed, when people complain about "cash bail" or "money bail" being unfair, their complaint is primarily against secured financial conditions leading to detention, just as arguments for "higher bail" are typically complaints against money leading to unwise release in certain egregious cases. Accordingly, even though Illinois correctly eliminated the use of money altogether,[521] and even though judges occasionally comment on the irrationality of money in the release

[521] The history, the law, and the research by scholars and groups such as bail funds supports eliminating money at bail altogether, but jurisdictions leaving money in place must, at the very least, understand that a secured financial condition simply cannot act to motivate persons to return to court if they cannot post the bond either with or without help, just as posting some amount cannot magically erase any risk to public safety for those very few who are deemed dangerous and yet released.

and detention process,[522] jurisdictions are not required to entirely eliminate money to accomplish true, historic bail reform. Washington D.C. and the federal system still have money bail; they merely forbid allowing money that detains.[523] Judges in New Jersey still have money bail; they just rarely use it. Indeed, had judges insisted on affordable financial conditions in the 1800s and 1900s, or had the appellate courts disallowed unaffordable financial conditions based on excessive bail notions soon thereafter, or had the commercial surety industry found a way to "bail-out" everyone given a secured financial condition starting in 1900, the states, like the federal system and D.C., would have already changed their laws to allow for intentional release and detention without money, and we would not be in a time of national reform.

The fundamental point is that we have grown so used to money-based release and detention that we have ignored even thinking about a better way to do it, placing virtually every American state in a legal bind. Accordingly, as money as a detention mechanism is slowly eroded and intentionality is being inserted into the process, the states are being forced to look for alternatives, which, in turn, typically leads to a forced overhaul of their bail systems. That overhaul means crafting the only conceivable alternative short of releasing or detaining literally everyone pretrial, which is by drawing lines of intentionality leading to limited, safe, and fair pretrial detention and safe and wise release through fully-actualized release and detention orders.[524]

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[522] *See, e.g., Feltz v. Regaldo,* Case No. 18-cv-0298-SPF-JFJ (Order on Motion for Summary Judgment, Mar. 3, 2024), at note 49 ("By what reckoning does a bail system withstand rational basis review when, by design, a recidivist fentanyl dealer who has the money to make bond will, within hours of arrest, be put back on the street to resume plying his trade, while an indigent arrestee who has been accused of a much less serious crime faces the very real prospect, for lack of a due process-compliant bail hearing, of sitting in jail to await trial?"); *People v. Melville,* 62 Misc.2d 366, 373 (Crim. Ct. N.Y.C. 1970) ("However, logic dictates that a defendant's potential danger to the community is not considered as a factor in the designation of bail because it is irrelevant to the question of the amount of bail. If a defendant would not matter [sic] clear and present danger if free in the community then it would not matter whether he had posted $100,000 bail or was released on his own recognizance. Danger to the community has no relationship to the ability of a defendant to post a bond.").

[523] *See,* D.C. Code, § 23-1321 (c) (3) (judicial officer may not impose a financial condition to assure safety, but "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"); 18 U.S.C. § 3142 (c) (2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person.").

[524] Although grossly underestimating the ultimate inertia in the states, this inevitable, forced change in systems was predicted by the U.S. Congress in 1970, when it wrote: "Ten years from now, court decisions based on equal

Embedded in this line-drawing is the important notion that jurisdictions recognize that intentional detention is meant to *replace* random and accidental money-based detention and unwise money-based release. Accordingly, states that make changes to their intentional detention provisions (typically found in the "no bail" exceptions in their right to bail provision) while still allowing money to detain the same persons carved out for intentional detention eligibility, are simply not doing the project of bail reform. Virtually every state already has an intentional detention provision; it is only when they begin using it (or some re-wording of it) to replace money-based detention that they begin to lessen the pressure of the inevitability of bail reform.

Unwise money-based release requires little explanation to the states, except to emphasize how rare it is based on the lack of serious defendant risk of the sort requiring detention. Nevertheless, in certain aberrational cases, a person who has been arrested for a serious or violent crime and who is extremely high risk to commit another serious or violent crime if released should not be allowed to buy his or her way out of jail only to re-victimize society. Moreover, I need not rehearse the reasons for why unnecessary money-based detention is or should be eliminated or eroded. Virtually every paper in the literature emphasizes the harms of needless pretrial detention caused by money. Indeed, pretending there are "pros and cons" to money bail, which is akin to saying there are "two sides to the debate" over money bail, is simply false. There are dozens of reasons to eliminate money-bail, and there are hundreds of groups advocating to eliminate money-based detention compared to only one or two groups wanting to keep the status quo by articulating a few conclusory arguments, each having serious flaws.[525]

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protection of the law may give the indigent defendant the means to force his release before trial if money is the barrier between jail and freedom. Such a development could not be welcomed by a society besieged with crime unless that society were empowered to protect itself against the truly dangerous defendant. In the judgment of a majority of your Committee, the only effective means of protection is pretrial detention." D.C. Court Reform and Criminal Procedure Act of 1970 (H. Rep. No. 91-907), at 85. In my discussion of "bail reform models," *infra,* I acknowledge the somewhat rare models that advocate for the release of literally everyone pretrial. The subtitle of my paper, *Model Bail Laws* -- "re-drawing the line between pretrial release and detention" – was simply a recognition that the states had already drawn one line – typically found in the constitution – which, due to the prevalence of money bail and its gloss of legality, had been ignored and thus would likely need a "re-drawing."

[525] New arguments to keep money bail often arise after old arguments fail to persuade, providing a bit of a moving target. For example, for many years, persons arguing to keep money bail claimed that the presumption of innocence was simply inapplicable to bail. Now, however, the presumption is used in the correct sense of helping to

For example, arguments to keep secured financial conditions (i.e., money bail) in any way focused on the commercial surety industry miss a broad point in bail reform, which is that secured financial conditions leading to detention for bailable defendants typically only affect people that the industry, for whatever reason, is not willing to help secure release. Similarly, arguing that a money-based system "gets people out of jail quickly" misses the broad point that this era of reform is focused equally on making sure that lower risk persons are not jailed for lack of money *and* making sure that extremely dangerous persons cannot buy their way out of jail. Likewise, arguments that money bail – that is, the use of secured money bond amounts – is a long and cherished American tradition conflates the word "bail" (a process of release) with money (a sub-condition of the return-to-court condition and a precondition to release), and has been rejected in several court cases.[526] Finally, arguments that a new, moneyless system might strain judicial or other resources fail to acknowledge that *anytime* due process is forced onto a system that has evaded due process for centuries, things are bound to take at least a little more time in the name of fairness.[527]

There are only two arguments that are not facially frivolous when it comes to maintaining the traditional money-bail system, and thus they each need a slightly more detailed response. The first argument is that removing money from the bail system is sometimes perceived by the public as being generally "soft on crime." While it is true that this *perception* exists, it is nonetheless a perception grounded in ignorance and fostered by groups often seeking to play on public fears of crime to avoid change. In fact, moving to a moneyless, intentional release and detention system is the *only* way to address public safety at bail, and being "soft on crime" outside of the pretrial phase of the case is best addressed through sentencing and

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foster a right to bail or release. Likewise, bail industry groups have occasionally argued both for and against preventive detention, depending on the arguments' effectiveness.

[526] *See, e.g., Holland v. Rosen,* 895 F.3d 272 (2018).

[527] This is not always true. My colleagues and I once performed a pilot project in which defense counsel, who were previously absent, would begin provisional representation of persons at their first appearance and bail setting. Despite attempts to stop the project based on arguments that adding defense council would dramatically slow the overall process, we found, for a variety of reasons, that adding defense counsel actually streamlined and quickened the process while simultaneously making it fairer. Moreover, based on our current American practices that take inordinate amounts of time arguing, determining, forfeiting, exonerating, and reviewing money bonds, an intentional release/detain system will most certainly lead to greater overall efficiencies by, for example, limiting detention eligibility and removing irrelevant layers of process.

punishment or, preferably, more holistic programs to eliminate crime completely outside of the criminal process.[528] Indeed, despite whatever perception the public has with bail, it is, in fact, the money-based release and detention system that is "soft" on crime in the sense that it allows extremely high risk persons to buy their way out of jail while keeping low and medium risk persons in jail, ultimately leading to later, avoidable increases in crime. In a way, the money-based bail system is worse than being "soft on crime." It perpetuates crime.

A more nuanced articulation of this "soft on crime" argument is the argument that removing money from the bail system will in some way adversely affect public safety, likely tied to money's ability to detain and detention proving itself by hiding false positives. Sometimes this argument is articulated crudely as, "It will let criminals roam free" (crudely and incorrectly, as persons on pretrial release are technically not "criminals" until they have been convicted), but the gist of every iteration of this argument is that money bail equates to public safety – that is, money bail keeps people safe. Again, this argument is based on ignorance concerning the entire reform movement, which correctly sees the money-based system as an enormous *threat* to community safety in both whom it releases and whom it detains, and which thus has a replacement that addresses both issues. Moreover, the argument is based on the false assumption that keeping money-based detention is a choice; that is, that jurisdictions can simply ignore the fact that that such detention is already being eliminated or eroded through legal and other commonsense pressures. Nevertheless, the answer to this argument is that money does not – and, indeed, was never meant to – keep people safe for a number of reasons.

First, recognize that the strength of the legal claims against money bail might force changes even if the result of those changes was an *increase* in crime. Surely, one might argue that forcing law enforcement to provide Miranda warnings prior to in-custody interrogations would somehow lead to more people being released only

[528] This argument is also often muddied by the use of general recidivism rates (including misleading and often simply wrong statistics) rather than pretrial crime rates to make its points. Of course, public safety – as determined, in part, by looking at the risk of pretrial crime and not crime far beyond the pretrial period – is one of the only two constitutionally valid purposes for limiting pretrial release.

to commit more crime, but the law has decided that fairness is paramount in that case. Likewise, if the states are required to begin providing some much-needed procedural due process prior to pretrial detention, then it is because the law simply places constitutional fairness above public safety and efficiencies in that case. After all, holding every arrested person "without bail" would virtually eliminate problems with failure to appear and pretrial crime, but such a system – a system without a meaningful right to bail – has been described by Justice Douglas as a "police state."[529] In the Texas case of *O'Donnell v. Harris County*,[530] those wanting to keep money-based detention argued openly that declaring money to be invalid based on equal protection would force them to release "risky" defendants who are not eligible for detention via the current Texas Constitution. The judge acknowledged this argument, but then suggested that the various defendants petition the Texas Legislature to amend that Constitution.[531]

Additionally, ever since America began discussing whether public safety might be a lawful purpose for limiting pretrial freedom, language addressing public safety at bail has typically never included using money to keep people safe beyond mere implication. Indeed, the resulting preventive detention provisions crafted in that

[529] *Carlisle v. Landon,* 73 S. Ct. 1179, 1182 (1953).

[530] *O'Donnell v. Harris County*, 251 F. Supp. 3d 1052, 1166 (S.D. Tex. 2017).

[531] In the end, Harris County stakeholders became subject to a federal consent decree to change the way the County dealt with misdemeanor defendants despite the lack of constitutional change. In a paper published in 2025, the Wilson Center for Science and Justice recounted the Harris County journey, and concluded that merely implementing new county bail policies (that is, not relying on radical changes to state law), the County has used less cash bail, resulting in improved public safety, better overall pretrial outcomes, and millions of dollars in savings. *See* Lindsay Bass-Patel, *Policy Shifts in Pretrial Detention: Lessons from the 2019 Harris County, Texas, Misdemeanor Bail Policies* (Wilson Ctr. for Science and Just., 2025), found at https://wcsj.law.duke.edu/wp-content/uploads/2025/07/Policy-Shifts-in-Pretrial-Detention.pdf. Since then, there have been many attempts to amend the Constitution, resulting in yet another piecemeal addition in 2025 when the legislature – under pressure from the Governor – ignored much of the good work done in 2023 and passed a constitutional amendment that lacks many of the recommendations found in this paper (for example, by leaving money as an alternative way to detain the very same persons added to a wider eligibility net), but nonetheless includes certain big improvements (such as better language than that found in the provision as introduced as well as a constitutional right to counsel during the hearing to detain). Unfortunately, Texas lawmakers ignored my attempt to completely re-write its right to bail provision, which is still necessary based on the overall constitutional structure, which includes several nets and several limiting processes (findings of risk within the nets) seemingly cobbled together with little to no justification. *See* Texas S.J.R. 5, found at https://legiscan.com/TX/text/SJR5/id/3133659. The civil rights advocates were able to insert certain language into S.J.R. 5 ameliorating parts of the proposed amendment and completely halted an even worse (and clearly unlawful) proposed amendment, S.J.R. 1. The provision passed as Proposition 3 on November 4, 2025. Simply reading the statements in support of the amendment reveals significant ignorance of the bail process.

era were designed to *entirely replace* what was deemed to be an illogical, hypocritical, dishonest, and unreviewable *sub rosa* process of using money bail to protect the public. Since then, the various sets of national standards[532] and various states have followed the federal and D.C. laws by enacting: (1) express prohibitions on setting money for public safety; or (2) limitations to use money only for purposes of court appearance.[533] Moreover, in the vast majority of states, financial conditions of release cannot be forfeited (as opposed to revocation of release) for new criminal activity;[534] typically, forfeiture is legally tied only to court appearance. This has led one federal district court to rule that setting a financial condition of release for purposes of public safety in a state in which forfeiture is only allowed for failure to appear for court is "illogical" and thus unlawful.[535]

Most recently, empirical research is showing that the use of financial release conditions has not been associated with reductions in public safety, as measured by any new pretrial arrest or new violent pretrial arrest, compared to non-financial release conditions,[536] and using "unsecured" bonds (i.e., a mere promise to pay in the event of default) can lead to vastly greater numbers of released

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[532] *See, e.g., ABA Standards, supra* note 118, Std. 10-5.3(b) ("Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person."), found at https://www.americanbar.org/groups/criminal_justice/resources/standards/pretrial-release/; *NAPSA Standards, supra* note 118, Std. 1.5 (calling for the abolishment of all financial conditions of release for any purpose), found at https://napsa.memberclicks.net/assets/NAPSA%20Pretrial%20Standards%20Revised%202024.pdf.

[533] *See, e.g.,* Wis. Stat. § 969.01(4); N.M. Rule Crim. P. 5-401.

[534] In some states, judges are expressly allowed to set money for public safety purposes, and yet, oddly, still have laws mandating that new criminal activity does not result in forfeiture. In 2022, Ohio actually amended its constitution to require courts to consider public safety when "determining the amount of bail" (an objectively flawed attempt at a pretrial improvement based on erroneous assumptions about money made confusing by the "excessive bail loophole" as described in *Appendix One*) and yet left in place the statutory limitation that allows forfeiture of that amount only for failure to appear for court. *Compare* Ohio Const., Art. I, § 9 *with* Ohio Rev. Code § 2937.35 (Forfeiture of Bail). This issue is made more complex by industry practice, which makes agreements with defendants, sureties, and courts to help assure appearance but not good behavior, and so industry presence is a factor leading to variations between states' laws dealing with forfeiture/revocation.

[535] *See, e.g., Reem v. Hennessy*, 2017 WL 6539760, No. 17-cv-06628-CRB (order granting motion to withdraw stay and imposing new stay), slip op. at 7-8 (Dec. 21, 2017).

[536] *See e.g.,* Claire Brooker, *Yakima County Pretrial Justice Improvements* (JSP/PJI, 2017) at 6, found at https://justicesystempartners.org/wp-content/uploads/2015/04/2017-Yakima-Pretrial-Pre-Post-Implementation-Study-FINAL-111517.pdf; Aurelie Ouss & Megan Stevenson, *Does Cash Bail Deter Misconduct?,* at 1 ("We find no evidence that financial collateral has a deterrent effect on failure-to-appear or pretrial crime."), found at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138; Zottola & Desmarais, *supra* note 49 at 277-289 ("Our findings do not support the use of money bail for ensuring that people return to court and avoid arrest.").

persons with no increase in pretrial crime.[537] Based on this and other research, courts ruling on money-bail claims rooted in equal protection and due process are concluding that the government's otherwise compelling ends of public safety and court appearance are simply not furthered in any way by using money.[538]

In short, money bail only affects public safety when it is set at unaffordable amounts. Unfortunately, however, setting an unaffordable financial condition for an improper purpose, such as to keep the person in jail intentionally, is already unlawful under excessive bail analysis,[539] and courts are increasingly ruling that keeping someone in jail on a secured money bond – whether intentional or not – is unlawful under due process and equal protection jurisprudence. Finally, even if it were lawful to set a secured financial condition with a purpose to detain a bailable person, it simply might not work, as bail bonds with seemingly unaffordable secured financial conditions are occasionally paid by crowdsourcing, foreign governments, or even lottery winners.[540]

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[537] See, e.g., *Jones, supra* note 142, at 10.

[538] *See, e.g., O'Donnell v. Harris County*, 892 F.3d 147, 162 ("The court's thorough review of empirical data and studies found that the County had failed to establish any 'link between financial conditions of release and appearance at trial or law-abiding behavior before trial.' . . . These findings mirrored those of various empirical studies from other jurisdictions.").

[539] *See Appendix One.*

[540] *See* Kelly McLaughlin, *Mother-of-Four Who Won $188 Million Powerball Prize Less Than a Year Ago Spends $12 Million Bailing Out Her 'Heroin-Trafficking' Boyfriend For the Third Time – Bringing Total Cost to $21 Million,* Daily Mail (Jan. 2, 2016), found at https://www.dailymail.co.uk/news/article-3381697/Mother-four-won-188million-Powerball-prize-year-ago-spent-21MILLION-bailing-loser-heroin-trafficking-boyfriend-jail-three-times.html. In 2013, a Missouri judge set a $2 million secured financial condition on the bail bond of a college student arrested in connection with the murder of a local bar owner. When the Saudi Arabian government posted the $2 million, however, the judge refused to release the student, explaining that the amount of money was meant to detain him, even if that detention potentially violated the Missouri Constitution. *See* Sarah Rae Fruchtnicht, *Missouri Judge Refuses to Release Saudi Student After He Posted $2M Bond*, found at http://www.freerepublic.com/focus/f-news/3027702/posts; Bill Draper, *Saudi Remains Behind Bars After $2M Bond Posted*, found at http://bigstory.ap.org/article/saudi-remains-behind-bars-after-2m-bond-posted. I surmise that the amounts were set to protect the public for good reason and with good faith, albeit with ignorance of certain fundamental legal principles of bail and without any express lawful procedure for intentional detention. In a report on North Carolina bail practices issued in 2016, I noted the flawed assumption that money protects the public found throughout the statute as well as the lack of any express provision whatsoever for intentionally detaining dangerous persons. *See* John Clark & Timothy R. Schnacke, *Upgrading North Carolina's Bail System: A Balanced Approach to Pretrial Justice Using Legal and Evidence-Based Practices* (PJI, 2016), found at https://www.nccourts.gov/assets/inline-files/criminal-10-20-2016-Upgrading-NCs-Bail-System-PJI-2016-003.pdf?x9pLQPP6om3egcZSFqWgk3LQ3TFpafTd.

The fact is that *eliminating* the use of secured financial conditions at bail makes communities safer,[541] and that groups as diverse as the ACLU,[542] the Heritage Foundation,[543] and the Uniform Law Commission[544] all agree that money should never be used as a means to protect the public. Instead, the best way to deal with public safety at bail is to follow my guidance on intentional release and detention, while addressing the root causes of crime under the umbrella of "pretrial justice."[545] In sum, making more intentional pretrial decisions is the best initial step toward avoiding pretrial crime, and states having done true bail reform, such as New Jersey, have even shown dramatic reductions in detention while maintaining the same court appearance and public safety rates.[546] Even when expanded to include a variety of pretrial improvements as well as both pretrial and longer-term crime, the Brennan Center reports that "[t]he best causal research to date . . . suggests that reforms have caused little, if any, increase in crime or pretrial rearrest rates. These findings hold even in jurisdictions that have made major changes to their policies relating to money bail."[547]

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[541] For good summaries on the effects of money bail on the safety of communities, *see,* Civil Rights Corps, *Reducing the Use of Money Bail Makes Communities Safer,* found at https://civilrightscorps.org/wp-content/uploads/2023/08/Reducing-the-Use-of-Money-Bail-Does-Not-Pose-a-Public-Safety-Risk-FNL.pdf; Allie Preston, *5 Ways Cash Bail Systems Undermine Community Safety,* Ctr. for Am. Progress, Willamette Week (June 20, 2017), found at https://www.americanprogress.org/article/5-ways-cash-bail-systems-undermine-community-safety/.

[542] Andrea Woods & Portia Allen-Kyle, *A New Vision for Pretrial Justice in the United States* (ACLU, 2019) (recommending the elimination of unaffordable secured financial conditions but allowing for intentional detention of dangerous persons), found at https://www.aclu.org/wp-content/uploads/publications/aclu_pretrial_reform_toplines_positions_report.pdf.

[543] Jason Snead, *A Path Forward for Pretrial Justice Reform* (Heritage Found. May 17, 2019) (stating "Do not use bail [that is, money] for dangerousness," and "using bail sums as a proxy for dangerousness are ineffective"), found at https://www.heritage.org/crime-and-justice/report/path-forward-pretrial-justice-reform.

[544] The Uniform Law Commission's recent *Uniform Pretrial Release and Detention Act* (2020) relies on the law, the history of bail, and the pretrial research to conclude that "it is inappropriate for a court to set a secured appearance bond to prevent harm to others." *See ULC Act, supra* note 181, at 31 (commentary).

[545] Jennifer Doleac makes a strong case for using research on what does and does not work to reduce crime through prevention, deterrence, and rehabilitation in, *Why Crime Matters, and What to Do About It,* Aspen Econ. Strategy Group (2024), found at https://www.economicstrategygroup.org/publication/doleac-crime-2/.

[546] For a good discussion of New Jersey's bail reform co-written by attorneys for ACLU of New Jersey and the New Jersey Attorney General's Office, *see* Alexander Shalom & Claudia Demitro, *Is Bail Reform in New Jersey a Success?,* 318-Jun. N.J. Law. (2019) (answering in the affirmative and citing to other diverse system actors in favor of the changes); *see also* Glenn Grant, *Criminal Justice Reform: 2021 Annual Report to the governor and Legislature, New Jersey Courts* (2022) found at https://www.njcourts.gov/sites/default/files/courts/criminal/criminal-justice-reform/cjr2021.pdf.

[547] Terry-Ann Craigie & Ames Grawert, *Bail Reform and Public Safety: Evidence from 33 Cities,* Brennan Ctr. for Just. (Aug. 15, 2024), at 2, found at https://www.brennancenter.org/our-work/research-reports/bail-reform-and-public-

From this perspective, there should be nothing partisan about a "moneyless" system, especially when we have the knowledge to enact the other elements of a safe, fair, and transparent replacement for a money-based one. In the past, arguments about bail consisted primarily of how high the amount was or should have been. As you will see, arguments in the future will not be concerned with money; instead, they will be concerned with the mechanics and elements of intentional release and detention, such as who is eligible for detention and how to word the required finding of risk within an eligibility net to detain.

The second argument requiring some more detailed explanation is that removing money bail's ability to detain will result in reducing judicial discretion. This is likely true, but only because the money-based system currently allows for virtually 100% discretion to detain for the relevant cases (including cases charging lower-level, nonviolent charges) so long as a judge does not express his or her intent to detain.[548] We must never forget that America's first bail laws were crafted primarily to *eliminate* the discretionary abuses of English bail setters.[549] Those first provisions were intentional release and detention provisions, which, in theory, were never allowed to result in the detention of a "bailable" person.[550]

As discussed previously, however, starting in the 1800s appellate courts began allowing bail-setting judges complete discretion to detain any bailable defendant using money, albeit through a somewhat dishonest and secretive system that

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safety. The report concluded: "This report discredits theories linking bail reform to recent increases in crime. We find no evidence to support such a connection, even after testing different types of reform in jurisdictions across the country. This finding should not be surprising: Claims that bail reform increases crime incorrectly assume that it requires the release of people who may threaten the community." *Id* at 9.

[548] The argument is somewhat odd, too, due to many systems allowing or even requiring money-bail schedules, which can also be seen as avoiding or replacing judicial discretion. Another way to respond to this argument is to explain that every criminal system has already created lines of intentionality that keep certain persons from being brought to jail and having their bail set, for example, for charges that by statute require a summons. Looking at it this way, intentional detention merely means being more discerning about who is actually released or faces the potential of detention, a process that often leads to more offenses being ineligible for detention than before based on the way America has traditionally done bail through money. Some states will likely end up with wider detention eligibility nets, which will force them to be more intentionally discerning while crafting the language for finding the risk within the net necessary to actually detain. *See* discussion on detention, *infra.*

[549] *See* Hermine Herta Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L. J. 1139, 1162 (1971-72) (early American statutes "indicate that [the] colonies wished to limit the discretionary bailing power of their judges in order to assure criminal defendants a right to bail in noncapital cases.").

[550] *See Founding, supra* note 289, *passim.*

relied on those judges never articulating their true intentions on the record.[551] Had this system with 100% discretion worked – that is, had it not led precisely to where we are today, with the wrong people both in and out of jail – we would not need to change.[552] Unfortunately, though, it did not work, and so any new alternative will likely lead to a system with at least some reduction in discretion, simply because there is nothing higher than 100% and because so many persons face charges that have traditionally been subject to detention through money bail.

Without being overly simplistic, designing an intentional release and detention system naturally involves drawing lines of intentionality – such as not allowing detention for anyone facing certain traffic offenses – that will automatically limit discretion (as compared to the money-bail system) in the relevant case or class of cases.[553] My process for crafting that intentional system, though, should be done with judicial input and support, and virtually every judge with whom I have worked on this project have almost entirely understood and welcomed any resulting loss in absolute discretion.[554]

Intentional

No one doubts the importance of intentionality in the normal (versus philosophical) sense of the word, as everyone agrees that making deliberate and purposeful decisions to achieve proper goals for sensible reasons is an objective good. Some have called intentionality a major difference between life and nonlife, as all life operates with purpose (even if only to survive) and is able to take goal-

[551] *See Appendix One.*

[552] Such a system was likely destined to fail, however, as the odds of judges "choosing" the right amounts of money (especially when the money was typically tied to charge and not persons) to effectuate release and detention leading to exactly the "right" (no false positives or negatives) persons being in and out of jail are so low as to likely present a statistical impossibility.

[553] These lines of intentionality ultimately form a detention eligibility net, which is a fundamental tradition of American bail law, and which does not diminish judicial discretion to actually detain or release those within the net, to set conditions, or to appropriately revoke release.

[554] Indeed, through education, most judges come to realize that the discretion they enjoy through the money-based system is mostly illusory and propped up by legal fictions. The history of bail shows clearly that early articulations of "bail" and "no bail" were meant to drastically limit judicial discretion, and those provisions have not been eliminated despite having a way to avoid them in all cases.

oriented actions (even if only a stimulus response). The notion is especially important to humans due to our advanced reasoning abilities and as evidenced by the dozens, if not hundreds of websites offering tips on living a more intentional or purposeful life.

Intentionality is thus infused into human life, but no more so than in the lives of judicial officials. Indeed, the *sine qua non* of judicial activity is intentionality through decision-making in order to solve our most complex disputes so that we are not left to solve them for ourselves. Socrates said that "to consider soberly" and "to decide impartially" are two of the four things that necessarily "belong" to the judiciary.[555] Ralph Waldo Emerson wrote that judges decide because "there must be a decision."[556] Finally, the thousands of analyses on judicial decision-making, including Posner's Nine Theories of Judicial Behavior,[557] assume deliberate and intentional decisions along with a recitation of reasons designed to provide procedural fairness[558] and to justify the courts' important societal role through transparent processes.[559] Although there may be times when reasons are appropriately withheld in judicial decision-making, this is not the case when the law dictates that motive – that is, the reason for why a decision is made – is integral to the legal issue itself. In sum, America has created a system of third-party dispute resolution to avoid the violence likely inherent in any alternative. In the criminal law, intentionality is a prerequisite to moral blame, and making intentional decisions designed to achieve societal goals to deal with criminality are

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[555] *See,* The Right Hon. Lady Rose of Colmworth DBE, *What Makes a Good Judge?* (Barnard's Inn Reading, June 16, 2022), found at https://jcpc.uk/uploads/barnards_inn_reading_lady_rose_speech_2022_807c8d91ed.pdf.

[556] Ralph Waldo Emerson, *The Complete Works of Ralph Waldo Emerson: Comprising His Essays, Lectures, Poems, and Oration Vol. II* (Bell & Daldy, London 1866) at 413, found at https://books.google.com/books?hl=en&lr=&id=Vqu9cKFzcwAC&oi=fnd&pg=PA1&dq=Ralph+Waldo+Emerson+(1866).+%E2%80%9CThe+Complete+Works+of+Ralph+Waldo+Emerson:+Comprising+His+Essays,+Lectures,+Poems,+and+Orations%E2%80%9D,+p.413&ots=v4ha2WE8Bw&sig=Kr019TXBOEY8r4I1x2snudky4QM#v=onepage&q&f=false .

[557] Richard Posner, *How Judges Think* (Harv. Univ. Press, 2008).

[558] Even the Code of Conduct for United States Judges states that "Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges," and the duty to dispose of matters promptly and fairly, causing no unnecessary delays or costs is woven through the canons. *See* Code of Conduct for United States Judges, Canon One and *passim,* found at https://www.uscourts.gov/administration-policies/judiciary-policies/ethics-policies/code-conduct-united-states-judges.

[559] *See* William Vickery, Douglas Denton & Wallace Jefferson, *Opinions as the Voice of the Court: How State Supreme Courts Can Communicate Effectively and Promote Procedural Fairness* (AJA), Court Rev. 2012, found at https://www.ncsc.org/__data/assets/pdf_file/0023/18059/ncsc-harvard-003-opinion-online.pdf.

essential to the response. And because motive is key to bail decision making – indeed, different motives may indicate lawful versus unlawful bail settings – intentionality and documented reasons for actions are especially crucial.

How, then, did we come to such a radical departure from intentionality when it comes to bail? Indeed, the very essence of the traditional money-bail system is that it is arbitrary and cloaked in secrecy. Indeed, bail scholars have long argued that round numbers, themselves, indicate arbitrariness at bail, and that few have ever satisfactorily answered why a $10,000 bond should not instead be $9,623 unless it is tied to ability to pay.[560] Moreover, the traditional money-bail system achieves goals, if at all, randomly and mostly by accident and often achieves the *opposite* result of some stated goal such as public safety.[561] Finally, it is commonly done with no record whatsoever, despite being one of those topics that requires a record to determine the lawfulness of the judicial decision based on a limited number of proper legal purposes for setting bail.[562]

Intentionality is the clearly favored state of affairs at bail, and yet there are four misconceptions that get in the way of such an obvious conclusion. First, intentionality primarily goes to (or at least should go to) the decision of whether a person should be released or detained – period. The gist of NIC's *Money as a Criminal Justice Stakeholder* paper is that when a judge sets a secured bond – that is, money to be paid upfront and typically the only precondition to actual release (besides agreeing to abide by reasonable conditions) – it is the money that makes the actual decision and not the judge. The misconception comes from judges thinking that making a *conditional* decision to release – much like making a decision to conditionally sentence a person or to discharge a case – is the only decision required. In essence, it is a judge saying, "I made my decision, and that decision is to release a person, but only if he or she pays some amount of money."

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[560] *See Money, supra* note 103, at 71-75 and note 171.

[561] Even the earliest studies concluded that keeping low or medium "risk" persons in jail for even a small amount of time increased crime, both during the pretrial period and longer-term, thus achieving to opposite goals for setting bail to begin with. *See id.* at 50-52.

[562] While setting bail to achieve an improper purpose would fail under excessive bail analysis, providing no record whatsoever has been overlooked by appellate courts (except in extremely rare instances), and thus plays a large part in the "excessive bail loophole," which is discussed in *Appendix One.*

It leads to an incorrect belief that the right to bail is merely the right to have bail set, which finds truth only through bad law.[563]

Without commenting on the lawfulness of other conditional judicial decisions, at bail we know that the condition at issue – i.e., a secured financial condition – simply does not work to achieve its lawful purposes and is held to an even higher level of legal scrutiny when it leads to detention.[564] It should be undeniable that when a conditional decision relies on a condition that is does not work, it is irrational to impose the condition. Accordingly, making any claim of intentionality surrounding that decision would be essentially meaningless. The better practice – indeed, the lawful and honest practice – is for judges to emulate the overall structure of the District of Columbia bail statute, which begins by providing judges with four lawful and *intentional* alternatives: (1) release with no conditions except return to court or on an unsecured appearance bond; (2) release on non-monetary conditions; (3) temporary detention; and (4) full detention.[565] So long as no other condition provides a roadblock to release, and so long as the accused person agrees to the conditions, this structure is simple in its intentionality.

Second, judges tend to conveniently forget that after some number of days, even a conditional decision to release becomes an intentional decision to detain once it is evident that the money is unaffordable. The fact that so many "bailable" defendants can remain in jail for the entire period of their pretrial phase based on the theory that they can find release at any time by simply paying the money simply ignores reality. Many states across America have enacted "bail review hearings," which look at various changed circumstances potentially leading to alterations of conditions, and which were often (and ironically) passed as a

[563] This state of affairs led, in part, to Dr. John Goldkamp's recommendation to the participants of the National Symposium on Pretrial Justice to "skip the dollar game" and move states toward direct decision making with mechanisms for feedback and review. *See* DOJ/PJI, *National Symposium on Pretrial Justice: Summary Report of Proceedings,* at 20 (2011), found at https://www.scribd.com/document/92690596/NSPJ-Report-2011.

[564] In sum, money as a limit on pretrial freedom short of detention would likely be held constitutional if "rationally related" to either court appearance of public safety. Money leading to an absolute deprivation of pretrial freedom through detention would be constitutional only if "necessary" to achieve either court appearance or public safety. The research showing money to be irrelevant to defendant motivation is damning to the use of money bail, whether it leads to detention or not, and is akin to ordering the release of a defendant so long as he or she first runs ten laps around the courthouse.

[565] See D.C. Code, § 23-1321 (a) (1)-(4). Other elements of the D.C. statute definitely *should not* be emulated, as discussed under the heading of "detention," *infra.*

measure to reduce money-based detention. Unfortunately, none of them lays down any decent rule on when it becomes evident that the accused will likely never afford the financial condition. I have personally tried to get states to simply add "unable to pay money amount" to a list of "changed circumstances" that might lead to at least re-examining the money condition, but most of the time those states have been reluctant, if not hostile to the change, for to accept it would be to upend the excessive bail loophole and to force changes to provide for a transparent and fair detention process.

The third misconception about intentionality is tied to the first two, which is that some people do not fully understand that the intentional decision must be tied to one of only two constitutional purposes for setting bail, which are court appearance and community safety. Having only two proper purposes makes it crucial that a decision to release (with conditions) or detain have a clear record for why the decision is made to distinguish one purpose from another.[566] This notion, however, is not universally followed in practice. Setting bail to punish is clearly unlawful, and yet I have seen it done. Setting bail to gain a plea or to appease the public in response to a particularly egregious crime are both equally unlawful, and yet I have seen both done.[567] As I have already discussed, setting money bail to protect the public is often wrong, if not unlawful, and setting bail to intentionally detain a bailable person is unlawful under federal law and typically under clearly articulated state law, and yet I see those things done every day.[568] In sum, when there are only two proper purposes for limiting pretrial freedom – court appearance and community safety – literally all other purposes are improper and thus unlawful.[569]

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[566] The proper purposes mirror those found in the so-called "3-Ms," which balance liberty against court appearance and public safety and is expressed as the "purpose of the pretrial release decision" in the *ABA Standards*, *supra* note 118, Std. 10-1.1.

[567] As noted previously, the ABA Standards mention the impropriety of setting high money bail to appease the public or to force the defendant to cooperate with the government. *See id,* Std. 10-5.3(b) (commentary).

[568] As noted previously, "setting high bail to prevent pre-trial release" was a topic discussed at the National Conference on Bail and Criminal Justice in 1964. *See National Conference, supra* note 95. The various federal and state cases are discussed in *Appendix One.*

[569] States occasionally add additional purposes, such as to "protect the integrity of the judicial process," or to "protect jurors and witnesses," but when examined carefully, one can see that the factual components of these phrases already fold into either court appearance or public safety as measured by new criminal activity. Indeed, in at least one standard, the ABA expressly ties "protecting the integrity of the judicial process" to securing

Fourth, perhaps the biggest misconception surrounding intentionality is that the same tendency to ascribe morality and culpability to persons accused of crimes applies to judicial decision-making, but in a novel way. In short, there is a fairly large literature of what is called a "side-effect effect" in decision making, which is the phenomenon in which people will perceive the negative side-effects of a decision to be more intentional than the positive side-effects, even when the effects themselves – either positive or negative – are actually unintentional.[570] What this means, in bail, is that if any particular bail setting leads to negative side effects, the public will deem the judicial official to have *intended* those side effects, whether that official even considered them or not.

Accordingly, a judicial official may only intend to complete his docket – that is to set bail on all cases before him on a particular day – without considering any consequences, helpful or harmful, of any particular bail setting. But to the extent that the ultimate consequences are bad, the public will tend to believe that the judge *actually intended to cause harm*. More specifically, bail setters may not intend to cause unnecessary detention, job loss, bankruptcy, in-custody deaths, new crimes both short and long-term, harms to the greater community, including children, or host of other bad consequences[571] – indeed, those consequences may never cross his or her mind. But these harms exist, and seeing them or hearing about them, the public will gradually reject any judicial official's claim of innocent motive in relying on the money-bail system. This side-effect-effect only bolsters the reasons for meaningful education about the consequences of money bail as well as for intentionality in release and detention decision making.

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defendants for trial. *See ABA Standards, supra* note 118, Std. 10-1.1, at 36. Singling out jurors and witnesses reflects pre-*Salerno* practice of considering public safety only when it involved court participants.

[570] *See generally,* C. Papadopoulos & B.K. Hayes, *What Matters When Judging Intentionality – Moral Content or Normative Status? Testing the Rational Scientist Model of the Side-Effect,* 25 Psychonomic Bull. & Rev. 1170 (2017), found at https://link.springer.com/article/10.3758/s13423-017-1312-x; Lawrence Ngo, Meagan Kelly, Christopher Coutlee, R. McKell Carter, Walter Sinnott-Armstrong & Scott Huettel, *Two Distinct Moral Mechanisms for Ascribing And Denying Intentionality,* 5 Scientific Reps. No. 17390 (2015), found at https://www.nature.com/articles/srep17390.

[571] See e.g., Civil Rights Corps, *Facts on Money Bail,* found at https://www.civilrightscorps.org/wp-content/uploads/2021/10/9i2UrGPoQJeM6uCmG5VZ.pdf; Will Dobbie & Crystal Yang, *The Economic Costs of Pretrial Detention,* Brookings Paper on Econ. Activity, 251 (Spring 2021), found at https://muse.jhu.edu/pub/11/article/845994/summary; Wendy Sawyer, *How Does Unaffordable Bail Affect Families?* (PPI, 2018) found at https://www.prisonpolicy.org/blog/2018/08/15/pretrial/.

In sum, the judicial decision at bail should be an intentional decision either to release or detain a defendant pretrial, and that decision should – in virtually all cases – be immediately effectuated. Nevertheless, "intentional" detention of a "bailable" defendant, in my opinion, is likely always unlawful under federal or state law. Moreover, so-called pure "unintentional detention," that is, allowing a release condition to keep someone in jail when the judicial official never meant it to happen is, quite simply, grossly absurd and easily avoided (and yet, if you look at most state statutes, you will see that the practice is seemingly anticipated and even tolerated). Finally, the longer a bailable defendant stays in jail due to an unaffordable bond, and the longer a bail-setting judge knows about it, the easier it is to conclude that the judge meant to intentionally detain in the first place. Fortunately, because bail reform in the true, historical sense, means creating a moneyless, intentional detention provision, the project should eliminate *any unnecessary detention*, whether on purpose or accidental.

Detention

I discuss misconceptions concerning the crafting of a detention provision before discussing release simply because, throughout the history of America, our intentional detention provisions, whether articulated in constitutions, statutes, or court rules, have always determined the scope of release. Put another way, the exceptions to the right to bail determine how broad the right to bail actually is (even when those provisions are ignored as a result of using money to detain). When I worked on my own moneyless, intentional detention provision, I had persons asking me to tell the states what their "ratio" of released to detained persons should be (such as 90/10 or 80/20), and I initially believed that there might be some cogent answer. Instead, however, and after two years of study, I answered that so long as a jurisdiction creates and justifies a lawful (carefully limited or narrowly tailored), properly worded, fair and transparent detention provision, the ratio that emerges will be the correct ratio.[572] Nevertheless, I wrote,

[572] *See Model Bail Laws, supra* note 23, at 41-43, 196.

there is no reason not to aim for a ratio that we all know can be met, which is releasing roughly 90% or higher of all persons involved in the criminal system before their trials while aiming for 90% court appearance and 90% public safety rates.[573] The bigger problem, though, is how to reach those numbers when jurisdictions that are either enacting or attempting to enact detention provisions are making significant mistakes based primarily on a lack of collaboration and education.

I have been involved in crafting intentional release and detention provisions and working on the so-called "state constitutional issue" for some time. Working behind the scenes on constitutional language in both New Mexico and New Jersey, however, I and others found that we knew too little to fully understand how to properly articulate intentional detention. At the same time, many in the field believed that "risk" would completely replace charge in our bail laws, which, if true, would lead to changes to traditional charge-based bail provisions in virtually every state. Accordingly, the paper that I drafted in 2017 focused precisely on the issues of whether American states could replace charge altogether, how to word an intentional detention provision based entirely on "risk" versus charge, and what role an assessment might play in any of that.

With a small team, I ultimately crafted a model that rejected an actuarial tool-based detention provision, unlimited detention eligibility, and language templates for risk within the net from all current state and federal systems, and instead I proposed a provision made up of: (1) a limited and justified charge-based detention eligibility net (justified, if not mandated by due process fair notice notions); (2) a "clear and convincing" finding of risk within that net focusing on the extent of defendant risk and answering the question of "risk of what" – such as a "substantial" or "extremely high" risk to flee or to commit a serious or violent crime; and (3) a requirement that judges compare and adopt alternatives short of detention along with various other elements of procedural due process. That model, contained in the paper titled, *Model Bail Laws*[574] and shortened and

[573] *See* note 400, *supra,* and accompanying text.
[574] *Model Bail Laws, supra* note 23.

summarized in *Changing Bail Laws,*[575] is still appropriately used not only for template language but also for its extensive justification for each element as well as for providing the legal boundaries for both crafting good detention provisions and for challenging "bad" ones.[576]

The Detention Eligibility Net: Why it Should be Charge-Based and Limited

States should realize that between the two main elements of an intentional detention provision, the detention eligibility net is likely less important than the inclusion of a strong finding of clear and convincing evidence of predicted risk within the net that is worded so that it correctly focuses only on extremely or substantially high risks to do particularly bad things on release, such as willful flight or committing a serious or violent crime. I have called this risk language a "further limiting process" (because the net acts to limit detention, and this finding acts to further limit detention beyond the net) as well as a "finding of risk within the net." Nevertheless, the nets and the risk findings for both bail in the first instance based solely on prediction as well as for revocation all work together. Indeed, a too-wide primary net can be fixed through tightening the risk finding, just as a too-narrow primary net can be fixed through slightly expanding the secondary net and risk finding for revocation. Nevertheless, there are good reasons for why (1) detention eligibility should be charge-based, and (2) the charge-based net should be limited.

When I wrote *Model Bail Laws,* I grappled with what alternative, if any, could replace what England and America had already created and molded through history, which was limited charge-based detention eligibility. My team and I decided that the alternative – a purely risk-based system (essentially, an unlimited charge-based net) had fatal flaws that eliminated it as a possibility, especially if the risk was risk as measured by an assessment tool. Right now, there are people walking the streets who are extremely high-risk, but who have not been assessed yet simply because they have not been singled out for examination. As a society, we would never jail an extremely high-risk person for no reason at all, but we would also not (or should not) jail an extremely high-risk person for something akin to jaywalking. However, as a society, we might demand that a person charged with serial murders be detained, even if there was little evidence of "high risk" based on a tool. In sum, the charge itself makes a big difference.

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[575] *Changing Bail Laws, supra* note 56.

[576] *See* note 374, *supra,* and accompanying text. The sort of justification needed to support a detention provision today can be gleaned from reading my *Model Bail Laws* paper, *supra* note 23, with the justification for my model providing an example. Many jurisdictions fail to provide adequate justification for the various elements in a detention provision, apparently thinking that they are entitled to widen detention eligibility or change other aspects of the process simply because some form of intentional detention already exists in the law.

Legally, charge-based nets have been part of American bail laws since the founding. Moreover, in *United States v. Salerno,* 481 U.S. 739 (1987), the Supreme Court held that the Bail Reform Act of 1984 satisfied due process, in part, because the Act limited detention to "a specific category of extremely serious offenses." This is not to say that the Court mandated it, but it is likely that it would have frowned on an alternative statute in which the government could theoretically detain everyone when the overall legal requirement is that the detention provision be "carefully limited." Also, the fact that probable cause for the crime is a prerequisite to "any significant pretrial restraint of liberty" (Gerstein v. Pugh, 379 U.S. 89, 91 (1975)), places proof of some crime at the forefront of the pretrial release and detention decision. Finally, and likely most importantly, charge-based detention eligibility satisfies due process fair notice (vagueness) so that it informs citizens of the sorts of charges that might lead to pretrial detention, guards against arbitrary detention, and upholds notions of separation of powers. *See Scione v. Commonwealth,* 114 N.E. 3d 74, 85 (Mass. 2019) (holding a portion of the Massachusetts pretrial detention provision vague for failure to adequately specify the offenses eligible for detention); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

Many states currently have what they believe to be "overly narrow" nets (such as those allowing on-purpose detention for only capital crimes). And while I understand the temptation for jurisdictions to amend their laws to create as wide a net as possible, there are numerous reasons for working toward limiting them. First, and again, nets should be limited to avoid vagueness (*see Sessions v. Dimaya,* 138 S. Ct. 1204, (2018) (Gorsuch, J. concurring) ("For if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[,] [t]his would, to some extent, substitute the judicial for the legislative department of government. Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions.") (internal citations and quotations omitted); *see also* discussion of the law in the pretrial justice pillar of education, *supra*.

Second, nets should be limited for the dozens of "general narrowing principles" articulated in *Model Bail Laws, see supra* note 23, at 154-157. Third, nets should be limited simply because each charge requires justification to be in the net. Fourth, they should be limited because it saves jurisdictions money to take certain charges "off the table" of detention, especially when we recognize just how little risk accused persons show during the pretrial phase. Fifth, they should be limited because research shows that a jurisdiction can increase releases and "nearly eliminate" racial disparities with a very narrow detention eligibility net. *See* Sarah Picard, Matt Watkins, Michael Rempel & Ashmini Kerodal, *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness,* (CCI, 2019). Sixth, they should be limited due to our

understanding of the "background perspective" provided by the risk research (such as knowing base rates and the types of crimes typically committed by persons on pretrial release when they to, in fact, commit a new crime), *see* discussion, *supra.* Seventh, they should be limited because the research shows that a large part of the issue of public safety can be solved through a proper and fair revocation provision (coupled with supports to avoid pretrial failure) rather than in the primary bail provision, which relies on pure prediction. Likewise, eighth, they should be limited because bail in the first instance (versus revocation) is based solely on prediction, a practice at which we are notoriously bad.

In my opinion, one obvious reason for limiting the net is that I know it can be done – indeed, it has likely already been done in some fashion in any particular jurisdiction even apart from the lines of intentionality drawn in a constitutional or statutory right to bail provision. If a jurisdiction has a provision that in any way avoids the money-bail system based on charge (for example, if certain traffic charges are dealt with outside of the money-bail system), then that jurisdiction has already placed an intentional limit on the seemingly unlimited eligibility net created by the money-bail system. Likewise, if a state law requires persons facing certain charges to be released on their own recognizance, then there is already a line of intentionality drawn around those cases, which would dictate release no matter how "risky" a person might be. In Colorado, I helped a group from the state crime commission create a limited, charge-based detention eligibility net, which ended up being agreeable to virtually every stakeholder. Accordingly, the history, the law, the national standards, and the pretrial research all point to using charge-based eligibility as well as to constantly striving to make that eligibility as narrow as possible. But the fact that we know we can narrow the net or, indeed, that we can compensate for a narrow net through revocation (thus bringing us ever closer to a detention provision that is “carefully limited”), means that we should do it.

It is extremely important for people to understand the "big picture" when creating a detention eligibility net. What you are doing, essentially, is saying that there are certain charges that simply should never lead to detention based solely on prediction (that is, bail in the first instance, or the "primary" process), *no matter how "risky" a person charged with that non-eligible charge might seem to be.* Because we know that "risk" is inherent in the bail system, and because we know that some people will fail while on pretrial release (everyone walking around today in America is "risky," we just haven't assessed them yet), and because we know that the research shows that when people fail, it is almost never by willfully fleeing or by committing a serious or violent crime, we design a secondary net and process (i.e., revocation process) as well as a system of services and supports that can successfully deal with the threat of more pretrial crime. General recidivism – that is, crime beyond the pretrial phase, is important to study, but it is quite likely that the mechanisms for reducing that sort of crime will be found beyond the design of intentional release and detention. The clearest findings from

research show that unnecessary pretrial detention leads to more crime (both short and long term), and any studies contradicting those findings should be carefully scrutinized.

Both of those papers were summarized further in a document titled, *The Single Biggest Issue in Bail Reform Today* (2019), and summarized with more detail on the process and wording of changes in the form of a 2023 memo titled, *"Information to Help With State Attempts to Change Constitutional and Statutory Right to Bail (Release) and "No Bail" (Preventive Detention) Provisions* (or *"Memo on Constitutional Bail and "No Bail"*).[577] Jurisdictions hoping to get up to speed quickly are advised to read the documents in reverse order, although the longest document, *Model Bail Laws,* is primarily helpful and likely crucial to those actually tasked with making changes to their constitutional or statutory detention provisions. This is due to the comprehensive discussion of substance as well as its detailed justification for the various elements. Moreover, it contains answers to a number of detailed and occasionally arcane questions that typically only come up during drafting or defending a finished product.[578]

Since then, various groups advocating for bail reform have gradually adopted the basic structure surrounding a "proper" detention provision as articulated in those documents. Indeed, after a recent survey of 70 national groups, I counted thirteen (although at least one group represents a list of many other groups) that have either formally or informally adopted the precise structure (charge-based net, with a common sense and express finding of the extent of risk and answering the question, "risk of what") with only slight variations in template language.[579] Illinois

[577] These and other tools may be found at the Center For Legal and Evidence-Based Practices website, found at http://clebp.org/home.html, at the home page and the page titled, "Help Changing Bail Laws."

[578] For example, I have had persons ask questions when drafting constitutional provisions (such whether a different burden of proof should be used to assess risk for flight versus safety or why certain post-BRA of 1984 federal cases still seemingly – and incorrectly – allowed for money-based detention), the answers to which were found in various footnotes in *Model Bail Laws.*

[579] The groups do not always have formal statements about their stance, and so occasionally the stance was confirmed by testimony, interviews, etc. The groups include Civil Rights Corps, the Uniform Law Commission, the Center for Legal and Evidence-Based Practices, the American Civil Liberties Union, the Leadership Conference on Civil and Human Rights, The Bail Project, McArthur Foundation, the Vera Institute of Justice, the UCLA Law School, the National Association of Pretrial Services Agencies, and – to some extent – the Thurgood Marshall Institute, Arnold Ventures, and the Brennan Center. Other groups ascribe to the charge-based net and further finding model, but with inferior template language or too-wide nets. I apologize if I have missed any others. The main point is that

is the first and, so far, only state to recently adopt this better, more nuanced language.[580] Most recently, a fourteenth group (the Minnesota Justice Research Center), tasked with making recommendations to the Minnesota Legislature, spent eighteen months studying the issue and ultimately called for a "transformation" that included changing the Minnesota constitutional bail provision by adopting this better model.[581]

This growing number is compared to the vast majority of groups that have not weighed into the issue in any detail,[582] the very few groups that merely advise states to adhere to their current right to bail provisions (which have varying charge-based nets and limiting processes), even fewer groups articulating somewhat aberrational or conclusory stances, including so-called "abolitionists" and scholars writing in the early 1990s (occasionally arguing for no pretrial detention whatsoever or "revocation only" models due to the limitations of prediction),[583] and bail industry stances, which waver between "not expanding

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these groups – while still making up a relatively small percentage of groups focused on pretrial justice – have still landed on the same basic model for change.

[580] All other states vary in quality of the wording of preventive detention or "no bail" provisions, but are mostly inferior to the templates provided in the more hypothetical papers adopted by the roughly fourteen national groups, and as enacted in Illinois. One notable exception is Louisiana, which, while not perfect, includes a limited charge-based eligibility net (although some would undoubtedly disagree with its scope) and a finding of risk within the net that is surprisingly similar to the newer, more lawful articulations requiring clear and convincing evidence of "substantial risk" (how high) to either "flee or pose an imminent danger to any person or the community" (answering the question, "risk of what?"). La. Const. 1 § 18. Based on a Louisiana State Bar report, however, it appears that money bail still allows bail setters to mostly ignore the more transparent preventive detention provision. *See Report on the Louisiana Bail System* La. State Bar. Assoc. Crim. Just. Comm. (2019), found at http://files.lsba.org/documents/CJC/LSBACJCReportonBail.pdf.

[581] Minnesota Justice Research Center, *Toward Safety, Liberty, and Equity: A Community-Centered Framework for Redesigning Minnesota's Pretrial System,* at 19 (2025), found at https://www.mnjrc.org/_files/ugd/c9192e_1a8af5bd8528461abd63b9b3f3f62e0f.pdf.

[582] These groups either say nothing about intentional detention or, more frequently, mention it in passing by generally writing that these provisions must be extremely limited and only focus on the few persons considered to be an actual flight risk or an extreme danger to persons, albeit without providing the exact template language.

[583] The abolitionist stance is far more nuanced than described in the press, and has, in many ways, solid foundations in the law and pretrial research as there is an ever-shrinking distinction between "extremely limited" pretrial detention versus no detention whatsoever. Nevertheless, even those making a strong case for ending pretrial detention altogether occasionally admit the need to detain a "dangerous few." *See* Rene Reyes, *Abolition Constitutionalism and Non-Reformist Reform: The Case for Ending Pretrial Detention,* 53 Conn. L. Rev. 669, 678 (2021). An example of a "revocation only" model (that is, no detention in the first instance based solely on prediction) based on the various flaws found in the federal statute is from Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment,* 75 Minn. L. Rev. 335 (1990). I continue to believe that if jurisdictions can articulate even one hypothetical case in which pretrial detention is appropriate, that jurisdiction must create the lawful process to effectuate it. The model I and my colleagues have crafted addresses all of the limitations leading

preventive detention" (which would require states to keep current constitutional and statutory right to bail provisions and exceptions), and "eliminating preventive detention" (which would require changing constitutional and statutory right to bail provisions and exceptions) while keeping money and, presumably, money-based detention.

While there will be differences in the size of the articulated detention eligibility nets, this should be expected as states will likely craft justified nets within the overall legal mandate to "carefully limit" detention that are best suited to their particular jurisdictions.[584] Accordingly, my net from *Model Bail Laws* is "serious or violent offenses," which allows for detention in certain very serious cases not technically considered to be violent. Others have proposed using certain other charge groups with preconditions (such as violent felonies after conviction for a previous violent felony) as a way to further limit detention despite adding to the net.[585] There are several good reasons for making sure that states should err on the side of leaving certain charges out of the net, including better following guidance from *Salerno,* avoiding false positives, better following the history of bail and the risk research, court efficiencies, and the fact that we know it can be done – especially with the fallback of a proper revocation provision (*see "The Detention Eligibility Net: Why it Should Be Charge-Based and Limited," supra*). Nevertheless, we must recognize that the net and risk finding work together to limit the overall scope of detention. It is primarily these two things, working in tandem, that are the most obvious elements to be assessed for being or not being "carefully limited." *Thus, once again, it is crucial – and likely more important than*

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to the Miller/Guggenheim 1990 "revocation only" model (especially for public safety), and manages to create a limited, safe, fair, and transparent detention provision both for bail in the first instance (based solely on prediction) and revocation. Nevertheless, today's risk research seems to show that a "revocation only" model for flight – versus danger – might be entirely reasonable today.

[584] Put another way, states will be able to differentiate variations in nets, which would be justified based on the states' particular needs. While the U.S. Supreme Court has said that, overall, detention provisions must be "carefully limited," there are no firm rules on how each part should be crafted. Thus, a court reviewing a state detention provision will look at the combination of parts – the net, the limiting process, the secondary net and limiting process, and other elements to determine whether those parts, altogether, "carefully limit" detention. This provides all states considerable flexibility while aiming at the same basic goal of only detaining persons who are extremely risky to do very bad things if released.

[585] To completely avoid vagueness of a net, the individual charges for charge groups, such as "violent offenses" would still need to be specifically listed somewhere in the law.

articulating the net – to articulate a proper finding of risk within the net to actually detain: a somewhat wider net can be legally acceptable so long as the risk finding is based on a good, common-sense articulation of the extent of the risk (i.e., "substantial" or "extreme") needed along with answering the question, "risk of what?"

An example of this sort of risk finding was articulated by Sakira Cook on behalf of the Leadership Conference on Civil and Human Rights in her testimony before the United States Commission on Civil Rights, wherein she wrote that the net should be "extremely" limited, and coupled with a risk finding as follows: "clear and convincing evidence that individuals pose a high risk of intentional flight or of seriously harming another reasonably identifiable person during the adjudication period [and] there are no conditions or combination of conditions that will ensure the accused person will return to court and not pose a risk of specific and identifiable harm to known persons in the future."[586] In *Changing Bail Laws,* my finding of risk applied to a net of "violent offenses" is as follows: "(1) clear and convincing evidence as shown through relevant facts and circumstances that the person poses an extremely high risk of intentional flight to avoid prosecution, or; (2) clear and convincing evidence as shown through relevant facts and circumstances that the person poses an extremely high risk to commit or attempt to commit a serious or violent crime while on pretrial release against a reasonably identifiable person or groups or persons or their property; and, for all persons in (1) or (2), the court finds clear and convincing evidence that no condition or combination of conditions will suffice to manage the person's extremely high level of risk."[587]

The overall rule of thumb for constructing these net/risk finding couplets is to recognize that there are numerous reasons for jurisdictions to always aim toward

[586] The Leadership Conference on Civil and Human Rights, *Statement of Sakira Cook, Senior Director, Justice Reform Program,* found at https://civilrights.org/resource/statement-of-sakira-cook-senior-director-justice-reform-program-the-leadership-conference-on-civil-and-human-rights-u-s-commission-on-civil-rights-hearing-on-the-civil-rights-implications/. I would refrain from using the word "ensure," meaning certain, and instead use reasonable or adequate "assurance," phrases articulated by the Supreme Court in *Stack v. Boyle,* 342 U.S. 1, (1951).
[587] *Changing Bail Laws, supra* note 56, at 51.

enacting narrower and narrower detention provisions.[588] If you believe that a net of "all felonies" is warranted, you should still ask whether you could better justify a more limited net of serious or violent felonies. If the word "high" risk is used, you should still ask whether words like "extremely high" might be better. When it comes to the net, I have seen various groups add various other limiting language to nets, meaning that there is some degree of creativity in the endeavor despite the need for legal justification.

When it comes to the risk finding, I have seen hypothetical models that call for no detention in the primary net for risk of flight (relying only on revocation in appropriate circumstances coupled with effective supports to avoid FTAs), which is based on the well-documented notion that people very, very rarely flee.[589] Based on recent research on risk and the broader consequences of detention, I have seen proposals to include a sentence to the risk finding (or, at least, to the various "statutory factors") that judges must consider the risk to the public not only from the accused, but also from the detention itself. I have seen compromises resulting in, for example, a constitutional net provision paired with a risk finding found only in the statute.[590] I have seen proposals to create a somewhat narrow net with a provision allowing additions to the net by a legislative super-majority. I have even seen one state listing, as an option to which I vigorously do not agree, the

[588] *See Model Bail Laws*, *supra* note 23, at 154-157. If is perfectly lawful for a jurisdiction to create a model that releases everyone pretrial, but the converse is not true. Detaining everyone prior to trial would be unlawful, and, theoretically, an unlimited net with an extremely loose (meaning easy to detain) finding of risk within the net would be equally unlawful. While we have seen states consider removing their constitutional right to bail provision altogether (which would be a mistake, in my opinion), removing the express right would not eliminate the actual right; indeed, the Supreme Court has warned us that release must be the "norm" even when there is no constitutional right to bail. The paper, *Model Bail Laws,* gets back to these bail basics in asking questions like, "Why do we even have a right to bail?" Answers to these questions, and especially answers to questions concerning actual defendant risk, are essential to crafting any intentional detention provision.

[589] *See USCCR, supra* note 12 (statement of Insha Rahman, Vice President of Advocacy and Partnerships, Vera Institute of Justice), found at https://www.usccr.gov/reports/2021/civil-rights-implications-cash-bail; *see generally* Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration,* 46 Ford. Urb. L. Rev. 845 (2019).

[590] Nevertheless, I have articulated my preference for both the net and risk finding to be written into a constitution when there is a right to bail. Sates are nonetheless free to experiment so long as they know and understand the various hard legal boundaries. In 2022, Alabama added charges to its detention eligibility net in the constitution, but put its risk finding in an accompanying statute. In this particular case, the decision might be fortuitous as the risk finding was based on poor template language, and so having it in the statute will mean it can be fixed without once again amending the constitution.

elimination of the express constitutional right to bail altogether.[591] Virtually everything else, though, is on the table, with somewhat complex yet learnable guardrails provided by bail's history, law, and social science research. As far as these go, it is essential that states leave enough of these boundaries and guardrails in the constitutions so that no one can argue that the constitutional right to bail has been eliminated or wholly and unlawfully delegated.

The intentional detention templates crafted and justified by these various papers and adopted by this growing number of influential national advocacy groups provide the long-sought answer to the question, "What replaces money bail – or, more particularly, money-based detention?" Nevertheless, the documents also make clear that jurisdictions can make many errors (albeit most unintentionally) in doing so, primarily by skipping either collaboration or education. For example, New Mexico's bail reform found its genesis from a single state supreme court opinion, which put all of the state's bail setters on notice that the appellate courts would no longer tolerate the misuse of money bail.[592] This opinion sparked a very strong reaction resulting in an attempt at true, historic bail reform (attempting to replace money-based detention with intentional detention), but it was mostly a top-down approach, with collaboration and education mostly confined to the Justices on the Supreme Court and those working on constitutional and court rule changes in the aftermath of the opinion. Accordingly, New Mexico has seen far more dissention over the years than has, for example, New Jersey, which accomplished bail reform through the somewhat amiable collaboration of the Governor, the Chief Justice, and the General Assembly, and which included excellent extensive statewide education prior to implementation.[593]

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[591] Apart from being listed as a mere option, I can think of no person in the last 150 years who has actually advocated to eliminate a right to bail rooted in a state constitution. Only one state has ever eliminated its express constitutional right to bail, and that was done by a previously Confederate state soon after the end of slavery and the Civil War, clearly tainting the decision.

[592] *See State v. Brown,* 338 P.3d 1276 (N.M. 2014).

[593] Every state attempting to achieve true, historic bail reform will likely fall on a spectrum of adequacy for collaboration and education, so these illustrations are not meant to put New Mexico in a bad light, especially since that state had *some* level of collaboration and education, has received much more since 2014, and can nonetheless operate with less due to the uniqueness of bail law in that state. The point is that the more effort a state puts into collaboration and education, the less it will see attempts to revisit constitutional language, the less it will see litigation objecting to the changes, and the less it will see news articles every year debating the merits of provisions previously aimed at "reform."

I have learned from Illinois that collaboration must include grass roots groups, civil rights groups, and average citizens along with traditional criminal system stakeholders. From Illinois and elsewhere, I have learned that the education must be slow and comprehensive, including everything from the definition of bail, to the history of bail, to legal foundations of bail, to risk and prediction, to arcane state constitutional rulings on the right to non-excessive bail. Finally, and most importantly, from Illinois and from crafting my own model of intentional detention, I have learned that the states currently attempting to make changes to their current intentional detention provisions – found primarily in state constitutional right to bail sections but also in statutes and court rules – are making two significant errors: (1) mistakenly changing preventive detention language piecemeal without optimally addressing – at a minimum, and through consensus – all five major variables for constitutional change at the same time; and (2) mistakenly borrowing language found in flawed models from other states, or, more often, from the federal pretrial system, while ignoring the most recent legal, historical, and social science research (including risk research) available to guide them to more appropriate language templates. This second error is especially egregious because if money as a detention mechanism is eliminated or even eroded, then using these dated and flawed templates as substitutes for random money-based detention can easily lead to extremely high rates of moneyless intentional detention. This, in turn, would make "bail reform" arguably worse than the money-based system it seeks to replace.

Drafting Mistake Number One

The first mistake can be summed up briefly. As discussed previously, there are two types of pretrial risk: (a) the risk needed to place limitations on persons who are released; and (b) the risk needed to detain, which is much higher because it is based solely on prediction and leads to a complete deprivation of liberty. To address the risk needed to detain, there are five important variables a state must consider when crafting a constitutional (or statutory) detention provision, each of

which must be legislatively justified:[594] (1) the detention eligibility net; (2) the "further limiting process," or finding of risk within the net (expressing the extent of risk as well as answering "risk of what," and which can and probably should require consideration of alternative conditions); (3) the "secondary net and process," or sanctions for pretrial failure up to and including bail revocation; (4) the use of money (or, more specifically, the use of any condition of release that might lead to detention); and (5) sometimes, the use of an actuarial tool.[595] These variables are intertwined (along with best-practice/legal language to be placed into a statute or court rule) and should be considered and crafted all at once – like a puzzle – with jurisdictions seeking consensus through give and take on the variables.[596]

So, for example and as mentioned above, if a net is perceived to be too wide, it can be cured through a "tight" limiting process (i.e., making it harder to detain within the net). Likewise, if a net is perceived to be too narrow, it can be cured through variations of language found in the revocation process. Again, all of this is known because weighing these variables – with an understanding of bail's history,

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[594] I say "legislatively justified" only because it seems fairly clear that constitutional or statutory right to bail language will initially be changed through legislation, even if it leads to eventual ratification by the electorate, even though I recognize the ability of some states to allow for citizen-crafted ballot initiatives that avoid the legislatures altogether. Nevertheless, justification is important if and when a provision is challenged in court, whatever its origins. It seems clear that when analyzing new detention provisions, courts will look at the entirety of the law to determine whether it is "carefully limited" as mandated in *United States v. Salerno,* 481 U.S. 739 (1987)*;* thus, a somewhat wider net in one state might not pass legal muster if coupled with a risk finding that makes it extremely easy to detain, while a somewhat wider net coupled with a more limiting risk finding might be upheld. *See generally Lopez Valenzuela v. Arpaio,* 770 F.3d 772 (9th Cir. 2014). "Legislative justification" also expresses the notion that one need not justify the law empirically, even though my detention eligibility net in *Model Bail Laws* was justified empirically. Again, one of the biggest mistakes I have seen states commit when drafting these provisions is a failure to properly justify them *at all* or for the wrong reasons, such as to punish persons pretrial. States must analyze these elements for changing laws, but local jurisdictions are advised to learn the concepts behind change so that local changes in policies will also not run afoul of any law. I have seen several states make the basic mistake of believing it can simply add to detention eligibility, for example, simply because they are allowed generally to detain persons pretrial. Justification would require a state to show why some new charge or group of charges, in particular, might require pretrial detention in certain circumstances.

[595] Other important elements, such as procedural due process hearings, will likely be forced on the states. Still others, such as temporary detention, speedy trial, or other best-practice language, may be fleshed out in rules or statutes. Nevertheless, precise language for these elements – depending on what they are – might also be used in any negotiated process. This is yet another reason for not doing release and detention piecemeal.

[596] Most recently, Texas passed a proposed amendment to its constitutional right to bail provision through which advocates were able to offset many seemingly bad parts to include a better burden of proof as well as a constitutional right to counsel for the designated eligible offenses, which is something apparently no other state has done. *See supra,* note 531.

legal foundations, and, especially, pretrial risk research – was crucial to my own experience of creating an early, so-called "hypothetical" moneyless detention model in 2017 (with others following) designed to help guide the states through constitutional change.[597]

It is important, however, not to "bargain away" certain fundamental aspects of the variables. For example, while a looser revocation process can make up for a narrow net, jurisdictions should never allow any detention (even in the form of sanctions) for technical violations. Likewise, revocation should also not rely entirely on the federal articulation of risk, and thus the risk needed to detain through revocation, while it can be slightly looser than for bail in the first instance, should still focus on the risk of willful flight and the high risk to do a very bad thing.

Unfortunately, most states today (with Illinois being the obvious exception) appear to be skipping comprehensive change addressing all five variables either from lack of education or for short-term political victories. They are, instead, focusing on only one or two variables, even though consideration of the five together is essential to crafting optimal language and gaining consensus on any new constitutional model. This is especially true with the variable dealing with money. Indeed, the entire endeavor of creating a safe, fair, and intentional preventive detention model is to *replace* money-based detention based on the excessive bail loophole, and not to give states two different ways to detain the same persons. Removing money as a detention mechanism was a primary motivator for Congress to create the first modern preventive detention law in 1970.[598] Moreover, from bail's history we know that when money-based detention

[597] There are now many so-called "hypothetical" models, all of which tend to favor the same template language. The only meaningful changes I have considered for my own model include a requirement to potentially exclude certain charges from a net if those offenses are disproportionately charged against one group of persons versus another (such as, for example, assault against a police officer), and potentially adding a requirement to consider community harm due to detention in the risk finding, but with the understanding that it could also be added to the statutory list of "factors" guiding judicial bail setting.

[598] *See* Committee Print, *Statement of the Managers on the Part of the Senate Submitted Regarding the Conference Action Upon S. 2601, The President's Crime Legislation for the District of Columbia,* at 34 (1970) ("It is inconceivable that for decades *de facto* detention through high money bond and absent any procedural protections could avoid constitutional condemnation, while a measured response to bail recidivism fully surrounded by due process

is not addressed, states will simply ignore even the best preventive detention language.[599] Finally, when crafting a new, intentional release/detain scheme, states are often trying to enlarge their current, mostly narrow constitutional provisions to provide for more moneyless pretrial detention, and thus having money on the table as a sort-of bargaining chip can help convince states to give up a bad practice – use of money – in exchange for a new, seemingly wider "no bail" process, but which will ultimately be far narrower than the virtually unlimited net associated with money-based detention.

This does not mean, however, that states must simultaneously eliminate money bail or wait until money-based detention is taken from them before crafting a transparent and intentional detention provision – even if they should. At the very least, however, all relevant states must act *as if* all money-based detention has or will be eliminated. Doing so will motivate them to craft the most comprehensive and effective moneyless intentional detention provisions to provide a rational, unbiased, and clearly lawful alternative to random detention based on high money bonds in the event that those states are either forced or choose to abandon money-based detention.

Drafting Mistake Number Two

The second mistake involves states wanting to use the so-called "federal detention model" language, and this mistake is more intractable only because it follows a general tendency through history of states hoping to borrow template language that they think has already worked in some other jurisdiction to enact into their own laws. Indeed, in bail, virtually every state that has amended or attempted to amend its constitutional net and limiting process in the last ten years (with the exception of Illinois) has mistakenly borrowed language from the federal system

protections, the net result of which will guarantee the release of many persons wrongfully detained, will not pass Constitutional muster.").

[599] For example, the District of Columbia rarely, if ever, used its preventive detention provision enacted in 1970 until it added a line in 1992 nearly identical to the federal statute expressly forbidding money-based detention. *See The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth,* at PJI-DCPSACaseStudy.pdf. States, too, have shown the same trend of ignoring lawfully enacted preventive detention provisions. *See also In re White*, 21 Cal.App.5th 18, 26-27 (Cal. Ct. App. 2018), *aff'd,* 463 P.3d 802, 805 (Cal. 2020) (reviewing preventive detention used for the first time, decades after enactment).

and from a few states which, themselves, have also borrowed the federal language.[600] That language includes a somewhat limited (but certainly not optimal) charge-based detention eligibility net[601] coupled with a limiting process (finding of risk within the net) that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[602] Nevertheless, states should be aware of the general rule in bail that borrowing language from any American jurisdiction is often a mistake based on those laws also being antiquated (and ignored in favor of using money-based detention), cobbled together, and premised on flawed assumptions about defendant risk.[603] In particular, and for the following reasons, borrowing the federal detention process as a template could be disastrous for the states.

The Federal Net

As it pertains to the eligibility net, the Supreme Court in *United States v. Salerno*, citing the legislative history of the Bail Reform Act of 1984 and its discussion of two particular social science studies, approved the federal model based, in part, on the notion that detention was limited to "a specific category of extremely serious offenses" committed by persons that "Congress specifically found . . . are far more likely to be responsible for dangerous acts in the community after arrest."[604] While there are signs that Congress, in fact, held the flawed assumption

[600] Prior to this generation of reform, states using the federal language included Arizona, Florida, Missouri, Oklahoma, Pennsylvania, and Vermont. In this generation (and as of the date of this writing), states using *or proposing it* include New Jersey, New Mexico, Alabama (net in constitution, "no conditions" limiting process in statute), Delaware, Indiana, Connecticut, and Texas. Again, Wisconsin and Ohio did not change or attempt to change their nets or limiting processes.

[601] Another flaw of the Bail Reform Act of 1984 was its inclusion of an unlimited net for potential detention due to risk of flight, which was based on an assumption that judges historically had fairly unlimited discretion to detain for flight. Unfortunately, it was also based on inaccurate assumptions about risk and justified in a conclusory manner seemingly to fully compensate for elimination of money-based detention. For a legislative history showing the lack of any decent justification for various parts of the BRA of 1984, *see Model Bail Laws, supra* note 23, at 74,

[602] 18 U.S.C. § 3142 (e).

[603] *See Changing Bail Laws, supra* note 56, at 14-25.

[604] *United States v. Salerno,* 481 U.S. 739, 750 (1987). This legislative "finding" was repeated in *Foucha v. Louisiana*, 504 U.S. 71, 88 (1992) (O'Connor, J., concurring), and *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 782 (9th Cir. 2014). Looking at precisely the pages and cites on which the Supreme Court relied for making its statement shows, instead, that Congress expressly found that the question of whether future criminality can be predicted "is one in which neither the experience under the District of Columbia detention statute nor empirical analysis can

of what might be called "inherently risky offenses,"[605] a deeper reading of the legislative history found at the precise pages cited by the Supreme Court reveals that Congress did not make any particular finding tying charge to future risk, despite likely believing it to be true. Instead, Congress found that there were *crimes being committed generally by persons on release*, thus providing broad justification for consideration of dangerousness and preventive detention in the federal system. Moreover, the two studies included therein did not support the notion that certain crimes were "risky" crimes. Those studies found, instead, that: (1) there was a lack of relevant data and research on the issue of accurate predictors (with one study actually arguing against preventive detention versus releasing more defendants and using speedy trials and revocation for reducing pretrial crime); (2) the numbers of persons convicted of new crimes while released was, relatively speaking, very low; and (3) the crimes committed by released persons were mostly "economic" in nature, which tracks current research showing that, along with drug crimes, larceny, theft, and fraud (as well as FTA and technical violations, when those are made crimes) are the most common crimes committed while on release.[606]

Today, the notion of a single, serious detention eligible charge demonstrating serious future defendant risk has been complicated, if not entirely refuted by research,[607] and thus consideration of the charge-based net requires more thought to the issue than that given by the Supreme Court in 1987 (or by Congress

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conclusively answer." Congress thus concluded that the nature and serious of the offense charged can and should be considered (along with many other factors) by bail setting judges to help identify a "reasonably identifiable group of defendants who would pose a serious risk of safety to others if released," expanding the focus beyond mere arrest for charges in the net. *See* S. Rep. No. 98-225, at 6-10.

[605] The BRA of 1984 copied many parts of the D.C. Act of 1970, which, in turn, defined "dangerous crimes" eligible for detention to be crimes "with a high risk of additional public danger if the defendant is released" (that is, assuming that any new crime committed by the released person would likely be the roughly the same if not identical to the original crime), H. Rep. 91-907, at 79 (1970); *See also id.* at 93 (using risk to the victim from the charged offense to infer future risk); S. Rep. No. 98-225, at 19-20 (equating "significant risk of pretrial recidivism" with major drug felonies, albeit based only on what the Committee felt was common sense versus empirical evidence). All of these reflect the flawed assumption that charge is an accurate proxy for risk.

[606] *See* S. Rep. No. 98-225 at 6,7 (1984); *Pretrial Release and Misconduct in the District of Columbia (INSLAW* Study, 1980); *Pretrial Release: A National Evaluation of Practices and Outcomes* (LAZAR Inst. Study, 1981). Larceny, theft, fraud, and drug offenses are also most strongly correlated with any new offense. *See supra* notes 38-39 and accompanying text, *supra; see also Model Bail Laws, supra* note 23, at 99-100 and citations therein.

[607] *See Model Bail Laws*, supra note 23, at 96-103; 172-81 (showing justification for a net consisting of all "violent" offenses).

in creating other parts of the federal statute, such as its rebuttable presumptions), which seems to bless a false assumption that a serious charge equals a serious risk to commit the same serious crime. Accordingly, people looking to *Salerno* for justification of an eligibility net focusing on so-called "risky" crimes, should, more appropriately, turn to current legal and social science (especially defendant risk) research and newer release and detention models for a more nuanced method for creating a limited and properly justified eligibility net.[608]

The Federal Limiting Process (Finding of Risk Within the Net)

Moreover, the Supreme Court also approved the use of a loose (easy to detain) limiting process – the "no condition . . . will reasonably assure" appearance or safety process – perhaps as a seemingly logical fit when paired with a net made up of persons that the Court already assumed to be "risky" based on their charge. Nevertheless, apart from issues associated with the net, using this "no conditions" finding solely to determine risk is problematic on its own.

It derives from the 1951 case of *Stack v. Boyle* and the fact that it, and the Bail Reform Act of 1966, only discussed release, and not detention, of noncapital defendants.[609] *Stack* was a "release" case, and it was somewhat clear in holding that if a judge wanted to place some limitation on release (versus detention), he or she could do so only to provide reasonable (and not complete) assurance of court appearance. Likewise, the Bail Reform Act of 1966 was a "release" act, with "release on conditions" the most intrusive alternative for noncapital defendants. Accordingly, federal courts struggling with intentional detention after 1966 would often query whether they could detain someone when "no conditions" listed in the statute sufficed to provide – using the release language of *Stack* – "reasonable assurance of court appearance."[610] Importantly, though, in case after case, judges

[608] *Id.* at 172-77; *Changing Bail Laws, supra* note 56, at 48-50. As noted previously, the federal "net" has many other problems based on faulty assumptions, such as seemingly unlimited nets for detaining for risk of flight or "obstructing justice," which states should avoid.

[609] *See Stack,* 342 U.S. at 9; Bail Reform Act of 1966, Pub. L. 89-465, 80 Stat, 214 (1966). Indeed, when the parties inferred that bail had been set not to release, but possibly to detain, Justice Jackson wrote that such a purpose would be "contrary to the whole policy and philosophy of bail." 342 U.S. at 10.

[610] *Model Bail Laws, supra* note 23, at 48-65 (discussing America's struggles with money-based and intentional, moneyless detention).

articulated the kinds of risk needed to detain, and it was typically extremely (or substantially) high risk either to willfully flee or to commit a serious or violent crime on release – and not simply to miss court or to commit any and all crimes.[611]

Likely due to the struggle illuminated by these cases, Congress ultimately adopted the "no condition . . . will reasonably assure" finding for the Bail Reform Act of 1984, but, curiously, not any language from the court cases expressly stating how high the risk must be (instead, the risk in the federal model is "so high that no conditions suffice"), let alone an appropriate answer to the question, "risk of what." Again, as seen historically through the so-called "detention cases," the risk needed to detain in America, when it has been articulated, has been articulated as an *extremely high* risk of *willful flight to avoid prosecution or (when consideration of public safety was allowed) to commit a serious or violent crime against reasonably identifiable persons, and not the risk to miss court for any reason whatsoever or to commit any crime whatsoever, from traffic to murder.* Using the "release" language of *Stack,* however, Congress allowed (and the Supreme Court upheld) detention in the federal system based on a finding that no conditions sufficed to provide "reasonable assurance" of "appearance" (theoretically, missing court for any reason) and public "safety" (theoretically, by committing any crime).[612] Using what is, essentially, the language of risk more appropriately applied to release for a detention provision is a category error and obviously flawed, leading to a legal structure likely to over-detain based on differing base rates for pretrial misbehavior. And, indeed, the federal system overwhelmingly over-detains.

Rebuttable Presumptions Toward Detention?

At the time the federal detention provisions were enacted, the authors of that language knew very little about actual defendant risk, and, accordingly, used rebuttable presumptions toward detention for certain charges based on misconceptions about those charges (such as serious

[611] *Id. See also Changing Bail Laws, supra* note 56, at 26-35 and *passim.*
[612] *See* Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified at 18 U.S.C. §§ 3141-3150) at § 3142(e)).

drug charges) or preconditions showing "inherent" risk. The same flaw is found in what are called "categorical no bail provisions," which allow detention on a likely now unlawful showing of only proof evident/presumption great for the charge (which was typically a capital crime), and which became the only rebuttable presumption toward detention allowed in the now outdated ABA Standards. After two years of research into American detention provisions, I relied upon roughly 200 pages of justification when writing the following: "No rebuttable presumptions should be used in this model, for two reasons. First, the research (as well as various limitations of risk prediction) simply does not support any rebuttable presumption toward detention, and because of that, it is even more unfair to force defendants to attempt to prove they are not dangerous, that they will not do some unknown but forbidden act, and that they will not flee. Second, our country's history of using rebuttable presumptions has only led to their misuse, causing jurisdictions to treat them more like un-rebuttable presumptions. The only presumption should be a general presumption of release in all cases or more specific presumptions similarly guiding courts toward release that must be overcome by the government." *Model Bail Laws, supra* note 23, at 184. At roughly the same time, other authors began to point out big flaws in the federal rebuttable presumptions, concluding, for one of the presumptions, "These results lead to the conclusion that the presumption was a poorly defined attempt to identify high-risk defendants based primarily on their charge, relying on the belief that a defendant's charge was a good proxy for that defendant's risk." Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates,* Fed. Prob. 52, 60 (Sept. 2017). *See also* amaryllis Austin, Sara Valdez Hoffer & Christopher Lowenkamp, *The Presumption for Detention Statute's Relationship to Release Rates Revisited: A Replication and Extension,* 88 Fed. Prob. 14, 20 (Sept. 2024) ("In the intervening eight years, it appears the presumption has continued to have an inordinate effect on low-risk defendants, which cannot be explained by their outcomes. In fact, the outcomes for presumption cases reflect that we continue to ignore the risk principle and, in so doing, are making our communities less safe by increasing failure rates for defendants charged with presumption cases.").

Occasionally, a state will try to enact rebuttable presumptions toward detention, only to have researchers illustrate the same flaws. In one study, researchers looked at the rebuttable presumptions proposed by the legislature and, using criminal justice data sets and statistical analysis, showed that adding those presumptions would not add accuracy (with some presumptions being only slightly more accurate than detaining randomly) and would result in false positive rates – that is, detaining persons thought to be dangerous but who actually are not – of up to 90%. *See,* Cristopher Moore, Elise Ferguson & Paul Guerin, *How Accurate are Rebuttable Presumptions of Pretrial Dangerousness? A Natural Experiment from New Mexico,* 20 J. of Emp. Leg. Studies 377, (2023), found at https://onlinelibrary.wiley.com/doi/abs/10.1111/jels.12351?msockid=1ac3813fc8136cf204ea94

41c9eb6d58. In a more enlightened effort at following both the law and the research, Virginia repealed its presumptions toward detention in 2021. *See* Legal and Justice Ctr., *Presumptions Against Bail,* found at https://www.justice4all.org/what-we-do/criminal-legal-system/pretrial-justice/presumptions-against-bail-2/?utm_source=chatgpt.com.

In sum, based on the history, the law, and the pretrial research, American bail systems should only be based on presumptions toward release, and never include presumptions (rebuttable or not) toward detention. While charge is the proper form for creating a "detention eligibility net" for several reasons, including due process fair notice, that net must still be justified, limited, and paired with a finding of risk within the net as well as various due process elements to actually detain. Singling out a particular charge or adding preconditions to a charge category should be done only to limit detention, and never to make it easier.

In sum, the "no conditions" limiting process should never be used *solely* to determine a finding of risk to detain. It is phrased in release rather than more appropriate detention language and it was likely thought to be adequate due to faulty assumptions about defendant risk based solely on charge, which was reflected in *Salerno's* discussion of the original net as well as other statutory provisions such as rebuttable presumptions. Moreover, it was crafted as a unique solution to a federal problem fifty years ago at a specific time in history (having its genesis in *Stack* and the 1966 BRA), it only hints at the level of risk (i.e., so risky that "no conditions" provide assurance), and is complicated by being dependent on the research showing effectiveness of release conditions; that is, any research showing the ineffectiveness of release conditions will make it much easier to show that "no conditions" suffice to address risk and thus make detention much more likely. Finally, and perhaps most importantly, it is highly subjective, resource-driven, and its use has led to likely unconstitutionally high detention rates in the federal system.[613]

On the other hand, there is some merit to including the "no conditions" language as an add-on to a much better limiting process simply because comparing

[613] *See* Alison Siegler, *Freedom Denied: How the Culture of Detention Created a Federal Jailing Crisis,* found at Freedom Denied (uchicago.edu). In 2019, the *average* detention rate in the federal system was roughly 75%.

alternative conditions is similar to what courts would require under a heightened or strict scrutiny standard involving limitations on pretrial liberty. Thus, that "much better" limiting process with the add-on would include: (1) a clear and convincing burden of proof; (2) an express statement of how high the risk; (3) an answer to the question, "risk of what?" based on historic notions of detention;[614] and (4) then, and only then, a finding that no other conditions suffice to mitigate the stated risk.[615]

The fundamental point is that the federal detention process (which is also found in the D.C. bail law as well as other states copying the federal process)[616] is flawed and makes it far too easy to detain, as shown by the egregiously high detention rates in the federal system. Using the same process in the states would, again, likely be disastrous and lead to continued pressure to change. Accordingly, states should absolutely avoid using the federal detention process, by itself, as some sort of template for constitutional change. Instead, they should use the more recent and appropriate formulas for net/process combinations found, for example, in Illinois or in such documents as *Model Bail Laws*, *Changing Bail Laws*, or other similar "hypothetical" models that better justify detention eligibility and that use a process designed to better articulate the risk needed to detain.

Importantly, using the Supreme Court's foundational legal standard for detention provisions as an overall boundary – i.e., that they be "carefully limited" – this likely means crafting a slightly wider (that is, wider than the nets found in categorical "no bail" provisions, such as "capital offenses") albeit properly justified detention eligibility net to account for the lack of any singular "risky charge," but pairing that net with a far more robust, exacting, and commonsense "further limiting process" (or finding of risk within the net) that is designed to focus a judge's attention on

[614] I place these in order of "extent of the risk" and "risk of what" simply because the two notions have been phrased by me and other authors in that order. Jurisdictions can just as easily determine the answer to the question, "risk of what" first, which might help in determining the proper verbiage for how high the risk should be.
[615] *See Model Bail Laws*, *supra* note 23, at 190-196; *Changing Bail Laws, supra* note 56, at 50-56; other resources can be found at Center for Legal and Evidence-Based Practices (clebp.org).
[616] After watching bail settings in Washington D.C., I surmise that the difference in detention rates between the federal system (high) and that of the District of Columbia (low), which have similar detention provisions, is due primarily to a "release culture" adopted by the D.C. judges through training and ongoing coaching.

the risk needed to detain, which is extremely high risk of willful flight or to commit a serious or violent crime.

Avoiding these primary mistakes[617] can pave the way for true, historic bail reform consisting of eliminating money-based detention and replacing it with intentional release and detention through the creation of a charge-based eligibility net and a finding of risk within the net that focuses on the things for which pretrial detention is appropriate. The project is not partisan – indeed, it is one that takes into account reasonable differences in the width of the net and strength of the risk finding language, and assumes collaborative compromise based on deep bail education. No longer should jurisdictions argue over how "high" or "low" some financial condition of bail is or should be – an argument made incomprehensible by the arbitrariness of the amounts used. In the future, discussions will be centered on the only true replacement for a random, unsafe, and ineffective money-bail system, which means discussions about nets and risk findings for both bail in the first instance and revocation as well as other common sense detention limiting elements. Crafting intentional release and detention to replace money-based systems is the only way to make sure the "wrong" persons are not in and/or out of jail, the only way to simultaneously achieve both liberty and safety at bail, and the only way to bring a definitive end to this wave of reform.

"General Bail Models" Versus "Bail Reform Models"

The literature review leading to this paper revealed a tendency for authors to categorize so-called "models of bail reform" based on a variety of attempts at change, rather than limiting the discussion to true, historic bail reform that focuses on eliminating money-based detention and crafting its replacement. This has caused unnecessary confusion, as many of the papers discussing "models of

[617] Of course, there are many other significant errors a jurisdiction might make (and have made) when enacting changes to the bail system, including adding rebuttable presumptions toward detention, changing a constitution to allow money to be set for public safety, or changing a statute to require secured money bonds on certain serious charges. Nevertheless, even a small amount of bail education would likely dissuade states from making those obvious errors. The two mistakes articulated in the text above are mistakes happening after a state has decided to embark on the objective improvement of replacing money-based detention with intentional release and detention and have begun the process of choosing the actual template language for intentional detention. They are "primary" mistakes because they go to the heart of the project of true, historic bail reform.

bail reform" often focus on mere pretrial improvements and compare wholly different things – such as implementing more meaningful due process protections versus, for example, making various changes to pretrial services – as equivalent ways to achieve "bail reform."

To me, a "*general* bail model" is how any particular jurisdiction currently provides for release and detention, including all of the component elements, whether those elements are considered to be objectively good or bad. For example, Colorado's model includes an amended constitutional provision for danger, but uses money as its primary means of pretrial detention. New York's model has been changed to release more persons pretrial, but forbids consideration of public safety and still allows money bail for certain serious charges. New Jersey and New Mexico both had their own "models" of release and detention, but changed to different models in 2014 and 2016, respectively. These broad models for pretrial release and detention, including the sources of law upon which they are based, are what makes "borrowing" elements for improvements so difficult. Each state has unique sources of law that dictate how bail is to be done, and it is always possible that those sources provide limitations that make it impossible for other states to borrow.

A "bail reform model," on the other hand, would be any model addressing true, historic bail reform and assessed by its adherence to the (at least) five necessary and properly justified elements contained in an intentional detention provision that *entirely replaces* money-based detention. That is, one should not attempt to call something a "bail reform model" unless and until it is an attempt at true, historic bail reform. Only then may you ask, "How wide or narrow is the net?" "How strict or loose is the finding of risk within the net?" "How good is the secondary net and process (i.e. revocation)?" "What are the various due process protections?" "What justification exists for each element?" Many states have enacted provisions to their laws indicating a desire to add more intentionality to the process, but then ignore those provisions by leaving money as a detention mechanism in place. Those states have not achieved (and, indeed, have likely not even attempted) true bail reform except to the extent that they are trying to be

ready once money that detains is inevitably eliminated. More importantly, many states have attempted to add various objectively good pretrial improvements to their general models, but they have not engaged in true, historic bail reform until they begin the project of replacing or switching systems from money to intentional release and detention.

This is why it is important to know the difference between enacting one or more pretrial improvements – what might be called changing one's *general bail model* – versus doing the more nuanced and acute work of designing a *bail reform* model consisting of a complete switch from money to intentional release and detention. For example, a recent document helpfully describes the findings of numerous researchers from assessments of improvements done in six jurisdictions, including Harris County, Texas, New York, New Jersey, Los Angeles County, California, Philadelphia, Pennsylvania, and Cook County, Illinois.[618] Nevertheless, while all of the improvements were important, that is, while assessing those improvements both pre-and post to determine impact on a number of variables is crucial to our learning about the effects of those particular improvements, and while most, if not all of the improvements have been labeled "bail reform" by the press and others, only one or possibly two of the jurisdictions can be said to have engaged in the project of "true, historic bail reform." This is crucial to understand. When someone argues against bail reform by holding up some seemingly flawed element in the general New York bail model, for example, often the best answer is to back up and explain why the so-called improvements were compromises done to avoid the complete work of true, historic bail reform.

When I wrote *"Model" Bail Laws* in 2017, I intended it to be a true "bail reform model" because it was my attempt at completely switching systems. Nevertheless, I put the word "model" in quotation marks to highlight the fact that the word was not being used to convey some supreme, particularized template that should be thoughtlessly plugged into the laws of every state. The 2017 paper was *my* bail

[618] Just Journalism, *Bail Reform: What to Know and Where to Go for More,* found at https://justjournalism.org/page/bail-reform.

reform model,[619] whereas other states might create their own models, which might be different in some ways from my own. Thus, I wrote, when states inevitably move toward a moneyless, intentional release and detention model, it will be unique to that state in some respects while still containing certain elements likely required for all states. For example, I believe that a limited charge-based detention eligibility net (versus a so-called risk-based or unlimited charge-based net) is likely required under the constitution, but the point is that jurisdictions will likely vary – and some may vary greatly – on the exact width of the net. Nevertheless, a state could borrow my model and at least be able to rely on 200-plus pages of justification, which is far more than most states use in a typical detention provision.

Just as one can assess a state that has attempted or completed true, historic bail reform after the fact, one can also assess – at least at a rudimentary level – proposed bail reform models or the so-called "hypothetical" models, like mine, which are models drafted by scholars and other groups designed to help states change to intentional release and detention. For example, my 2017 model includes a somewhat wider net than that currently found in many states, but it is far narrower than the nets found in New Jersey and New Mexico. Likewise, the finding of risk to detain within the net in my model is vastly superior to the risk finding in those and in virtually all other states, and I provide ample justification for every element. Any organization – such as my organization, the Uniform Law Commission, ACLU, NAPSA, or Civil Rights Corps – that has constructed a bail reform model has the ability to provide jurisdictions with whatever justification it used, so that it could be adopted to help justify a new provision.[620] For a number of reasons, the most important part of any hypothetical model will be the precise

[619] Admittedly, my 2017 model focused almost exclusively on the detention provision, as the biggest debate in America at the time was whether and how to craft intentional detention provisions taking into consideration the erosion of money bail and the risk assessed by actuarial assessment tools. At the end, though, I articulated various elements of the model that I believed should also be included in statutes or court rules dealing more specifically with release.

[620] *Model Bail Laws, supra* note 23; *ULC Act, supra* note 181. In my opinion, all models (good and bad) should nonetheless be consulted and considered before a state begins the important task of changing a constitutional or statutory right to bail provision. I once drafted an entirely new constitutional provision for Texas, in which I: (1) relied on the best hypothetical model language; but with (2) explanations for why other models (including every other state model) were inadequate.

language it uses in creating intentional detention, and thus it is important to know the extremes in language design as well as the flaws found in current state models before judging a hypothetical model.

Indeed, looking at those extremes can help with assessing all proposed models, and especially "bail reform models." For example, a state could try to detain everyone pretrial based solely on charge, but that model would likely be struck as unconstitutional. A state might seek to release everyone pretrial, although this model would likely be impractical. A model might leave money as a condition of actual release in place, while another model might eliminate money entirely. On the other hand, there are proposed models in between the extremes; for example, a state might find it imminently rational to refrain from detention based solely on prediction of flight versus danger, preferring only to respond to risk of flight through revocation. The point is that there is great creativity found in the design of a "bail reform model," so the more bail education, the more background perspective based on the risk research, the better.

At the end of *Model Bail Laws,* I provided three ways to analyze new, intentional detention provisions or "bail reform models." Of those three ways, jurisdictions should pay close attention to assessing those provisions according to the law, for just as the law provides the boundaries necessary for crafting intentional detention language, the same law provides avenues to challenge provisions after enactment for failure to adhere to those boundaries.

Release

As noted previously, forbidding money leading to detention while crafting a narrowly tailored, safe, fair, and intentional system for detention and revocation will determine – mostly in advance – who *might* be detained, and, therefore, who *will* be released (that is, "bailable" persons and those in the "no bail" nets who are not found to pose sufficient risk for detention). Jurisdictions must not be disheartened at the seemingly daunting nature of this project, for it has already

been done – both hypothetically[621] and in practice.[622] This, in turn, will make many previous recommendations based on the use of money leading to detention, such as mostly ineffectual bond review hearings, presumptions for release on recognizance, and certain pretrial services agency practices that grew up around money bail, altogether unnecessary.

On the other hand, certain recommendations for pretrial improvements would remain unchanged, such as the need for better options for supports following arrest, evidence-based diversion or other treatment courts, and strategies to improve first appearances and case processing as well as a variety of provisions to help make statutes and court rules "better."[623] Because true, historic bail reform will typically require a complete overhaul of statutes and/or court rules, jurisdictions are advised to take the time to look through the various standards and models for ideas and templates. For example, the Civil Rights Corps model includes an innovative, research-based, and commonsense process for dealing with persons failing to appear for court.[624] As another example, having kept up to date over the years, the NAPSA Standards provide an excellent reference for both pretrial system and agency best practices, the need for which will likely persist even after the creation of intentional release and detention.[625]

Overall, if jurisdictions simply adhere to the law and the research while fostering an overarching desire simply to help released persons succeed, most perceived difficulties concerning what to do with persons released pretrial will quickly evaporate. Nevertheless, I briefly note two persistent misconceptions that often require explanation in this area.

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[621] Using the CLEBP model as a guide, a subcommittee of the Colorado Commission on Criminal and Juvenile Justice spent roughly one year collaborating over a new, moneyless, intentional release and detention constitutional provision for that state. It remains shelved, at least in part, due to the official sunset of the Commission.
[622] *See* Public Act 101-652 (eff. Jan. 1, 2023), known as the SAFE-T Act, with pretrial provisions commonly called the Pretrial Fairness Act (completely replacing money bail with intentional release and detention).
[623] In *Changing Bail Laws, supra* note 56, at 56-58, I listed various sources to enumerate a number of statutory or court rule provisions that might be part of a bail system overhaul, even though individual jurisdictions will better understand the limitations of their own laws.
[624] *See* Civil Rights Corps, *Pretrial Release and Detention Act,* found at https://civilrightscorps.org/policy/bail-policy-package/.
[625] *See NAPSA Standards, supra* note 118.

The first is the notion of "least restrictive conditions," a term made necessary due to money's tendency to detain. It was first formally articulated in the Bail Reform Act of 1966, which required judges choose the "first of the following" conditions from an enumerated list, rank ordered from least to most restrictive and with secured financial conditions listed last among the expressly listed conditions.[626] In the past, confusion over the term was due to groups (including the bail industry) arguing that secured financial conditions were, instead, the "least restrictive" of all conditions, ignoring the fact that the use of money bail often led to unnecessary and unlawful detention, making it as restrictive as detention itself. I attempted to clear up that confusion in an earlier paper,[627] but it may still be important for jurisdictions to actually articulate criteria used for defining the boundaries of restrictiveness.

Today the confusion mostly stems from the overall lack of understanding that the concept of "least restrictive conditions" transcends bail and is a fundamental part of American justice, in which the default is liberty, and in which the government is required to show greater and greater justification for greater and greater infringements on liberty. Jurisdictions occasionally believe that they have done "bail reform" (or, more modestly, made a pretrial improvement) by merely inserting a reference to using "least restrictive conditions," but they do so without articulating which conditions, in particular, are considered the least restrictive and without understanding that the foundational legal principle exists whether or not it is expressly articulated in the law. Again, there is still some debate today over which non-financial conditions are more restrictive than others, with some groups correctly asking for a more exacting process of assessing "restrictive conditions of release" versus "non-restrictive" ones.

The second notion requiring at least some explanation in the area of release concerns trends showing a gradual move from more supervisory and controlling conditions to more helpful supports designed to help persons succeed on pretrial release. This is due, at least in part, to a commonsense desire to begin addressing

[626] *See* Pub. L. 89-465, June 22, 1966, 80 Stat. 214 (codified at 18 U.S.C. §§ 3146-3152 (1966)).
[627] CLEBP, *Best Practices in Bond Setting* (revised, 2014), found at http://clebp.org/coloradobailprojects.html.

a person's needs – especially when they translate into "risk" – as soon as possible, as well as the understanding that the research on various traditional conditions is gradually – very gradually – showing their ineffectiveness. For now, the research on any particular condition is often said to be "mixed," but because we must always follow the law and research wherever it takes us in bail, we would be wise to at least think of the ramifications of a field in which traditional conditions of release are ultimately found by research not to achieve their stated goals. After all, such research is a primary reason for the slow but inevitable elimination of money bail in America.

As mentioned above, if traditional conditions of release are slowly found to be ineffective, then the need to assess risk in order to assign those conditions will lessen. We might still find uses for risk assessment beyond assigning conditions, such as sorting persons so that a jurisdiction with limited resources will know who to interview to ascertain their needs for success or for crafting speedy trial rules for higher-risk but released persons. Nevertheless, the mounting research behind traditional conditions will likely mean a change in how we think about and use actuarial risk assessment tools.

Moreover, and as stressed above but re-iterated here for emphasis, if traditional conditions of release are gradually found to be ineffective, then states looking to adopt the so-called "federal detention model," which allows detention when "no condition or combination of conditions" suffice to meet our goals, will quickly see that virtually everyone could be easily detained. After all, research showing that a condition of release does not work would certainly be considered "clear and convincing evidence" that the condition does not "suffice to provide assurance" of either court appearance or public safety. Trying to balance a detention provision that allows for such easy detention with broader constitutional concepts such as liberty being the American "norm" will likely only lead to another round of entirely avoidable bail reform.

Summary

In sum, when it comes to release, the creation of an intentional release and detention provision will make many other seemingly pressing issues concerning release simply go away, but it still leaves in place the need to constantly assess what we do with people on release and why we do it. There may well be a time when we can say that we only detain persons who show an extremely high risk to either flee or commit a serious or violent crime, and that everyone else is simply released with court reminders and whatever possibly untested supports are needed to succeed. Following both the law and the research – that is, following legal and evidence-based practices – means that we must be prepared for such changes.

Conclusion

As I briefly recounted above, the first time that I witnessed a bail-setting, I could see that it was overwhelmingly lopsided and unfair to people who were, like me, innocent until proven guilty. More importantly, though, I quickly concluded that the use of money in the bail process – indeed, the focus of every bail "hearing" – was completely arbitrary, irrational, and thus, as I had learned in law school so very long ago, likely unlawful. After the smallest amount of research, I reported to my superiors that our county was likely violating the constitution and that if someone were to shine a light on what seemed to be typical money-bail practices across America, we would quickly enter into a phase of national bail reform, with every state pressured to find some replacement for one of the most egregiously unlawful processes in the criminal system. Bail reform, I said, was inevitable because money at bail was arbitrary and irrational.[628]

Twenty years later, and we find ourselves in the middle of that phase of national bail reform (that is, "true, historic bail reform"), with an army of reformers and the knowledge of how to successfully end the era gleaned from legal, historical, and social science research. This paper is designed to help states reach the goal line and to do it in a way that will prevent having to revisit the issue again and again. It outlines the three things that I would do if any state or local jurisdiction invited me in to help. First, I would gather everyone together (collaboration). Second, I would provide the information needed to understand the issues (education). And third, of the many pretrial improvements that any particular jurisdiction might hope to implement arising out of that education, I would immediately help them to make the inevitable switch from a random, unfair, and unsafe money-based release and detention system to an intentional, fair, and safe release and detention system. Doing so is imperative as I believe that money (or indeed, any

[628] As this paper explains, money at bail only reduces public safety. When it comes to flight, to believe that an accused person will be more motivated to return to court by potentially losing $100 (or any other amount) versus having the bond revoked and either being subjected to new, more onerous conditions or to remand and possibly new criminal charges seems absurd.

other release condition) leading to detention is going to disappear, leaving only one question: "What will replace it?"

This paper fleshes out these three things, which I have called "pillars of pretrial justice." There may be other pillars that will ultimately help in the effort – for example, I happen to know people currently working hard on applying implementation science and adaptive leadership principles to pretrial change, and this will certainly speed along the more difficult aspects of the inevitable system transformation.

I consider the recent political nonsense over "cashless" bail to be mostly a desperate distraction, albeit the kind of distraction that will lead to many unfortunate bills in the upcoming legislative sessions. We should remember, though, that we started from nothing, and we are overcoming nearly two-hundred years of bad practice. We fought bad pretrial release and detention bills even before we began to reform the system, and we will continue to fight bad bail bills as we move ahead. But the switch is inevitable, and it is far more important that we learn how it should be done. Indeed, to the extent that "bad" bail bills (primarily those inserting more money into the bail system) force the states to slow down in order to learn exactly how to craft the ultimate solution, then I actually welcome them.

Creating the kind of system I describe in this paper is – or should be – bipartisan simply because it focuses on both the "in" and the "out," release and detention, and the status quo is both unfair and unsafe, leading to more crime due to both unnecessary pretrial detention and unwise pretrial release. We all want liberty. We all want safety. And we all want rationality and intelligence in our criminal systems. Anyone trying to make this era of bail reform political simply does not understand bail reform.

Good luck to all of you who are engaged in this endeavor. You are doing God's work, and one day you will look back and know that you have spent time in your lives sacrificing to achieve truly noble goals.

APPENDIX ONE

The Excessive Bail Loophole

Bail law includes one significant principle that causes great confusion, but that is the answer to many persistent bail questions. For example, why is it so hard to eliminate money-based detention when we know that it is likely unlawful and, in most instances, harms entire communities? Why do we say that bail is legally and historically a process of release, when there are so many persons “held on bail?” How did we move from a country in which the right to bail typically meant a right to actual release to a country in which the right to bail is seemingly now only a “right to have bail set?” Why is the money-based bail system, a system that allows money-based detention, so intractable, and how have states been able to ignore their constitutional or statutory declarations of pretrial detention eligibility (sometimes called “no bail” provisions or "exceptions to bail") for so long? The answers to all of these questions are based on the unfortunate legal principle tied to excessive bail that I have titled the "excessive bail loophole.”

Background

By way of background, virtually all states have three main methods besides contempt or various holds to detain a person pretrial. The first method is through an intentional process of “no bail,” typically articulated in a state’s constitution (41 states), but sometimes found in its statutes or court rules. The second method is through bail revocation, which can be a remedy when persons “fail” while on pretrial release and show some requisite high risk to likely fail on release again. The third method is through an unfortunate line of American cases found in excessive bail jurisprudence saying that while a judge must set bail for "bailable" defendants (that is, persons not eligible for "no bail"), it is not necessarily unconstitutional to set a money bond that is unaffordable and leads to detention so long as the judge makes no record of *intentional* detention. Put another way, these opinions say, essentially, that a bailable person does not have a right to bail he or she can “make,” so long as the bail-setting judge neither speaks of his or her

intent to detain nor exhibits any conduct that can be construed as intent to detain. These cases are ubiquitous in both the federal and state systems; indeed, if you look up any recent court opinion addressing excessive bail today, you will likely find a cite to one of these opinions as they form the core of the loophole.

This third method of detention has been used in America since the 1800s, and because it has been in use for so long, the states have been able to ignore their intentional release and detention provisions in constitutions, statutes, and court rules (and even their revocation rules), simply because that third method – detention using unaffordable bail bonds – is quicker, easier, and is allowed to operate with no meaningful due process. It is based on the fiction that since a person detained on an unaffordable bond is technically able to secure release at any time (so long as they pay the required amount of money), there is no need for any procedural safeguards.

Because of this, detention using unaffordable money bonds undergirds the entire money-bail system in America. Indeed, it is likely the primary reason why states are so reluctant to abandon money even in the face of research showing that it does nothing to motivate defendant behavior after release. Moreover, because the states have ignored the other methods of detention for so long, even if those methods were to be dusted off and used, most states would now find them (and recently have found them) to be entirely unsuitable to achieve the states compelling goals of court appearance and public safety.[629]

The "excessive bail loophole" is actually made up of three lines of court cases and is so named because it is found in excessive bail jurisprudence and provides judges with a way to avoid the historic rule (from both England and American history) that so-called "bailable" persons should be released pretrial. Historically,

[629] This notion can be easily understood by simply asking the following question: "If money bail were completely taken away in your state, by what mechanism would you detain persons pretrial?" Because money bail is, indeed, being taken away from the states, this question has great relevance. States looking at their constitutional and statutory "no bail" provisions for their answer frequently find those provisions to be antiquated, based on flawed assumptions, and either too broad or too narrow.

bail meant release, and "no bail" meant detention,[630] and if anything interfered with bailable persons being released or unbailable persons being detained, history demanded correction typically through eras of bail reform.[631] Thus, overall, the loophole allows the detention of bailable defendants in contravention of the historic rule. Moreover, the loophole allows states to ignore designations such as "bailable" or "detention eligible" (along with any due process requirements) as articulated in their existing constitutional, statutory, or court-rule-based intentional release and detention provisions due to the loophole's allowance of money-based detention for virtually 100% of persons arrested and brought to the jail.

The public's (and, indeed criminal stakeholders') confusion over the loophole stems from the fact that the enormous number of court opinions allowing "bailable" defendants to be detained on an order of release gives the whole system a gloss of legality, which, until recently, has shielded the states from recognizing the gradual move away from historical norms and the need for bail reform based on historic markers. Indeed, until very recently, no matter what a state constitutional or statutory bail provision might say, a judge could ignore that provision, set any amount he or she wanted to set, say nothing (that is, make no record showing bail being set for an unlawful purpose such as to intentionally detain), and rest assured that the appellate courts would uphold all but the most egregious amounts. It is the great paradox of bail that is illuminated in the notion that "bail" – that is, a device used throughout history to release persons – can actually be used to detain. As I and other authors have previously written, being

[630] *See* sections on the history of bail and the definitions of terms and phrases found in NIC's *Fundamentals of Bail, supra* note 20. As recently as 1951, the United States Supreme Court equated the "right to bail" with the "right to release before trial" and the "right to freedom before conviction." *Stack v. Boyle,* 342 U.S. 1, 4 (1951). By the time of the Bail Reform Act of 1984, the federal system had entirely replaced the word "bail" with release.

[631] I have called the rule that bailable persons should be released and unbailable persons should be detained "the Big Rule" due to its historic importance. Early on, America changed the detention side of the English rule only to allow detention when someone is both (1) charged with an eligible offense, and (2) shows the requisite high risk to detain within that net. I have called the American changes to the "Big Rule" the "American Overlay," which means that the "Big Rule" as applied to American bail-setting today would more accurately say that bailable defendants should be released and unbailable defendants "may" be detained. *See Model Bail Laws, supra* note 23.

"held on bail" is real, but it is absurd when bail is properly defined as a mechanism of release.[632]

The excessive bail loophole is only present in the money-bail system,[633] though, and thus "bail reform" – that is, switching systems from random, money-based release and detention to intentional release and detention – automatically means eliminating that loophole. Indeed, states that have achieved or nearly achieved true, historic bail reform have done so by eliminating the loophole. Persons in the federal and District of Columbia systems have correctly boasted that they have eliminated the loophole by adding a single line to their statutes that forbids judges from setting a money bond that "results in the detention" of a person pretrial. This makes sense, but what the states apparently do not fully comprehend is that *even the smallest erosion of the loophole inevitably sets in motion a series of causal events typically leading the state to abandon money-based detention for an intentional release and detention system.* Understanding how this happens requires a slightly more detailed discussion of bail's history.

The History of the Loophole

For the most part, early America adopted English bail practices and justifications for those practices almost entirely. For example, America adhered to putting both "bailable" and "unbailable" offenses in state founding documents in order to clearly articulate who would and would not face potential pretrial detention. Moreover, America adhered to the notion that "bail" should equal release, and so it continued England's practice of using a personal surety system and unsecured bonds (meaning a mere promise to pay only upon failure to appear and with no actual payment up-front) to make sure "bailable" persons (i.e., those not in the "no bail" category) were actually released.

[632] *See Fundamentals of Bail, supra* note 20, *passim.*

[633] Theoretically, any condition of release could lead to detention, depending on how it is used. Thus, when states seek to add language to their laws expressly stating the money cannot lead to detention, I typically advise them to think broader than money and to include all conditions of release in the prohibition.

As our country progressed, however, it ultimately chose a bail model with three significant deviations from the English system. First, America expanded the right to bail, so that eventually only capital offenses (or a few other extremely serious charges) were included in the "no bail" or exceptions provisions. Second, America removed the discretion that had gradually permeated the English system over hundreds of years, and through which English judges could use non-charge "risk factors" to determine bailability prior to a release decision. Instead, American bailability would be based on charge alone, and risk factors would be used only to add or subtract from the financial condition, which, as already noted, was an "unsecured" condition (i.e., merely a promise to pay) designed so that, at least in theory, it would not get in the way of actual release.

Third, America added the requirement that bail setters make an additional finding of risk for those in the "no bail" category so that literally everyone would be eligible for release and no one would be detained based on charge alone. In other words, even if you found yourself in the "no bail" net, the lack of risk might allow your release no matter how serious the charge. The first of these required findings was "proof is evident, or the presumption great," which looked at proof of guilt and was based on the assumption that persons likely guilty of a serious charge would flee. Better articulations of the risk finding, however, such as "clear and convincing evidence of an extremely high risk to flee or to commit a serious or violent crime, for both flight and public safety" – have been adopted or recommended over time.

Thus, in theory, the consensus American bail clause was an intentional release and preventive detention model, with bailable persons expected to be released, and unbailable persons only eligible for detention. It was, and is today, made up of right to bail language, exceptions to that right (more appropriately called a "detention eligibility net" but often "exceptions to bail"), and a "further limiting process," or a finding of risk needed to actually detain persons within the

detention eligibility net.[634] Virtually all state constitutional bail provisions still contain these three main elements, although the language varies widely.
This intentional release and detention model worked relatively well in America until, gradually, the number of willing personal sureties diminished, ultimately leading to a tipping point of an unacceptable number of bailable persons detained in jail some time in the 1800s. Because all this detention pushed against the general rule that bailable persons should be released (and for a variety of other reasons and/or abuses), judges reacted by experimenting with other ways to make sure those persons would obtain release with some assurance of return, including setting a financial condition that the accused could pay upfront as a precondition to freedom. Occasionally called "self-pay" in the literature, it was the first use of what we now call a "secured" financial condition, and it led, unsurprisingly, to even more persons ordered released but "held on bail."[635]

The Three Lines of Cases

Bailable persons detained through the use of secured financial conditions objected to this and other practices, leading American appellate courts to develop three lines of early cases, which, together, form the excessive bail loophole. Essentially, those courts held that: (1) while judges had to set bail for "bailable"

[634] See generally *Model Bail Laws, supra* note 233, at 26-48; *Changing Bail Laws*, *supra* note 56. 13-25. The phrase "further limiting process" expresses the notion that the charge-based net, itself, is the first limitation on detention because only eligible persons may be detained. From within that limitation, there is a "further limiting process" designed to determine who, inside of the net, should actually be detained. It should not be confused with current notions of procedural due process at bail, which, although also serving a limiting function, came later. As mentioned above, the "proof evident, presumption great" limiting process was essentially a finding of risk within the net based on an assumption that proof of guilt for someone facing a capital crime indicated likelihood to flee, and, despite its likely unlawfulness post-*Salerno,* these charge-and "proof evident, presumption great" risk findings (often called categorical "no bail" provisions) still exist in a majority of states for certain serious charges. While there were always exceptions – that is, people who could not find willing sureties – and while those exceptions may have seemed somewhat high in the late 18th Century, See Kellen R. Funk and Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816 (2024), it appears that the overall pool of "bailable" yet detained persons did not fundamentally alter the bail system until it reached a tipping point at some time in the 1800s, causing judges began to seek alternatives to respond to diminishing personal sureties.

[635] It is worth noting that England, too, suffered from the loss of personal sureties. It's solution, however, which was apparently deemed too radical for America, was to pass a law allowing judges to allow for the release of persons with no surety whatsoever and by later banning profit and indemnification, thus avoiding the commercial bail system found in America. It seems as though American judges were less trusting of defendants, believing that all would claim poverty and then flee when released.

defendants (that is, a person could not be denied bail unless he or she was first found to have been charged with a detention eligible crime), (2) an unaffordable bail amount was not necessarily unconstitutional, but (3) judges could not set an unaffordable bail amount with *intent to detain* a bailable defendant. These three lines of cases make up the entirety of the loophole, which still forces judges to "set bail" for bailable persons, but nonetheless gives those judges 100% discretion to intentionally detain any person using money so long as they avoid showing outward intent to detain, whether by expressly saying so on the record or by doing other things that might be deemed evidence of intentionality.[636] As noted previously, it is a loophole around the historic notion of bail equaling release and/or using a state's intentional process, but because it props up the entire money-bail system, fully understanding the ramifications of *eroding or eliminating that loophole* – something that is actually happening now – requires a slightly more detailed examination of the three relevant lines of cases.

The First Line: Judges Must Set Bail for Bailable Defendants

The first line of cases is significant primarily to show the importance of the bail clause and in staying within the express exceptions when denying bail. Courts in those cases uniformly hold that a judge may not deny bail for a bailable person; in other words, the judge must set bail for all persons given a right to bail. This type of opinion exists in every state, and is typically so fundamental that it is often found in state supreme court cases from even the early 1800s. More recent examples include *Locke v. Jenkins*[637] and *Simms v. Oedekoven.*[638] The rationales

[636] Occasionally, even without any record whatsoever, an appellate court will remand a case when the amount is so egregiously high as to, by itself, indicate intent to detain. Of course, remanding a case for a second bail setting, when the numbers used in both are arbitrary unless tied to something like ability to pay, is meaningless. A classic example of this "dance" around motive and the underlying arbitrariness of the numbers in found in *United States v. Melville,* 306 F. Supp 124 (S.D.N.Y. 1969), in which a district judge reviewing a magistrate's bail setting said that it was apparent that the use of "astronomical numbers" was designed actually to mean "no bail," but nonetheless set new financial conditions that were less than the original amounts but still between two to ten times more than what each defendant said he could meet.

[637] 253 N.E.2d 757 (Ohio 1969) (requiring the judge to set bail for a defendant not charged with any exception, writing, "The right to bail . . . is absolute, the only exception being for capital offenses. There is no discretion in the trial court for such matters.").

[638] 839 P.2d 381, 385 (WY 1992) (despite a rule allowing detention when "no condition or combination of conditions will reasonably assure" appearance of public safety, the judge was wrong to deny bail to someone not

for these cases often discuss the overall importance of the state bail clause (especially given the lack of a federal right to bail provision), and the language found in those discussions can often be used to bolster an argument against money-based detention of a bailable person. An illustrative case in California from 1951, *Ex Parte Keddy,*[639] provides strong language concerning the state constitutional bail clause:

> The people of the State of California through their Constitution have provided in Article I, Section 6, that '*All persons* shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great.' [Italics in original]. This mandate of the people cannot be legally set aside by the civil, legislative or judicial branch of the government. It will be observed that the people, who are sovereign, have seen fit to provide that with but one exception, to wit, where a person has been charged with a capital offense, all persons are entitled to bail as a matter of right. Irrespective of the villainy of the accused or the heinousness of his offense, without regard for public opinion, or for the personal views of an individual officer as to the wisdom of the constitutional provision, such provision is binding without qualification upon the courts until the people have by inherited processes legally erased the constitutional mandate.[640]

Moreover, this sort of language can be used for application in other analogous situations. Indeed, citing to *Keddy,* the California Supreme Court forbade bail-setting courts from "reading into" the bail clause any additional charges subject to detention – i.e., additional exceptions to bail – via a determination of dangerousness, writing, "If the constitutional guarantees are wrong, let the

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charged with a detention eligible offense; "The State, in effect, is seeking to invoke an exception to what is a clear extension of a right to bail.").

[639] 233 P.2d 159, 162 (Cal. Dist. Ct. App. 1951). The state constitutional right to bail provision has been changed since this case.

[640] *Id.* (footnotes omitted).

people change them – not judges or legislators."[641] Statements concerning the importance of the bail clause like these are often crucial to the third line of cases, below, because using money to *intentionally* detain is often considered to be doing detention (or "no bail") unlawfully by adding exceptions to the bail clause or by ignoring and thus negating a constitutional right to bail altogether.[642]

The Second Line: Moreover, Money Can Keep Someone in Jail

The second line of cases is also easily found in every state and in the federal system, and the opinions in those cases uniformly hold that even though a judge may be forced to set bail, so-called "bailable" persons do not have a constitutional right to bail that they can "make." I first wrote about this as "the unfortunate line of cases," and criticized both the case most frequently cited for the proposition as well as the rationale (or rather, the lack of any decent rationale) for the rule.[643] These are the opinions that provide the language judges seemingly know by heart; language that gives them 100% discretion to detain anyone – despite any constitutional or statutory right to bail.

The Third Line: But Money Cannot Be Used to Detain Someone on Purpose

The third line of cases is comparatively rare (that is, compared to the flood of cases affirming money-based detention), but critical in understanding how the loophole works in practice; indeed, it is the only real guardrail we have to unlimited money-based detention despite state and federal prohibitions on excessive bail. This line of cases includes opinions that essentially hold that even though the second line of cases allows judges to set unaffordable bonds, they may not do so *with an express purpose to detain.* One can find these cases both in

[641] *In re Underwood,* 508 P.2d 721, 724 (Cal. 1973).
[642] The same rationale would be true for the nine states with only a statutory right to bail, if, indeed, they have language articulating detention eligibility.
[643] *See Money, supra* note 103, at notes 73-82 and accompanying text.

the federal[644] and state[645] systems. In many cases, the opinions are based on clear facts showing an express intent to detain. But a researcher can come to the conclusion that a state would adhere to the proposition simply by piecing

[644] The rationale behind the third line of cases in the federal courts is that using money to keep a person in jail on purpose is an "invalid" or improper purpose of bail. *See, e.g., Galen v. County of Los Angeles*, 477 F.3d 652, 660 (9th Cir. 2007) ("The court may not set bail to achieve invalid interests.") (citing *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987) (affirming a finding of excessive bail where the facts established the state had no legitimate interest in setting bail at a level designed to prevent an arrestee from posting bail); *see also Stack v. Boyle*, 342 U.S. 1, 10 (1951) (setting a financial condition in order to intentionally detain a defendant pretrial "is contrary to the whole policy and philosophy of bail.") (Jackson, J. concurring); *Bandy v. United States*, 81 S Ct. 197 (1960) ("It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom"). *Bandy's* precise phrasing has been used repeatedly in the states, and is clearly meant to focus on intent; because "excessive bail" is always unlawful, it would be unnecessary to add the phrase "to assure that a defendant will not gain his freedom" unless the focus was intent to detain. This can be seen from at least one opinion in which the rule was articulated in two different ways. *See Dubose v. McGuffey,* 179 N.E.3d 780, 784 (writing, "Yet a court may not impose excessive bail for the purpose of keeping an accused in jail. Keeping an accused in jail by excessive bail is as much a denial of his constitutional rights as refusing to fix bail" (internal quotation omitted), and "[I]t is unconstitutional to achieve a de facto denial of bail without satisfying the rules for a true denial of bail [under the state constitution].").

[645] The rationale behind the third line of cases in state courts most often focuses on the state constitution using the following logic: if judges are able to use money to intentionally detain a bailable defendant, that practice is either: (1) a dishonest way to detain persons when they might be honestly detained through the constitution; (2) adds an exception to the right to bail clause; or (3) ignores, if not negates, the "no bail" constitutional provision altogether, thus rendering it meaningless. See, e.g., *Torrez v. Whitaker*, 410 P.3d 201, 219 (N.M. 2018) ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release....") (citing other state cases); *Foreman v. State*, 875 S.W.2d 853, 854 (Ark. 1994) (judge reversed after asking defendant's counsel how much defendant can make, "so I can set it above what he can make"); *People v. Snow*, 173 N.E. 8, 9 (Ill. 1930) (judge reversed for stating, "If I thought he would get out on that I would make it more"); *State ex rel. Corella v. Miles*, 262 S.W. 364, 365 (1924) ("The bail bond must be fixed with a view to giving the prisoner his liberty, not for the purpose of keeping him in jail. If, in order to keep him in custody, the bond is ordered at a sum so large that the prisoner cannot furnish it the order violates [the right to bail under the Missouri Constitution]. For that is saying the offense is not bailable when the Constitution says it is."); *Gusick v. Boies*, 233 P.2d 446, 448 (Ariz. 1951) ("[E]xcessive bail is not to be required for the purpose of preventing the prisoner from being admitted to bail."). The issue can arise even in states with even the widest of constitutional detention provisions albeit limited by statute. *See Dominguez v. Cloutier,* 377 So.3d 1244, 1246 (Fla. D. Ct. App. 2024) (Ray, J., concurring) (granting habeas petition when State did not seek pretrial detention and judge, instead, set bail at unaffordable amount, writing: "[T]he pretrial detention statute cannot be circumvented through the imposition of an unachievable condition of release."). As mentioned in the text of this paper, delegates to the National Conference on Bail were briefed that American law prohibited using "bail" to detain. *See* Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964*, at 8 (DOJ/Vera Found., 1965) ("In sum, bail in America has developed for a single lawful purpose: to release the accused with assurance he will return at trial. It may not be used to detain, and its continuing validity when the accused is a pauper is now questionable."). Moreover, going back to the early 1960s, using money to intentionally detain a bailable defendant on purpose has been called "unlawful," "dishonest," an "end run" around the state constitution, an "abuse," a "game," and furthering an improper purpose of bail (i.e., detention) "sub rosa" or in secret. *See generally Determining the Meaning of a State's Constitutional Right to Bail Clause for Purposes of the Uniform Pretrial release and Detention Act,* at 42-51 (2021) found at http://www.clebp.org/uniformlawrighttobail.html. Its dishonesty is made more evident when, after two or three days, it becomes clear that the accused cannot possibly post the amount, thus leaving intent to detain as the only rational explanation. The loophole, which forces states to focus on intentionality, is key to understanding why this generation of reform, which mostly seeks intentionality at bail, likely makes the elimination or erosion of money bail inevitable.

together various quotes or cites arising in other contexts. For example, Colorado has no case directly on point and I assume that, as in many areas of bail law, Colorado would argue that it is not necessarily bound by any other indirect case, such as a federal circuit opinion from a circuit other than the Tenth. Nevertheless, Colorado does have cases explaining the importance of the right to bail, quoting both *Stack* and *Bandy's* release language, and citing to the ABA Standards release provisions. Moreover Colorado even has a federal district court opinion applying the federal test from *Galen v. County of Los Angeles* to Colorado, and actually quoting the language in which *Galen* writes that setting bail to detain is an "invalid interest" for purposes of excessive bail.[646] Piecing together an array of cases which, as a group, essentially affirm the same proposition that states have affirmed on more direct facts seems a hurdle easily met, simply because to say otherwise is to say that judges can literally ignore the state constitution.

This third line of cases also provides the rationale for a very important stance on what actually constitutes the right to bail in American states. While it could be correctly argued that the right to bail historically was a right to actual release, it is clear now that under the money-bail system, this is not the case as we see countless "bailable" persons in jail. Thus, people will often say that when you add money into the mix, the right to bail merely becomes a "right to have bail set." But this third line of cases from the excessive bail loophole makes it clear that the right to bail – while not technically a right to actual release unless and until the loophole is eliminated – should be read as the right to not only have bail set, but also *not to be detained on purpose outside of any set of charges listed as eligible for "no bail."* This is crucial to understand because there are many, many people in America currently designing release and detention models that allow for on-purpose detention "outside of the net" – that is, beyond the expressly listed exceptions to bail currently found in either a state constitution or statute.

Overall, the three lines of cases seem to articulate one basic premise when it comes to bail law, which is that when processes are used that make "bail"

[646] *See Abdul Muner Masad v. Nanney,* 2014 WL 4265848 (D. Colo., Aug. 27, 2014) (quoting *Galen v. County of Los Angeles,* 477 F.3d 652, 660 (9th Cir. 2007)).

indistinguishable from "no bail," then those processes will be deemed unlawful. Thus, a judge cannot deny bail to a "bailable" defendant, for to do so makes bail and "no bail" the same. Also, judges can set an unaffordable bail bond, but not if it is set with a purpose to detain; otherwise, once again, bail becomes indistinguishable from "no bail" (but for a meaningless "order of release"). Indeed, cases from line number three are absolutely necessary to allow cases from line number two to exist; without some limit, cases from line number two would render "bail" to be no different from "no bail." In those states that have yet to directly rule on whether a particular bond has been set with an intent to detain, the rule of thumb must be that the more "bail" looks like "no bail," the more likely a particular bail setting will be deemed unlawful.

The Future of the Loophole

In sum, the entire money-based bail system is propped up by the excessive bail loophole. Primarily created through caselaw, it allows judges to detain using money *so long as* they do not expressly articulate an intent to detain or do other things that *clearly* demonstrate intent to detain. The ability to detain *by merely thinking about it* but not articulating it or engaging in activity showing intent to detain is a convenient way to: (1) avoid the historic rule at bail requiring the release of bailable defendants; and (2) ignore current state constitutional detention provisions, which – at least – provide for a detention process with some due process protections, if only to require a judge to assess some level of risk. The loophole makes detention easy, and it has been used frequently, if not exclusively in certain states since the 1800s.

Nevertheless, this is not what America's founders wanted when they enacted their first constitutional release and detention provisions, some of which exist in their original form today. Those provisions, called by some "consensus" provisions[647] or "dissenter" provisions,[648] were crafted specifically "to limit the

[647] See generally, Matthew Hegreness, *America's Fundamental and Vanishing Right to Bail,* 55 Ariz. L. Rev. 909 (2013).
[648] *Founding, supra* note 289, at 1842-45.

discretionary bailing power" of judges "to assure criminal defendants a right to bail in noncapital cases."[649] Contrary to this founding notion, the excessive bail loophole provides 100% discretion to detain, so long as the bail-setter makes no record of intentional detention.

Perhaps more importantly (and as mentioned briefly before), the loophole has also provided a legal gloss of legitimacy to money-based detention, clouding the fact that it should never have been allowed in the first place. What was once clearly seen as unlawful (or, at least highly inappropriate except in the most exceptional circumstances) – that is, having "bailable" persons in jail – now has a multitude of excessive bail appellate cases affirming money-based detention and finding no constitutional violation. For at least the last one hundred years, Americans have become overly accustomed to: (1) judges setting "high bail" that results in detention (to the point of believing that money fosters public safety); (2) permitting the detention of "bailable" persons, which is an historical anomaly; (3) allowing judges (or a bail schedule) to detain without any record of reasons; and (4) constantly ignoring their own constitutional or statutory right to bail provisions.

As I have written in the main body of this paper, however, in this wave of reform we see a variety of ways in which the loophole is being eroded, from litigation to social science research. In short, anything done either to reduce or eliminate money's ability to detain or to increase intentionality in the bail process erodes the loophole. That erosion, in turn, requires jurisdictions to seek other methods for intentional detention, which brings them to their constitutional, statutory, or court rule articulations of on-purpose release and detention. And most everyone who has looked at that language describing the other methods in their particular state has found it to be insufficient to the task of safe, fair, and transparent pretrial detention due to being antiquated with flawed assumptions.[650] The

[649] Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L. J. 1139, at 1162 -64 (1971-72).
[650] Occasionally states look at their constitutional "no bail" provisions and find that they are acceptable. After months working with the state of California, and after expressly discussing the various options for amending its constitutional provision, the task force making recommendations to the Supreme Court specifically referenced the existing California constitutional bail provisions as providing a "bedrock of a reformed pretrial system" (and

fundamental point is that the essence of this wave of bail reform appears to be reducing money and increasing intentionality. If true, then every state will face the dilemma of possibly amending certain foundational laws allowing for intentional release and detention without money.

And, indeed, we are seeing both the reduction of money's ability to detain and the increase of intentionality happening right now. This is due to a variety of pressures, including: (1) lawsuits based on due process and equal protection claims; (2) lawsuits based on excessive bail (such as those using federal or state law forbidding setting money bail designed to detain); (3) lawsuits based on state right to bail clauses or other existing state laws; (4) legislatures or courts forbidding or limiting certain practices surrounding money, such as by requiring due process hearings, ability to pay findings, or meaningfully favoring "least restrictive" conditions; (5) pressure from stakeholders arguing that money amounts are arbitrary and thus unlawful; (6) pressure from stakeholders concluding that money does not work to achieve lawful goals; (7) pressure from civil rights organizations, grass roots groups, and affected persons concluding that money bail does not work and harms communities; (8) pressure from the mounting social science research showing the detriments of unnecessary pretrial detention and that money actually does not work even to motivate behavior for released persons; and (9) more specifically, pressure from research showing that unnecessary money-based detention actually makes communities *less safe* by increasing crime both short and long-term. All of these pressures point to a more intentional process using less money. Accordingly, it becomes much harder for judges to set unaffordable bail bonds, let alone to set them and then act as though it was not set to detain on purpose.

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implicitly finding those provisions adequate by not recommending their revision), but with "comprehensive" changes to statutes and court rules. *See* Pretrial Detention Reform Workgroup, *Pretrial Detention Reform: Recommendations to the Chief Justice,* at 56 (2017), found at https://courts.ca.gov/sites/default/files/courts/default/2024-08/pdrreport-20171023.pdf. I surmise that this is because, unlike so many other state constitutional bail clauses, the main California bail provision is already articulated in roughly the same way recommended by this and other papers. This is not to say that everyone in California is pleased with certain aspects of that constitutional provision and will not seek to amend it later. In fact, I believe that there is a high probability for future amendment.

We can see this process playing out now in the states. Indeed, the erosion of the loophole is the reason that nearly 25% of states with constitutional right to bail clauses have changed or attempted to change them *in just the last two years*, albeit with little or no guidance as to proper template language. The body of this paper seeks to summarize both the process and substance of changes to bail laws in order to oversee the replacement of the loophole with a bipartisan intentional release and detention provision. It is urgent that we learn how to do it.