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Reforming State Bail Reform

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REFORMING STATE BAIL REFORM

Shima Baradaran Baughman, Lauren Boone,** & Nathan Jackson****

We are waist-deep in the third wave of bail reform. Scholars, policy makers, and the public have realized that the short period of detention before trial creates ripple effects on a defendant's judicial fate and has lasting impacts on our system of mass incarceration. Over 200 proposed bail bills are pending throughout the states. This is not the first period of bail reform in America—two previous waves of bail reform in the 1960s and 1980s have both ended in increased pretrial detention for defendants. Some of the recent efforts in the third wave of bail reform have also increased detention in different states and have caused other unanticipated problems. This invited piece aims to create a relatively short guide for those contemplating the best path to reform bail. It lays out steps to reform state bail reform efforts by focusing on seven considerations often neglected in bail reform discussions.

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INTRODUCTION

BAIL, or pretrial detention reform, is sweeping the nation as we are currently in the “third” wave of American bail reform.¹ There has been a realization in the last ten years that the initial decision to incarcerate someone—even for a few days—has a substantial impact on whether they are incarcerated long term, whether they maintain a job and home,² and whether they are able to appropriately defend their case.³ In part due to advocacy efforts, attempts to cut criminal justice costs, and the pressure of civil rights litigation, states and counties have championed various bail reform efforts in their jurisdictions.⁴ In the last

1. Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 949, 1012 (2020) (discussing the various bail reform efforts states and cities have undertaken in recent years with the current third wave of bail reform particularly focused on implementing pretrial risk assessments).

2. See Bruce Western, Jeffrey R. Kling & David F. Weiman, *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQUENCY 410, 411 (2001) (noting that the stigma of incarceration makes ex-inmates unattractive across many sectors of the job market, and such effects can be seen from as early as juvenile delinquency); Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 92 n.121 (2019) (citing Michael Mueller-Smith, *The Criminal Labor Market Impacts of Incarceration* 3, 18 (Aug. 18, 2015) (unpublished manuscript), <https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf> [<https://perma.cc/2WU9-XZBJ>] (noting a “clear positive relationship between incarceration and recidivism and a negative relationship between incarceration and future employment” and highlighting that “[e]ach additional year behind bars reduces post-release employment by 3.6 percentage points” and that “[a]mong felony defendants with stable pre-charge earnings incarcerated for one or more years, post-release employment drops by at least 24 percentage points”). See generally Hensleigh Crowell, *A Home of One’s Own: The Fight Against Illegal Housing Discrimination Based on Convictions, and Those Who are Still Left Behind*, 95 TEX. L. REV. 1103, 1104 (2017) (discussing housing discrimination against people with criminal convictions, the effects of unstable housing or homelessness on previously incarcerated individuals, and its connection to recidivism).

3. See Paul Nieuwbeerta, Daniel S. Nagin & Arjan A.J. Blokland, *Assessing the Impact of First-Time Imprisonment on Offenders’ Subsequent Criminal Career Development: A Matched Samples Comparison*, 25 J. QUANT. CRIM. 227, 228 (2009) (arguing that the experience of imprisonment reduces an incarcerated individual’s legal prospects, which “in turn may cause imprisonment to increase rather than decrease the imprisoned offenders’ future criminal involvement”); Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, 31 CRIM. JUST. POL’Y REV. 1015 (2019), <https://journals.sagepub.com/doi/full/10.1177/0887403419838020> [<https://perma.cc/49EQ-EFV2>] (“[Pretrial] detainees plead guilty 2.86 times faster than defendants released pretrial do.”); Press Release, Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, Prison Pol’y Initiative (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html> [<https://perma.cc/NN8S-SMHU>].

4. See *Bail Reform*, CTR. FOR CT. INNOVATION, <https://www.courtinnovation.org/areas-of-focus/bail-reform> [<https://perma.cc/2ZCL-GEKW>]; *Bail Reform*, ACLU, <https://www.aclu.org/issues/smart-justice/bail-reform> [<https://perma.cc/J8NE-2TBB>]; *New York’s New Bail Reform Model: The Next Wave of Bail Reform Goes Beyond Ending Money Bail*, VERA INST., <https://craft2.vera.org/state-of-justice-reform/2019/bail-reform> [<https://perma.cc/YH2H-LHCT>]; Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1403 & nn.9–11, 1404 & n.15 (2017) (outlining various bail reform advocacy efforts); Laura I. Appleman, *Nickel and Dimed Into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1485 (2016) (describing how financial “innovations” surrounding bail have “metastasized” “criminal process into a booming source of revenue for state courts and corrections departments”); SHIMA BARADARAN BAUGHMAN,

ten years, some cities have abolished money bail altogether,⁵ some have instituted risk assessments to increase data-driven release decisions by judges,⁶ and others have increased the role of pretrial release supervision.⁷

THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 170 (2017) (highlighting the work of Equal Justice Under Law who filed ten class action challenges to the constitutionality of commercial money bail); *Challenging the Money Bail System*, CIV. RTS. CORPS, <https://www.civilrightscorps.org/work/wealth-based-detention> [<https://perma.cc/5SVY-9V67>] (providing a list of ongoing bail related litigation across various states); *ACLU Files Federal Class Action Lawsuit Challenging Discriminatory Cash Bail System That Punishes Poor People in Detroit*, ACLU (Apr. 14, 2019), <https://www.aclu.org/press-releases/aclu-files-federal-class-action-lawsuit-challenging-discriminatory-cash-bail-system> [<https://perma.cc/GE9Q-56PP>].

5. BAUGHMAN, *supra* note 4, at 171 (noting that cash bail has been abolished in cities in Alabama, Kansas, Mississippi, and Louisiana); Pretrial Fairness Act, H.B. 3347, 101st Gen. Assemb., Reg. Sess. (Ill. 2021) (abolishing monetary bail in Illinois); Yiming Fu, *Pretrial Fairness Act Would Make Illinois First State to Abolish Cash Bail*, DAILY NW (Jan. 21, 2021), <https://dailynorthwestern.com/2021/01/21/top-stories/pretrial-fairness-act-would-make-illinois-first-state-to-abolish-cash-bail> [<https://perma.cc/NXE6-XTPB>] (reporting on the Illinois legislature's passing the bill that was signed by the governor on February 22, 2021); *see also Illinois Becomes First State to Commit to Eliminating Cash Bail*, NBC (Feb. 22, 2021, 10:31 PM), <https://www.nbcchicago.com/news/local/illinois-becomes-first-state-to-eliminate-cash-bail/2444424> [<https://perma.cc/BPT9-DJ6Q>]; Public Act 101-0652, H.B. 3653, 101st Gen. Assemb., Reg. Sess. (Ill. 2021). As of January 17, 2020, Kentucky's Department of Public Advocacy (Kentucky's public defender system) petitioned the Kentucky Supreme Court on this issue asking the court to "enter an order directing the Court of Justice to refrain from using money bail in any case involving an indigent person, unless there is a finding by clear and convincing evidence that the individual presents a danger to the community." *See* WHAT'S HAPPENING IN PRETRIAL JUSTICE, PRETRIAL JUST. INST. 2 (2021). Oregon still allows cash bail, although Oregon's Metropolitan Public Defender (the largest public defender in the state) has launched a concerted campaign aimed at ending cash bail. *Oregon: State-wide Bail*, CIV. RTS. CORPS, <https://www.civilrightscorps.org/work/wealth-based-detention/oregon-state-wide-bail> [<https://perma.cc/53NN-L3RX>]. California attempted to abolish cash bail. *See* S.B. 10, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018) (disapproved in Nov. 3, 2020 Referendum); Patrick McGreevy, *Prop. 25, Which Would Have Abolished California's Cash Bail System, Is Rejected by Voters*, L.A. TIMES (Nov. 4, 2020 8:49 AM), <https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-25-results> [<https://perma.cc/JG27-XDU7>]. *See generally* Adam Peterson, *The Future of Bail in California: Analyzing SB 10 Through the Prism of Past Reforms*, 53 LOY. L.A. L. REV. 263 (2019) (examining California's criminal justice reform efforts through analysis of SB 10, the California Money Bail Reform Act of 2017).

6. *See, e.g.*, CHRISTINE BLUMAUER, ALESSANDRA BROWN, MARIELLA CASTALDI, SELEEKE FLINGAI, PHILLIP HERNANDEZ, STEFANIE MAVRONIS, KATIE PIERCE, TOM STANLEY-BECKER & JORDAN STOCKDALE, *ADVANCING BAIL REFORM IN MARYLAND: PROGRESS AND POSSIBILITIES* 23 (2018), https://spia.princeton.edu/sites/default/files/content/Advancing_Bail_Reform_In_Maryland_2018-Feb27_Digital.pdf [<https://perma.cc/5AHF-BC6P>] (noting that "[r]isk assessment tools are cornerstones of many successful bail reform efforts across the country"); *Release Assessment* N.Y. CITY CRIM. JUST. AGENCY, <https://www.nycja.org/release-assessment> [<https://perma.cc/2LMA-NPA2>] (describing the risk assessment tool used by the CJA which has resulted in "NYC releas[ing] more defendants without monetary conditions than any other big city in the country"); STATE OF N.J. DEP'T OF L. & PUB. SAFETY, *UNIFORM CRIME REPORT: JANUARY – DECEMBER – 2017* (May 4, 2018), https://www.njsp.org/ucr/pdf/current/20180504_crimetrend_2017.pdf [<https://perma.cc/7Q9C-BLWB>] (New Jersey reform efforts included a risk assessment to evaluate releases with positive results including low rearrest rates and high appearance in court rates.).

7. *See, e.g.*, PRETRIAL JUST. INST., *THE STATE OF PRETRIAL JUSTICE IN AMERICA* (2017), https://www.prisonpolicy.org/scans/pji/the_state_of_pretrial_in_america_pji_2017.pdf [<https://perma.cc/7GBV-SEYT>] (highlighting Washington, D.C.'s implementation of

This is not the first attempt to reform bail in America, and perspective on our current situation might help us avoid the mistakes of the past. In the 1960s and 1980s, advocates attempted to improve pretrial release and reduce the use of money bail. These efforts culminated in two rounds of national bail reform legislation that actually expanded the legitimate ways to detain defendants pretrial.⁸ While judges in the 1950s could not order the detention of an individual before trial unless they were a flight risk or were charged with a capital offense, judges gained a multitude of other reasons through the 1960s and 1980s to detain individuals before trial in the name of “preventative detention.”⁹ As no one at the time predicted, these latter two waves of bail reform opened the way to increased detention.¹⁰ Efforts of the bail industry lobby starting in the 1990s increased detention even further.¹¹

To illustrate how dramatic the change was, from 1970 to 2017, the num-

a pretrial services agency, which employs graduated supervision levels for pretrial release with a demonstrated high success rate; noting also that the D.C. Pretrial Services Agency operates 24 hours and reports that 89% of arrested people released before trial are not arrested for new charges while their cases are adjudicated and 98% are not arrested on a crime of violence while in the community pending trial); RICHARD WILLIAMS, NAT'L CONF. OF ST. LEGIS., BAIL OR JAIL 30 (2012), https://www.ncsl.org/Portals/1/Documents/magazine/articles/2012/SL_0512-Jail.pdf?ver=2012-04-16-110023-847 [<https://perma.cc/X5N4-98QF>] (noting Kentucky increased pretrial services and eliminated money bail); *Criminal Justice Reform: Pretrial Services Program*, N.J. JUDICIARY, https://www.njcourts.gov/forms/12088_cjr_pretrial_svcs_brochure.pdf [<https://perma.cc/WK3H-GWDA>] (noting New Jersey implemented pretrial services to ensure quick release and proper pretrial monitoring); POLICE EXEC. RSCH. F., NEW CHALLENGES AND PROMISING PRACTICES IN PRETRIAL RELEASE, DIVERSION, AND COMMUNITY-BASED SUPERVISION (2020) (discussing Davidson County, Tennessee's reforms that increased automation, standardized risk assessments and expanded options for community-based supervision of low risk defendants with results of increased pretrial release to 73% with declining jail populations of 32% and a cost savings of 2.7 million in 2018).

8. BAUGHMAN, *supra* note 4, at 22–27. Where historically pretrial detention was permitted only for a defendant posing a flight risk or charged with a capital crime, during these “bail reform” periods, courts began detaining defendants who posed a safety risk and those who had substantial evidence against them of a serious crime.

9. *See id.*; An Act To Revise Existing Bail Practices in Courts of the United States, and for Other Purposes, Pub. L. No. 89–465, 80 Stat. 214–17 (1966) (permitted judges to consider such factors as “the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused’s family ties, employment, financial resources, character and mental condition, the length of [his] residence in the community, his record of convictions, and his record of appearance at court proceedings”); Joint Resolution: Making Continuing Appropriations for the Fiscal Year 1985, and for Other Purposes, H.R.J. Res. 648, 98th Cong. (1984) (adding factors that judges may consider including, “past conduct, history relating to drug or alcohol abuse, criminal history,” and “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release”).

10. Shima Baradaran Baughman, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 738–54 (2011) (outlining the changes to federal pretrial law from the 1960s through the 1980s and the ensuing results, including increased detention); BAUGHMAN, *supra* note 4, at 44–45 (documenting the third wave of bail reform, the shift to a risk-based system). Between the years of 2000 to 2016, pre-disposition inmates accounted for 95% of the total jail population increase. ZHEN ZENG, U.S. DEP’T. OF JUST., JAIL INMATES IN 2016 (2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> [<https://perma.cc/E2QW-2DKU>].

11. BAUGHMAN, *supra* note 4, at 27.

ber of people detained in jails prior to conviction rose by 433%.¹² State pretrial detention rates climbed 77% from 1990 to 2019, and federal rates rose 20% over a similar time period.¹³ The number of people incarcerated in U.S. jails before conviction for the same time frame has increased by 131.8%.¹⁴ State detention rates were about 40% on average between the years 1990 and 2004.¹⁵ High pretrial detention continues to persist with pretrial detainees accounting for a reported 74% of the nation's jail population as of 2020.¹⁶

The current third wave of bail reform is on its way to the same fate as the last two iterations. There are over 200 pending bail bills among the states,¹⁷ as well as a Uniform Law Commission proposal aiming to reform

12. LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 1 (2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf> [<https://perma.cc/JJN3-44AS>].

13. ZHEN ZENG & TODD D. MINTON, U.S. DEP'T OF JUST., JAIL INMATES IN 2019 3, 5 tbl.3 (2021), <https://www.bjs.gov/content/pub/pdf/ji19.pdf> [<https://perma.cc/4JQ4-G5GQ>]; *QuickFacts*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/US/RHI825219> [<https://perma.cc/WAC8-7SN2>] (the rate of the unconvicted population in jails per 100,000 Americans is calculated as follows: (Unconvicted / Total US Population)*100,000 = Unconvicted in jail per 100,000. For 2019: (480,700 / 328,239,523)*100,000 = 146.45 per 100,000 in 2019); DARRELL K. GILLARD & ALLEN J. BECK, U.S. DEP'T OF JUST., PRISON AND JAIL INMATES, 1995, at 11 tbl.13 (1996), <https://www.bjs.gov/content/pub/pdf/PJ195.PDF> [<https://perma.cc/EMA5-8JHU>]; *By Decade: 1990*, U.S. CENSUS BUREAU (Apr. 1, 1990), <https://www.census.gov/programs-surveys/decennial-census/decade.1990.html> [<https://perma.cc/A5FF-LY35>] (For 1990: (207,358 / 248,709,873)*100,000 = 83.37 per 100,000 in 1990. The change from 83.37 to 146.45 is an increase of 75.66%, rounded to 77%). Between 1995 and 2010 alone, the percentage of federal defendants detained pretrial rose from 59% to 79%. THOMAS H. COHEN, U.S. DEP'T OF JUST., PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995-2010 1 (2013), <https://www.bjs.gov/content/pub/pdf/pdmfcd9510.pdf> [<https://perma.cc/6TRP-FPYR>] (noting that in recent years, some federal courts report pretrial detainee populations of over 80% with New Jersey, North Dakota, and Nebraska reporting 82%, 84%, and 87% percent respectively).

14. GILLARD & BECK, *supra* note 13, at 11 tbl.13; ZENG & MINTON, *supra* note 13, at 5 tbl.3 (in 2019 the number incarcerated but not convicted was 480,700). This is a 131.92% increase $[(480,700 - 207,358)/207,358] * 100 = 131.92\%$ increase).

15. See THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUST., STATE COURT PROCESSING STATISTICS, 1990-2004: PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/T23N-7KMF>]; Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POL'Y INITIATIVE (May 31, 2017), <https://www.prisonpolicy.org/reports/jailovertime.html> [<https://perma.cc/3B45-LM4E>] (reporting jail trends by state).

16. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html#slide-show/slideshow1/2> [<https://perma.cc/PSS3-D7BS>].

17. See Baughman, *supra* note 1, at 1022 n.442 (providing instructions for locating this figure via the National Conference of State Legislatures database); see also *The Bail Project Applauds Introduction of 'Zero-Dollar' Bail Legislation*, THE BAIL PROJECT (Jan. 27, 2021), <https://bailproject.org/the-bail-project-applauds-introduction-of-zero-dollar-bail-legislation> [<https://perma.cc/9UXD-HELW>] (celebrating California SB 262 and AB 329, which would reset the presumptive bail amounts to zero for most misdemeanor or low-level felony offenders); PRETRIAL JUST. INST., WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING 4-9 (2019), https://www.prisonpolicy.org/scans/pji/where_pretrial_improvements_are_happening_jan2019.pdf [<https://perma.cc/9LJ3-MNJX>] (providing a list of recent efforts on pretrial litigation including descriptions of both recently passed bills and proposed bills).

pretrial detention.¹⁸ Cities and states who have adopted risk instruments have seen increased detention pretrial.¹⁹ The infamous California money bail bill started as an ambitious effort but became marred in political compromises.²⁰ And a recent Uniform Law Commission Pretrial Release & Detention Act (the ULC Act) may lead to increased detention.²¹ The ULC Act is the latest attempt at bail reform, and while it takes several important steps in the right direction, it is missing some key elements to reducing detention rates nationwide. We will discuss this bill as an example in various sections addressed in this piece.

There are certainly many shortcomings in current bail legislation, and many of these have been addressed by top scholars and advocates across the country.²² The purpose of this piece is not to discuss in detail any

18. UNIF. PRETRIAL RELEASE & DETENTION ACT (UNIF. L. COMM'N 2021) [hereinafter ULC Act].

19. Baughman, *supra* note 1, at 984 (“[R]isk assessments are increasingly being applied as an improvement to money bail but sometimes end up treating misdemeanors like felonies and leading to increased detention for misdemeanor offenses, or failing to reduce detention overall.”); see Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 355 (2018) (providing data illustrating the decrease in non-financial pretrial release (i.e., increase in detention) in Kentucky with the adoption of the Public Safety Assessment tool); DAVID G. ROBINSON & LOGAN KOEPKE, UPTURN, INC., CIVIL RIGHTS AND PRETRIAL RISK ASSESSMENT INSTRUMENTS 3 (2019), <https://www.safetyandjusticechallenge.org/wp-content/uploads/2019/12/Robinson-Koepke-Civil-Rights-Critical-Issue-Brief.pdf> [<https://perma.cc/6PQY-VCR9>] (“[I]t remains unclear whether [risk assessment] tools typically cause substantial and lasting reductions in jailing.”).

20. S.B. 10, 2017-2018 Leg., Reg. Sess. (Cal. 2018) (repealing bail procedures based upon risk assessments of defendants and that eliminated monetary bail).

21. Examples of jurisdictions that have adopted bail reform bills that have either increased or failed to reduce detention rates include Kentucky, Virginia, Utah, New Jersey, Colorado, and California. For further explanation, see Baughman, *supra* note 1, at 1014–22; ULC Act, *supra* note 18.

22. See Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 683 (2018) [hereinafter Gouldin, *Defining Flight Risk*] (discussing the needed “nuance in the definition of nonappearance and flight, both in actuarial risk-assessment tools and in bail reform efforts more broadly”); Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 861 (2020) [hereinafter *Reforming Pretrial Decision-Making*] (discussing the history of bail reform and noting that “[w]hile some reforms have placed limits on judicial power, most have not significantly reduced judicial discretion over pretrial decision-making”); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 590 (2017) (discussing the effect of recently established community bail funds on the pretrial money bail system); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715–16 (2017) (addressing the profound consequences of pretrial detention for misdemeanor offenses both within and beyond the criminal justice system); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1303 (2012) (discussing the abuses of pretrial detention as punishment, resulting from the failures of the 1984 Bail Reform Act and dangerousness evaluations); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 425 (2016) (discussing the impact of judicial discretion on the current bail system and proposing judicial discretion be replaced with “bail guidelines” to determine whether defendants should be released); Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 148 (2021) (arguing that “that the reduction or eradication of monetary bail alone has not, and will not, ensure a fair and unbiased system of pretrial detention”); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1416 (2017) (providing a broad conceptual framework for how policymakers can design a better bail system by weighing both the costs and benefits of pre-trial detention); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 507 (2018) (addressing bail reform’s failure to assess defendants’ crime risk and dangerousness as equal to that of non-

particular reform strategy, but to provide jurisdictions considering bail reform a guide to follow comprised of our research as well as that of many others. Most of the reforms that we highlight are not discussed with any theoretical or empirical rigor. In this invited symposium piece, rather than providing meaningful depth, we hope to instead provide some brief insights on some of the key factors missing in bail reform.

This Article discusses several important considerations in state bail reform legislation. Although neither exhaustive nor complete, this Article aims to cover some of the key areas to address for meaningful pretrial detention reform. All of these factors are important to reforming state bail reform legislation. First, states must change the underlying presumptions pretrial from detention to release. In other words, the presumption of innocence must prevail pretrial unless it is impossible to release an individual safely. Second, states must ensure representation for detained individuals for all pretrial hearings, including the first pretrial release hearing. Third, they must implement more robust data tracking to facilitate the development of more accurate and less discriminatory pretrial reports and risk assessment instruments for evaluating pretrial release. Studying all pretrial instruments to determine whether any bias results should be a regular part of pretrial practice. Fourth, states must acknowledge the difference between flight and nonappearance and refuse to detain individuals for a failure to appear. Fifth, they must eliminate cash bail and replace it with release on recognizance, monitoring with pretrial services or electronic monitoring when absolutely necessary, or conditional release. Sixth, they must ensure pretrial reform does not violate constitutional due process of law principles, including judicial pretrial fact-finding. Finally, they must create a narrow detention net with the ultimate goal of release, only detaining defendants who are determined to be impossible to release safely pretrial. We attempt to highlight key issues of pretrial detention reform that are missing from current models in an attempt to avoid the bail reform mistakes of the past.

Most importantly, we hope that jurisdictions considering bail reform will first set a proper detention net—one that is narrow and allows presumptive pretrial release (without a hearing) for the vast majority of accused individuals. The first and last principles will discuss this important proposed reform. If due process and the presumption of innocence are maintained and if the presumption is to release, the law must make it difficult to detain an individual before trial, not the opposite. Therefore, rather than adding factors for judges to consider pretrial and allowing a potentially random determination, jurisdictions should set a protocol that allows release for all individuals except those who fall in the detention net due to a substantial burden of releasing the individual safely. The

defendants, while imposing harsher pretrial restraints); 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, 803 (2020); Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 756 (2020).

detention net should be narrow and aim to only capture those individuals who pose a significant public safety threat to specific individuals that cannot be managed through pretrial conditions. Those who are charged with misdemeanors or nonforcible felonies²³ should not be captured in the detention net, as it should only capture individuals charged with forcible felonies (i.e., serious felonies usually perpetrated with violence) who have a history of violent crime.²⁴ The remainder of this invited piece explains this detention net and other common problems in bail reform legislation. In order to avoid the mistakes of the prior waves of bail reform, we must realize that adding new factors or new data tools will not improve pretrial release rates. The overarching pretrial reform that can help improve pretrial release is a presumption of release for most defendants (felony and misdemeanor) with a shallow detention net for the most dangerous defendants.²⁵

I. CHANGING PRESUMPTION TO RELEASE PRETRIAL

Ideally, pretrial release legislation creates a presumption or default of release, where the government has to show substantial cause to detain an individual pretrial or set conditions on release. One common problem with pretrial legislation is that the presumption is typically detention, not release.²⁶ Most individuals should be released on their own recognizance

23. We refer to forcible felonies throughout this piece. The definition of a forcible felony will vary across jurisdiction, but generally these include very serious felony offenses. For example, forcible felonies in Illinois include “treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual.” 720 ILL. COMP. STAT. ANN. 5/2-8 (LexisNexis 2012).

24. See Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 544–45 (2012) (noting that defendants below forty years of age present a higher risk of pretrial crime). Illinois’s recently adopted bail reform act is a good example of limiting its detention net to violent forcible felonies and a variety of other felonies only where there is a “real and present threat to the physical safety of any person or persons.” Public Act 101-0652, H.B. 3653, 101st Gen. Assemb., Reg. Sess. § 110-4.1(c) (Ill. 2021).

25. See Open Letter from James Austin, Ph.D., JFA Inst., Sarah L. Desmarais, Ph.D., N. Carolina St. Univ. & John Monahan, Ph.D., Univ. of Virginia Sch. of Law, to Pretrial Justice Inst., [hereinafter Open Letter from James Austin] http://www.gopopai.org/docs/2020/article_item/Open_Letter_to_the_Pretrial_Justice_Institute.pdf [https://perma.cc/D6VF-ELWK] (“Given that most detained defendants are suitable candidates for release based on the criteria of flight risk and danger to the community, there should be a presumption of release.”). See generally MELISSA HAMILTON, NAT’L ASS’N CRIM. DEF. LAW., RISK ASSESSMENT TOOLS IN THE CRIMINAL LEGAL SYSTEM – THEORY AND PRACTICE: A RESOURCE GUIDE (2020), <https://www.nacdl.org/getattachment/a92d7c30-32d4-4b49-9c57-6c14ed0b9894/riskassessmentreportnovember182020.pdf> [https://perma.cc/35NA-9Z4S].

26. See Baughman, *supra* note 1, at 1022–24 (explaining that recent bail reform has failed to incorporate a presumption of release). For example, Utah presumes an individual’s pretrial detention if the individual has committed certain felonies, the “prosecution demonstrates substantial evidence to support the charge, and meets all additional evidentiary burdens,” or “the court finds that no conditions that may be imposed upon granting the individual pretrial release will reasonably ensure” the individual’s court appearance, the safety of others, or no obstruction of justice. UTAH CODE ANN. § 77-20-1(7)(a)–(c)

(with no conditions) from the police station before a court hearing. For those who are charged with forcible violent felonies, the government should suggest conditions for release, or the court should impose such conditions on its own accord.²⁷ Only if there are no conditions that allow safe release should a person be detained pretrial. Also, the factors considered by judges should be limited to prohibit finding any facts pretrial.²⁸

Accordingly, a bill has a presumption of release when most individuals are released from the police station or, in instances where the crime is a forcible felony, the individual is released unless the government can show that the individual poses a significant risk to public safety by clear and convincing evidence. The Federal Bail Reform Act of 1984 has rebuttable presumptions in the wrong direction for many federal crimes, not just the most serious crimes.²⁹ For example, the burden to produce evidence rests

(West 2020). The statute fails to create a presumption of a defendant's release and to place the burden of proving detention necessary, by a clear and convincing standard, upon the government. *See id.*; *see also, e.g.*, N.J. STAT. ANN. § 2A:162-17(a) (West 2021) (authorizing detention without distinguishing between felony and misdemeanor charges, and allowing the court to issue a defendant's pretrial release, either on recognizance or on an unsecured appearance bond, at the court's discretion upon review of "any information that may be provided by a prosecutor or the eligible defendant," instead of requiring the prosecutor to prove detention necessary by a clear and convincing standard); IND. CODE ANN. § 35-33-8-3.8(a)–(b) (West 2017) (requiring the court only to "consider" the results of its pretrial risk assessment "if available" along with "other relevant factors" and allowing the court to "consider releasing" "an arrestee [who] does not present a substantial risk of flight or danger" based on those factors, rather than presuming an individual's release and placing the burden upon the government to show detention is necessary).

27. Public Act 101-0652, H.B. 3653, 101st Gen. Assemb., Reg. Sess. § 110-10(b) (Ill. 2021) ("The court may impose other conditions . . . if the court finds that such conditions are reasonably necessary to assure the defendant's appearance in court, protect the public from the defendant, or prevent the defendant's unlawful interference with the orderly administration of justice[.]"); *id.* § 110-2(b) ("Additional conditions of release . . . shall be set only when it is determined that they are necessary to assure the defendant's appearance in court, assure the defendant does not commit any criminal offense, and complies with all conditions of pretrial release.").

28. *See infra* Part VI.

29. 18 U.S.C. § 3142(e). The statute presumes pretrial detention of an individual if "no condition or combination of conditions will reasonably assure" either (1) the individual's appearance and the "safety of any other person and the community" or (2) "the safety of any other person and the community," based on certain offenses of the individual's prior criminal record. While the person may rebut this presumption, the statute nonetheless presumes such person's detention. This fails to align with the presumption of innocence. Instead, the statute should presume the person's release and place the burden upon the government. *See generally* Baughman, *supra* note 10; TIMOTHY R. SCHNACKE, CTR. FOR LEGAL AND EVIDENCE-BASED PRACTICES, "MODEL" BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION 41 (2017), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=E0ff560c-6de6-db75-02ea-2af46f94e875&forceDialog=0> [<https://perma.cc/8V4M-S9TF>] ("Even the federal government . . . has allowed the federal statute to lead to over-detention through a widening of the detention eligibility net and rebuttable presumptions in ways the Court might not approve today."). Section 3142(f) provides certain offenses and risks that require detention: (A) those charged with "a crime of violence, a violation of section 1591 [for sex trafficking of children or by force, fraud, or coercion], or an offense listed in section 2332b(g)(5)(B) [for acts of terrorism] for which a maximum term of imprisonment of ten years or more is prescribed; (B) an offense for which the maximum sentence is life imprisonment or death;" drug offenses which carry a maximum sentence greater than ten years; repeat felony offenders; "any felony that is not otherwise a crime of violence that involves

on the defendant, not the government, for many crimes.³⁰ There is little research on the effects of this presumption. However, one study on this issue found that this federal presumption has contributed to a “massive increase” in federal pretrial detention and “has become an almost de facto detention order for almost half of all federal cases.”³¹

A successful state bill must differ dramatically from the federal model if the goal is increasing pretrial release.³² Federal pretrial detention rates are much higher than state detention rates at around 70% federal detention (versus about 40% state detention) in the last twelve-month period ending September 30, 2020.³³ Under this current structure, the presumption is detention, not release. There are a few exceptions. Washington, D.C. presumes release for crimes except murder and assault with the intent to kill,³⁴ releasing more than 90% of defendants with extremely low rearrest rates while on release.³⁵ Illinois’s recent bail reform, the Pretrial

a minor victim or that involves the possession or use of a firearm or destructive device . . . , or any other dangerous weapon, or involves a failure to register . . . ;” or if the defendant poses a serious risk of flight, obstruction of justice, or attempt to threaten, injure, or intimidate a prospective witness or juror. 18 U.S.C. § 3142(f).

30. Once the presumption of detention is raised, the defendant has the burden to produce evidence to rebut both that he is neither a danger to the community nor a flight risk. *United States v. King*, 849 F.2d 485, 488 (11th Cir. 1988). If the defendant produces sufficient evidence, the government bears the burden of persuasion to prove either the defendant’s risk of flight by a preponderance of the evidence or his danger to the community by clear and convincing evidence. 18 U.S.C. § 3142(e). The government must establish only one of these potential instances, while the defendant must produce evidence to rebut both. Further, this presumption does not function like the typical rebuttable “bursting bubble” presumption; the defendant’s production of evidence does not burst or eliminate the rebuttable presumption. Instead, “it remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in § 3142(g).” *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986). Thus, the defendant has no true opportunity to rebut the presumption by producing evidence.

31. Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, 81 FED. PROB. J. 52, 61 (2017), https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf [<https://perma.cc/E8Q4-SBDZ>]. “[W]hen clearly defined, the presumption focuses primarily on drug offenses and excludes the majority of violent, sex, or weapons-related offenses.” *Id.* at 62. Due to the rise in drug prosecutions alone, “at least 42 percent of all federal cases in any given year are now subject to the presumption.” *Id.* Consequently, the number of federal defendants detained pretrial has dramatically increased, “reaching as high as 59 percent in [2016], after excluding immigration cases.” *Id.*

32. SCHNACKE, *supra* note 29, at 17 (“[B]ail defined as a process of release is the only definition that allows jurisdictions to re-articulate their release and detention processes without confusion . . . most of that confusion comes from the fact that many people (indeed, many courts and legislatures) define bail by one of its conditions – money.”).

33. *Table H-14: Pretrial Services Release and Detention For the 12-Month Period Ending September 30, 2020*, U.S. DIST. CTS. (Sep. 30, 2020), https://www.uscourts.gov/sites/default/files/data_tables/jb_h14_0930.2020.pdf [<https://perma.cc/HSL3-DSBX>] (indicating that 52,002 of 73,647 cases resulted in detention without release); *see also* sources cited *supra* note 13.

34. D.C. Code Ann. § 23-1322(e)(2) (West 2017) (if not charged with first- or second-degree murder or assault with the intent to kill a person is “released on personal recognition or upon execution of an unsecured appearance bond . . . released on a condition [or] . . . temporarily detained to permit revocation of conditional release or detained” (only after a hearing); *see also id.* § 23-1322(b)).

35. PRETRIAL JUST. INST., *supra* note 7, at 3 (noting Washington, D.C. releases 92% defendants pretrial). San Francisco provides another effective reform model. The city began using a validated risk assessment tool, implemented a pretrial diversion program, and

Fairness Act (the Illinois Act), also presumes release rather than detention for misdemeanor offenses.³⁶ Additionally, although felony arrests result in appearance before the court, the Illinois Act provides that the prosecution must file a verified petition with the court for defendants to have a detention hearing.³⁷ The Illinois Act also requires the government to prove by clear and convincing evidence that a person is not eligible for release.³⁸ Putting the onus on the government to demand release is likely to increase pretrial release rates in Illinois. New Jersey's law, which became effective in 2017, also applies similar procedural safeguards to provide presumption in the right direction by allowing release before or at the defendant's first appearance, unless the prosecutor files a motion of detention.³⁹ The ABA Pretrial Release standards also dictate that release

eliminated cash bail. The city's jail population decreased by 47% and its new criminal activity rate is 10%. See Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POLY INITIATIVE (Nov. 17, 2020), <https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases> [<https://perma.cc/JLN3-PAQK>]. A key component to its success may also be a well-funded, active pretrial services agency.

36. Public Act 101-0652, H.B. 3653, 101st Gen. Assemb., Reg. Sess. § 110-2(a) (Ill. 2021) ("It is presumed that a defendant is entitled to release on personal recognizance on the condition that the defendant attend all required court proceedings and the defendant does not commit any criminal offense, and complies with all terms of pretrial release"); *id.* § 110-4(a) ("All persons charged with an offense shall be eligible for pretrial release before conviction. Pretrial release may only be denied when a person is charged with an offense listed in Section 110-6.1 or when the defendant has a high likelihood of willful flight, and after the court has held a hearing under Section 110-6.1."); *id.* § 109-1(a-3) (stating that "[a] person arrested with or without a warrant for an offense for which pretrial release may not be denied may, *except as otherwise provided in this Code*, be released by the officer without appearing before a judge" (emphasis added)). While this does create a presumption for release, section 109-3 slightly limits the presumption by requiring the judge to "hold the defendant to answer to the court having jurisdiction of the offense if from the evidence it appears there is probable cause to believe an offense has been committed by the defendant . . . if the offense is a felony." *Id.* § 109-3(a). In contrast to the Illinois bill, a Delaware bill that became effective on July 30, 2021 had the opportunity to allow for release on personal recognizance, but failed to do so. The bill continues to allow for bail to be posted on individuals who are arrested and charged for any crime other than a capital crime. See DEL. CODE ANN. tit. 11, §§ 2105–2107.

37. *Id.* § 109-1(b) ("Upon initial appearance of a person before the court, the judge shall . . . admit the defendant to pretrial release in accordance with the provisions of Article 110/5 of this Code, or upon verified petition of the State, proceed with the setting of a detention hearing as provided in Section 110-6.1 . . .").

38. *Id.* § 110-6.1(e) ("All defendants shall be presumed eligible for pretrial release, and the State shall bear the burden of proving by clear and convincing evidence that: (1) the proof is evident or the presumption great that the defendant has committed an offense listed in paragraphs (1) through (6) of subsection (a) and, (2) the defendant poses a real and present threat to the safety of a specific, identifiable person or persons, by conduct which may include, but is not limited to, a forcible felony, the obstruction of justice, intimidation, injury, or abuse as defined by paragraph (1) of Section 103 of the Illinois Domestic Violence Act of 1986 and, (3) no condition or combination of conditions set forth in subsection (b) of Section 110-10 of this Article can mitigate the real and present threat to the safety of any person or persons or the defendant's willful flight.").

39. See N.J. CONST. art. 1, ¶ 11; 2014 N.J. Laws ch. 31; N.J. Ct. R. 3:1 to :4A. It reads: Under CJR, prosecutors may seek to detain defendants charged on a complaint-warrant without the opportunity for release. Pretrial detention motions are limited to indictable charges and domestic violence related disorderly persons charges. The prosecution has the burden to demonstrate that no combination of conditions or level of monitoring is sufficient to reasonably assure the safety of the community. If the prosecutor files a deten-

should be the presumption.⁴⁰ Effective state pretrial reform allows a presumption of release for all but a select few forcible felony defendants. To rebut the presumption of release, the government should be required to demonstrate through clear and convincing evidence (or another substantial standard of proof) that the defendant poses an unmitigated threat to specific individuals and must be detained.

The ULC Act is somewhat similar to the Illinois Act in the procedural framework that it sets for release. Like the Illinois Act, the ULC Act prohibits the arrest of individuals for misdemeanors and non-criminal offenses in certain situations.⁴¹ Additionally, both acts allow for release after arrest without judicial hearing, subject to the discretion of the authorized official who made the arrest.⁴² The ULC Act also provides

tion motion, a Superior Court judge holds a pretrial detention hearing—usually within three to five days of the filing—so that both the prosecution and defense can present evidence. If the court orders a defendant detained, CJR’s speedy trial law sets specific timeframes that require the case to proceed to indictment and trial. If those timeframes are not met, the defendant can be released from jail.

GLENN A. GRANT, N.J. JUDICIARY, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 34 (2019), <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?cTAP> [<https://perma.cc/77P2-3ZXL>]. For a visual guide of New Jersey’s pretrial detention, see Criminal Justice Reform: A Step-by-Step Guide, N.J. JUDICIARY, <https://njcourts.gov/courts/assets/criminal/cjrstepbystep.pdf?c=IAZ> [<https://perma.cc/85NJ-TLN5>].

40. The ABA specifically lists “detention as an exception to policy favoring release” and “limit[s] the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings.” See ABA, PRETRIAL RELEASE, AT STANDARD 10-1.6 https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk/#10-1.6 [<https://perma.cc/4JTK-C5FP>]. The ABA establishes “specific criteria and procedures for effecting the pretrial detention of certain defendants after the court determines that these defendants pose a substantial risk of flight, or threat to the safety of the community, victims or witnesses or to the integrity of the justice process. The status of detained defendants should be monitored and their eligibility for release should be reviewed throughout the adjudication period. The cases of detained defendants should be given priority in scheduling for trial.” *Id.*

41. ULC Act, *supra* note 18, § 201(c) (“If an offense under subsection (b)(2) is [a misdemeanor or non-criminal offense] [punishable by not more than [six months] in jail or prison], [an authorized official] may not arrest the individual unless: (1) the offense is [insert the offenses or offense types for which the state chooses to authorize arrest]; (2) the individual fails to provide adequate identification, orally or through documentation, as lawfully requested by [the authorized official]; (3) the individual is in violation of a condition or order of probation, [parole], or release; or (4) [the authorized official] reasonably believes arrest is necessary to: (A) safely conclude [the authorized official’s] interaction with the individual; (B) carry out a lawful investigation; (C) protect a person from significant harm; or (D) prevent the individual from fleeing the jurisdiction.”); Public Act 101-0652, H.B. 3653, 101st Gen. Assemb., Reg. Sess. § 109-1(a-1) (Ill. 2021) (“Law enforcement shall issue a citation in lieu of custodial arrest, upon proper identification, for those accused of traffic and Class B and C criminal misdemeanor offenses, or of petty and business offenses, who pose no obvious threat to the community or any person, or who have no obvious medical or mental health issues that pose a risk to their own safety.”).

42. Compare ULC Act, *supra* note 18, § 203 (“[An authorized official] may release an individual after arrest and without a release hearing by issuing a [citation] under Section 201(a). [The authorized official] may require the individual to execute an unsecured appearance bond as a condition of release.”), with Public Act 101-0652 § 109-1(a-3) (“A person arrested with or without a warrant for an offense for which pretrial release may not be denied may . . . be released by the officer without appearing before a judge . . . A presumption in favor of pretrial release shall be applied by an arresting officer in the exercise of his

that individuals who are not released from the police station “[have] a right to be heard at a release hearing” where release is required unless “the court determines by clear and convincing evidence that the individual is likely to abscond, not appear, obstruct justice, violate an order of protection, or cause significant harm to another person.”⁴³

Despite the improvements from the federal system, which presumes detention, it is unclear whether the ULC Act will actually result in a presumption of release considering the discretion given to arresting officers and judges.⁴⁴ Additionally, the ULC Act could take additional steps to strengthen the presumption of release by requiring the prosecution to file a motion for detention, similar to the statutes in New Jersey and Illinois.⁴⁵

II. REPRESENTATION AT PRETRIAL RELEASE (BAIL) HEARING

Representation by legal counsel (or appropriate proxy)⁴⁶ for arrested persons at bail hearings (including release and detention hearings) is critical and should be mandatory. The justification for representation at a pretrial hearing includes substantial empirical evidence that pretrial counsel improves outcomes for defendants.⁴⁷ Defendants are more likely to be released and more likely to have a lower bail amount imposed.⁴⁸ Despite the benefit of legal counsel, substantially less than half of U.S. jurisdictions require counsel at the pretrial release determination.⁴⁹ Of

or her discretion under this Section.”). *See also* ULC Act, *supra* note 18, § 203 cmt. (permitting “policies and practices of ‘stationhouse release’—or release directly from a police station, booking facility, jail, or other law enforcement facility—without the need for a judicial hearing,” though also permitting the “imposition of an unsecured bond” as a condition of stationhouse release).

43. ULC Act, *supra* note 18, §§ 302(a), 303.

44. *See infra* Part VI. Furthermore, the entire citation and release section is optional. *See* ULC PRETRIAL RELEASE & DET. ACT: GUIDE FOR ADVOCS. & POLICYMAKERS 6 (UNIF. L. COMM’N 2020) [hereinafter ULC Guide] (on file with authors) (“Article 2 is placed entirely in brackets, meaning that it is technically optional for lawmakers. However, it is our view that *Article 2 is an essential aspect of an effective, fair, and efficient system of pretrial release and detention.*”).

45. *See* GRANT, *supra* note 39, at 5.

46. Though we are not aware of any jurisdiction that currently allows this, there is a future possibility of having paralegals or legal practitioners or otherwise trained criminal justice advocates represent individuals at pretrial hearings under supervision of lawyers. *See, e.g., Licensed Paralegal Practitioner Program*, UTAH ST. BAR, <https://www.utahbar.org/licensed-paralegal-practitioner> [<https://perma.cc/84S7-94AX>].

47. *See* ULC Guide, *supra* note 44, at 4 (acknowledging that “there is some evidence that providing counsel could eventually yield overall savings because the presence of counsel is associated with lower rates of detention.”). *See generally* BAUGHMAN, *supra* note 4.

48. BAUGHMAN, *supra* note 4, at 124; *see also* Colbert, *supra* note 22, at 803 (“With representation, data shows that an incarcerated defendant charged with a nonviolent crime stands five times as likely to be released on recognizance or affordable bail than an unrepresented defendant.”).

49. BAUGHMAN, *supra* note 4, at 122–24. In 1998, only eight states guaranteed counsel at initial bail hearings and nineteen states denied representation. Colbert, *supra* note 22, at 796, 798 & n.19. In 2011, eleven states provided representation in most counties and nine states denied representation. *Id.* at 798 & n.19; *see also* John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 841 (2017) (examining the right for indigent defendants to have

those states that require counsel at initial appearance, many do not require counsel at the bail determination, which often happens at an earlier and quicker hearing. If the jurisdiction does not require representation at the bail determination, it should adopt a mandated release program. Such a program would make release the default, unless the government demonstrates with clear and convincing evidence that the person presents a substantial and specific risk of violence.

The ULC Act recognizes but does not require representation in pretrial release hearings. The ULC Act notes that previous pretrial detention reform efforts have included merely some court “recognition of a right to counsel at any proceeding that could result in detention.”⁵⁰ The ULC Act does the same, as it only guarantees the right to representation for detained individuals, but not arrested individuals. In section 402(a), the ULC Act acknowledges that the “detained individual has a right to counsel” and provides that “[an authorized agency] shall provide counsel” for indigent individuals.⁵¹ The ULC Act does give states the option of incorporating the right to arrested individuals before detention.⁵²

While moving closer to a requirement for representation in pretrial bail hearings, the ULC Act still leaves an option open for states to allow individuals to remain unrepresented at the defendant’s initial release hearing.⁵³ An optimal bail bill allows representation for all defendants at

counsel and finding that “in thirty-two states, counsel for indigent defendants is not physically present at the initial appearance”).

50. ULC Act, *supra* note 18, at Prefatory Note: The Need for the Act (citing Valdez-Jimenez v. Eighth Jud. Dist. Ct., 460 P.3d 976 (Nev. 2020); Caliste v. Cantrell, 329 F. Supp. 3d 296 (E.D. La. 2018); *In re Humphrey*, 19 Cal. App. 5th 1006 (Ct. App. 2018); Brangan v. Commonwealth, 80 N.E.3d 949 (Mass. 2017)).

51. ULC Act, *supra* note 18, § 402(a).

52. *Id.* § 302. If adopted by a state, section 302(a)-(b) would give “an arrested individual [the] right to counsel at a release hearing” and provide that counsel be appointed by an authorized agency “[i]f the individual is unable to obtain counsel for the hearing.”

53. The comments to section 302 explain the approach taken by the ULC and why it differs from the right to counsel given in section 402(a). The ULC states that the option for states to determine whether they will provide a right to representation in release hearings stems from a lack of legal certainty as to “whether a release hearing is a ‘critical stage’ of the prosecution.” *Id.* § 302 cmt.; *see also* Rothgery v. Gillespie Cnty., 554 U.S. 191 (2008). In that case, the Court clarified that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel,” *Rothgery*, 554 U.S. at 213, but the court reserved judgment on “the scope of an individual’s post-attachment right to the presence of counsel,” *id.* at 212 n.15. The comments from the ULC Act also cite to various cases from state and lower federal courts to show instances where “courts have recently held that an arrested individual has a right to representation if an initial appearance could result in continued detention.” ULC Act, *supra* note 18, § 302 cmt. However, the ULC recognizes that “many jurisdictions do not currently provide counsel at initial appearances where release and detention determinations are made.” *Id.* On the other hand, the comments to section 402 allow for the right of representation pursuant to “the procedural framework for detention hearings that the Supreme Court endorsed in *United States v. Salerno*, 481 U.S. 739 (1987).” *Id.* § 402 cmt. Accordingly, it seems unlikely that states will choose to incorporate a right to counsel for all early pretrial hearings based on the ULC Act. The ULC acknowledges this foreseeable outcome and the undesirable consequences. ULC Guide, *supra* note 44, at 4 (“We know that in many States, the main objection to providing counsel will be fiscal”); *id.* at 2 (“[T]he Act leaves many crucial points to state discretion—points that,

every pretrial hearing,⁵⁴ and if the government does not provide representation, allows presumptive release for the majority of defendants from the police station.⁵⁵

III. CAREFUL PRETRIAL DATA TRACKING

Although data can be dangerous and may sometimes allow racial bias, rejecting data altogether creates worse outcomes. Judges should have pretrial reports and risk assessments, including data on outcomes in cases where the default is not release.⁵⁶ Identifying key metrics and tracking detention data, such as arrest rates and detention length, can mold more accurate pretrial reports.⁵⁷ Pretrial reports can be a helpful tool in assessing the seriousness of threat that a defendant poses upon release, particularly for forcible felony defendants.⁵⁸ Objective criteria can assist judges in better predicting pretrial, post-release crime. Without data-based risk instruments, judges may rely on intuition or gut instinct,⁵⁹ which are typically wrong when predicting pretrial crime.⁶⁰ Judges' perceptions may also be impacted by implicit bias, and despite similarities with past cases, judges are not bound by those decisions in current bail determinations.⁶¹

from an equity and liberty perspective, could represent the distinction between a good bill and a bill worth opposing.”).

54. See ULC Guide, *supra* note 44, at 10 (“We also recommend fighting hard to have counsel also made available at the initial release hearing, which some (but not all) courts have indicated is constitutionally required.”); *id.* at 8 (“We believe that the release hearing is a critical stage, meaning that all arrested individuals must have appointed counsel at the hearing [W]e recommend that jurisdictions remove all brackets in Section 302.”).

55. See *id.* at 4 (acknowledging that many states' main objection to providing counsel will be fiscal, and in such case, those states should include the ULC Act's citation and release section to ensure that this legal need is met); *id.* at 8 (“[T]he fiscal burden of providing counsel can be reduced if Article 2 is included and results in increased use of citations instead of bookings.”).

56. BAUGHMAN, *supra* note 4, at 195 (discussing the use of risk assessment tools to inform decision-making pretrial); see also Colbert, *supra* note 48, at 802 (“[A] judge's release order receives validation when defendants return to court and comply with conditions of release. Public defenders and assigned panel lawyers should make a practice of providing judges with the follow-up information, which could be disseminated to the public-at-large to dispel the myth that released defendants fail to reappear or commit new crimes.”).

57. SCHNACKE, *supra* note 29, at 36–37 (“[U]sing actuarial pretrial risk assessment instruments is a more rational way to glean whether a defendant poses some extreme risk than by merely assuming high risk for serious charges.”).

58. BAUGHMAN, *supra* note 4, at 41 (“Pretrial reports are extremely helpful to provide an independent assessment to evaluate how likely a prisoner is to flee or commit a crime if released. In the District of Columbia, these reports have been considered quite successful at predicting the risk of releasing any given defendant.”).

59. Baradaran & McIntyre, *supra* note 24, at 553; see also Open Letter from James Austin, *supra* note 25 (“Evaluation of risk is a fundamental component of pretrial release decisions and will occur with or without the implementation of PRAIs. Objective and valid PRAIs are a more efficient, transparent, and fairer basis for making that assessment than a judge haphazardly and quickly scanning a myriad of documents. The benchmark here is not perfection but rather improving upon unaided human judgment, which is universally acknowledged to introduce racial and other biases.”).

60. BAUGHMAN, *supra* note 4, at 70.

61. See Amanda Woog, *What to Do When Judges Routinely Violate Constitutional Law*, 74 SMU L. REV. 475, 480 (2021).

Additionally, new research by Megan Stevenson and Sandra Mayson shows that judges may not rely on the risk assessment tools even when they are available.⁶²

Though much research still supports the use of risk assessments for providing critical data and improving detention outcomes,⁶³ risk assessments and pretrial reports should pay careful attention not to include racially inequitable factors. These factors may include the defendant's zip code, education level, job history, income, marriage status, and whether the defendant owns a home or cell phone.⁶⁴ New research indicates that risk assessment tools that use these factors can build in or perpetuate racial or socioeconomic bias.⁶⁵ Race-correlated factors in risk assessment tools (such as criminal record, socioeconomic factors, and neighborhood-related factors) should be carefully reviewed each year to ensure they are not perpetuating racial bias.⁶⁶

Pretrial information provided to judges should be primarily based on objective factors that consider risk of violent crime such as criminal history of three or more violent felonies.⁶⁷ Dangerousness and flight risk

62. Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, U. VA. SCH. L. 51 (Feb. 16, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787018# [<https://perma.cc/4B78-6MH4>] (explaining that “bail magistrates seem to be engaged in a mental and moral calculus that is something other than a technical evaluation of risk” and that “[t]hey ignore the recommendations associated with the risk assessment more often than not, and use fades over time”).

63. See Open Letter from James Austin, *supra* note 25 (discussing the fact that the vast majority of defendants released 75%–85% will not be rearrested or fail to appear at their next court hearing due to risk assessment instruments); Evan M. Lowder, Bradley R. Ray & Eric L. Grommon, *Improving the Accuracy and Fairness of Pretrial Release Decisions: A Multi-Site Study of Risk Assessments Implemented in Four Counties, Indiana, 2015-2018*, U.S. DEP'T OF JUST. (2020), <https://nij.ojp.gov/funding/awards/2018-r2-cx-0023> [<https://perma.cc/M8YU-YY2B>] (showing better outcomes where risk assessments are used compared to no risk assessments and show decreases in detention rates); see also Baradaran & McIntyre, *supra* note 24, at 553. See generally Evan M. Lowder, Carmen L. Diaz, Eric Grommon & Bradley R. Ray, *Effects of Pretrial Risk Assessments on Release Decisions and Misconduct Outcomes Relative to Practice as Usual*, 73 J. CRIM. JUST. (forthcoming Oct. 2021) (finding pretrial risk assessments can facilitate non-financial release and structured guidelines may help maximize pretrial release while minimizing conduct).

64. BAUGHMAN, *supra* note 4, at 72. For instance, Colorado's risk assessment that improperly considers factors accounts for the socioeconomic status of a defendant—including owning a house, making residential payments, and paying rent. See COLO. REV. STAT. ANN. §§ 16-1-103, 16-1-104, 16-4-103(3)(b) (West 2013).

65. BAUGHMAN, *supra* note 4, at 72 (“[R]isk assessments can be racially inequitable by giving more weight to certain factors that . . . are racially disparate.”); PRETRIAL JUST. INST., *THE CASE AGAINST PRETRIAL RISK ASSESSMENT INSTRUMENTS 2–3* (2020), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=7a99ffae-f435-4645-5748-4dab1cc56653&forceDialog=0> [<https://perma.cc/J2DQ-UL36>] (arguing that pretrial risk assessment instruments do not accurately predict behavior of people released pretrial and are racially biased against Black, Latinx, Indigenous, and low-income people and increase disparities in jails where implemented).

66. BAUGHMAN, *supra* note 4, at 199; see also Kristin Bechtel, Christopher T. Lowenkamp & Alex Holsinger, *Identifying the Predictors of Pretrial Failure: A Meta-Analysis*, 75 FED. PROB. 78, 87 (2011).

67. See generally JOHN CLARK & D. ALAN HENRY, U.S. DEP'T OF JUST., *PRETRIAL SERVICES PROGRAMMING AT THE START OF THE 21ST CENTURY: A SURVEY OF PRETRIAL SERVICES PROGRAMS* (2003), <https://www.ojp.gov/pdffiles1/bja/199773.pdf> [[https://](https://www.ojp.gov/pdffiles1/bja/199773.pdf)

should be evaluated and considered separately, rather than merged into one analysis.⁶⁸ Making the instrument available to the public can increase transparency in the risk assessment process.⁶⁹ The information that may be helpful in making pretrial decisions includes: (1) information on the original arrest for a violent crime, (2) whether the defendant has four or more prior convictions, (3) prior incarceration, (4) active criminal justice status, and (5) the age of the defendant.⁷⁰ The risk of rearrest, especially for violent crime, should be the primary consideration and should be based on evidence.⁷¹ Individuals with prior jail time are generally at a higher risk for committing crimes if released.⁷² Individuals charged with public order offenses, white-collar crime, and drug offenses (both trafficking and possession) as well as older defendants (over forty) are very unlikely to commit a violent crime pretrial.⁷³ Women are also at a lower risk for pretrial crime.⁷⁴ While many risk assessment tools are available, the best ones are tailored to the specific jurisdiction and should rely on local data for their creation and validation.⁷⁵ An evaluation of racial bias should be conducted each year to make sure that the risk instrument does not perpetuate bias on the basis of race or other classification.

The ULC Act is agnostic about whether states should use risk assessment instruments.⁷⁶ However, as states continue to work toward reform, proper use of risk assessment tools would favor the default for pretrial release. Additionally, for defendants who are charged with forcible felonies, relevant pretrial information relied on by judges would focus release decisions on the criteria that matter and set conditions for release that mitigate substantial risks. This data-informed model should not replace efforts to increase the amount of time courts dedicate to making individual bail decisions.⁷⁷ Nor should it favor efficiency at the expense of defendants' constitutional rights.⁷⁸

perma.cc/Q7AU-X66J]; BAUGHMAN, *supra* note 4, at 72–75 (“[T]he best practice for release officials is to combine an objective, actuarial risk assessment with a limited subjective assessment”).

68. Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 871.

69. *See* BAUGHMAN, *supra* note 4, at 71.

70. *Id.* at 90.

71. *See id.* at 63 (“[D]efendants charged with fraud, public order offenses and drug defendants have extremely low rearrest rates for violent crimes.”).

72. *Id.* at 76.

73. *Id.* at 192.

74. *Id.*

75. *Id.* at 195.

76. *See* ULC Act, *supra* note 18, § 303 cmt. (“This Act neither requires nor prohibits the use of actuarial risk assessment instruments. Jurisdictions may decide not to use such tools, or they may use actuarial instruments and direct or authorize courts to consider statistical risk assessments as ‘other relevant information’ under Section 303(3).”).

77. Carroll, *supra* note 22, at 157.

78. Baradaran & McIntyre, *supra* note 24, at 553.

IV. NO DETENTION FOR FAILURE TO APPEAR

A pretrial detention bill should not detain individuals for failure to appear. It is crucial to distinguish between nonappearance and flight in defining the proper grounds for pretrial detention.⁷⁹ As Lauren Gouldin has pointed out, grounds for pretrial detention should be based on whether an individual is truly a flight risk, rather than another non-absconding nonappearance.⁸⁰ Those who simply fail to appear should be provided reminders and other services to help them appear in court. They should not be detained for failure to appear if there is no evidence of flight.

The ULC Act distinguishes between failure to appear and absconding but does not prohibit detention for failure to appear.⁸¹ The ULC Act permits courts to take further action “[i]f an individual absconds or does not appear as required.”⁸² This should be permitted only for absconding nonappearances, not simple failures to appear. If a released individual fails to appear for a court date, and has not fled or absconded on purpose, the jurisdiction should use practical measures to get the individual into court.⁸³ For example, some pretrial services agencies send court date reminders via text, email, or postcard,⁸⁴ with some doing this in descending

79. Gouldin, *Defining Flight Risk*, *supra* note 22, at 685 (“[A]s release rates rise with the implementation of reform, rates of nonappearance will also rise. The sustainability of reform depends on maintaining acceptable appearance rates.”).

80. *Id.*

81. Compare ULC Guide, *supra* note 44, at 6 (“Throughout the Act, the text is careful to distinguish two different concepts: nonappearance and flight.”), with *id.* (“The individual poses a relevant risk [to pretrial release] only if the court finds by clear and convincing evidence that the individual is likely to abscond, not appear, obstruct justice, violate an order of protection, or cause significant harm to another person.”).

82. ULC Act, *supra* note 18, § 204(b). The comment clarifies that section 204(b) “calls upon a state to designate what a court is authorized to do if an individual does not appear as required by a citation. Options may include allowing a court to issue a summons (or its equivalent) or an arrest warrant or to take some other action or combination of actions consistent with the law of the state, other than this Act.” *Id.* § 204 cmt.

83. ULC Guide, *supra* note 44, at 10 (“We believe that pretrial detention should not be available to address non-appearance (because less restrictive conditions should always be able to address a mere non-appearance risk).”).

84. See *Request for Proposals to Conduct Research on Improving Pretrial Court Appearance*, LAURA & JOHN ARNOLD FOUND. 4 (Dec. 13, 2018), <https://craftmediabucket.s3.amazonaws.com/uploads/RFP-to-Conduct-Research-on-Improving-Court-Appearance-QA.pdf> [<https://perma.cc/82AK-M232>] (“[C]ourt date notifications continue to have the greatest impact on court appearance, oftentimes providing as much as 30 to 50 percent increase in appearance rates,” yet more studies could be done to understand which newer technologies are most effective to particular sub-groups of defendants.); BRICE COOKE, BINTA ZAHRA DIOP, ALISSA FISHBANE, JONATHAN HAYES, AURELIE OUSS & ANUJ SHAH, UNIV. CHI. CRIME LAB USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT 5 (2018), <https://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf> [<https://perma.cc/VJ2Y-RQMR>] (finding that reminder text messages reduced failure to appear by 26% in New York City); Maria Elena Cruz, NAT. CTR. FOR ST. CT., ARIZONA’S TASK FORCE ON FAIR JUSTICE FOR ALL 3–4 (2017), <http://nscs.contentdm.oclc.org/cdm/ref/collection/accessfair/id/785> [<https://perma.cc/NJ62-XT7H>] (noting reminders reduced failure to appear rates by 23% in Arizona; telephone reminders significantly reduced failure to appear rates in Jefferson County, Colorado; and postcard reminders significantly reduced failure to appear rates in Nebraska’s county courts).

order of the particular defendant's preferences.⁸⁵ Others provide transportation services.⁸⁶

A defendant's nonappearance could be for a variety of reasons other than deliberate flight. The problem of failure to appear is typically a failure of the system, or difficult personal circumstances, rather than a desire to escape justice.⁸⁷ Pretrial services agencies could conduct failure-to-appear investigations into defendants' nonappearances and use such findings to improve their methods to get defendants into court.⁸⁸ New York City, for example, found that defendants who provided a phone number and address were more likely to appear for their court dates.⁸⁹ And while "prior flight risk is predictive of future flight risk," this is more of a reason for a text reminder, not detention.⁹⁰ Thus, detention should be permitted only when there is proof of absconding, rather than nonappearance, or after several varied attempts to get the individual into court.

V. LACK OF MONEY SHOULD NOT LEAD TO DETENTION

The default for most defendants should be release with no reliance on money bail. There is no room for commercial bail in an optimal bail system.⁹¹ The ULC Act section 307(a) directly addresses this issue by clearly

85. See, e.g., PRETRIAL SERVS. AGENCY FOR D.C., CONGRESSIONAL BUDGET JUSTIFICATION & PERFORMANCE BUDGET REQUEST FISCAL YEAR 2021, at 22 (2020), https://www.psa.gov/sites/default/files/FY2021%20PSA%20Congressional%20Budget%20Justification_0.pdf [https://perma.cc/CNY6-QLGY].

86. To increase the likelihood of a defendant's court appearance, Santa Clara County sends reminders and offers transportation. Since this reform, only 1% of defendants were rearrested. See Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POLY INITIATIVE (Nov. 17, 2020), <https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases> [https://perma.cc/N7UK-75RH].

87. See Gouldin, *Defining Flight Risk*, *supra* note 22, at 687, 731 (explaining that research has made clear that a failure to appear is not cause for pretrial detention and that simple reminders like postcards, calls, and texts can dramatically reduce failure to appear).

88. See, e.g., PRETRIAL SERVS. AGENCY FOR D.C., *supra* note 85, at 23–24.

89. Corinne Ramey, *Algorithm Helps New York Decide Who Goes Free Before Trial*, WALL ST. J. (Sept. 20, 2020, 10:00 AM), <https://www.wsj.com/articles/algorithm-helps-new-york-decide-who-goes-free-before-trial-11600610400> [https://perma.cc/LY38-DEYZ].

90. BAUGHMAN, *supra* note 4, at 69.

91. While money bail—commercial or deposit—should not be used to determine who obtains release, there are some jurisdictions that do not have the political will to abolish money bail altogether. As a compromise position, these jurisdictions can remove some of the negative effects of money bail by relying on deposit bail (sometimes called cash bail) where the defendant gets their money back upon appearance before trial. BAUGHMAN, *supra* note 4, at 46. Judges must ensure that money bail does not discriminate based on race or socioeconomic status. Finally, bail amounts should reflect not any punitive goals but the purpose of bail: "to ensure that the accused will appear in court for trial." *Id.* at 32. To accomplish this last point, courts should never rely on a "uniform bail schedule" matrix or other guidelines to determine how much money bail to set in a particular case. *Id.* at 47. These bail schedules that assign a dollar amount for specific charges should be eliminated as they do not consider an individual's ability to pay and can allow release based on financial situation rather than risk. *Id.* at 206. In addition, money bail should be limited to forcible felonies, and never be applied to misdemeanor or nonforcible felonies. See Baughman, *supra* note 1, at 976; Doug Dais, *Cash Bail Keeps Poor People in Jail. Here's How We*

establishing that people should not be detained for inability to pay.⁹² However, the overall benefit of the clause may not be seen due to the many factors indicated that allow detention or restrictions to be placed on an individual without real evidence, as discussed in Parts VI and VII.⁹³ By contrast, the Illinois Act eliminates monetary bail and monetary fines in many circumstances.⁹⁴ In addition to scaling back on when monetary conditions can be placed on defendants, the Illinois Act requires courts to take into account the defendant's ability to pay before tacking on the duty to pay.⁹⁵

While eliminating money bail is something that almost all criminal justice experts agree is ideal, the bail insurance industry (commercial bail/bail bond industry) actively lobbies against reform in this area. When bail reform is on a state legislature's agenda, the bail insurance industry sends a representative to provide industry input.⁹⁶ This is not a battle of good or evil, but the commercial bail industry has a bottom line that profits when more people are arrested and detained because it means that more bonds are set. Commercial bail agents (and therefore their insurers) make more money when more individuals are arrested and when bail is set. Bail agents make more money when higher bail amounts are set. It is difficult to make decisions on pretrial reform with a lobbying body in the room. The bail industry has reportedly lobbied sheriffs' departments, legislatures, and judges to block potentially beneficial bail reforms.⁹⁷ An American Bail Coalition representative was included in the ULC commission that drafted the ULC Pretrial Reform Act. There should be a broader national discussion of whether it serves national interests in criminal justice reform to include organizations whose financial interests are diametrically opposed to ending mass incarceration.

Fix It, FREETHINK (Aug. 8, 2020, 12:00 PM), <https://www.freethink.com/videos/bail-reform> [<https://perma.cc/5JEZ-Z347>].

92. See ULC Act, *supra* note 18, § 307(a).

93. See discussion *infra* Parts VI, VII.

94. Public Act 101-0652, H.B. 3653, 101st Gen. Assemb., Reg. Sess. §§ 110-1.5, 110-10(b) (Ill. 2021). The Act includes monetary fines or fees only when an individual violates the Uniform Criminal Extradition Act, the Driver License Compact, or the Nonresident Violator Compact or when the defendant's release is conditioned on supervision by a pretrial service agency or a pretrial home service, both of which require electronic monitoring (which can also be problematic).

95. *Id.* § 110-10(b)(14.3) ("The person receiving pretrial services may be ordered to pay all costs incidental to pretrial services in accordance with his or her ability to pay those costs.").

96. See generally BAUGHMAN, *supra* note 4, at 157–85.

97. In a study conducted by the National Task Force on Fines, Fees, and Bail Practices in 2019, the Task Force found that in case studies of six states, "opposition to reform came from two main sources: the bail industry . . . [and] unwilling legislatures." See NAT'L TASK FORCE OF FINES, FEES, & BAIL PRACS., BAIL REFORM: A PRACTICAL GUIDE BASED ON RESEARCH AND EXPERIENCE 72–73 (2019), https://www.ncsc.org/_data/assets/pdf_file/0023/16808/bail-reform-guide-3-12-19.pdf [<https://perma.cc/HCD3-FL6W>]; Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1398–99 (2014) (discussing instances where the bail industry blocked legislation from 2006 to 2010); VERA INST., *supra* note 4 (noting that California's bail reform bill "SB 10 is now on hold pending a statewide referendum in November 2020 after the bail bond industry successfully gathered more than half a million signatures against the new law.").

As shown by the changes made in the ULC Act and in Illinois, when the goal of bail reform is release rather than detention, more can be done to remove the financial burden placed on defendants who are unable to pay. Money bail should not be a determining factor for pretrial release. Pretrial release should be the default, without regard to the wealth of the defendant and without the input of the commercial bail industry.

VI. CONSTITUTIONAL FACTORS SHOULD PREVENT PRETRIAL FACT-FINDING

Pretrial reform should not violate constitutional due process of law principles, including judicial pretrial fact-finding.⁹⁸ Judges in pretrial hearings should not be able to consider the weight of the evidence against a defendant to predict guilt before trial.⁹⁹ A judge given this ability is put into a position where they act as a jury, make determinations on the credibility of various witnesses, and weigh evidence.¹⁰⁰ This is especially problematic when a defendant has no counsel at a pretrial hearing, and these determinations often happen in a few minutes or less.¹⁰¹ Despite this so-far unidentified constitutional problem,¹⁰² the Bail Reform Act of 1984,¹⁰³ as well as many state laws, allow judges to “weigh the evidence” in determining whether to release a defendant pretrial.¹⁰⁴ The practical

98. Baughman, *supra* note 10, at 758–65 (discussing how three justifications for denying bail have been applied by courts inconsistently to obtain results “due to a disconnect between the presumption of innocence and the Due Process Clause.”).

99. Baradaran & McIntyre, *supra* note 24, at 524 (noting that “an ideal pretrial-release system that respects constitutional protections would leave all fact finding until trial and not allow judges to make any of these predictions pretrial.”).

100. Shima Baradaran, *The Presumption of Punishment*, 8 CRIM. L. & PHILOS. 391, 401 (2014) (Changes in state and federal law in the 1960s and 1980s have allowed for judges to overstep in this manner and “detain defendants because they had determined that they were likely guilty before they had the opportunity for a trial.”).

101. Sarah Ottone & Christine S. Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, 19 CRIMINOLOGY, CRIM. JUST., L. & SOC’Y 24, 33–34 (2018) (noting that in fifteen areas of southern California, most bail hearings are short and uncontested); Carroll, *supra* note 22, at 148 n.18.

102. As far as we know, Baradaran’s work alone has identified the problem with pretrial fact-finding and “weighing” of evidence pretrial. See Baradaran, *supra* note 100, at 401; Baradaran & McIntyre, *supra* note 24, at 515.

103. 18 U.S.C. § 3142(g) (2008) (“The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning . . . (2) the weight of the evidence against the person”).

104. See, e.g., Public Act 101-0652, H.B. 3653, 101st Gen. Assemb., Reg. Sess. § 110-5(a)(2) (Ill. 2021) (“In determining which conditions of pretrial release, if any, which will reasonably assure the appearance of a defendant as required or the safety of any other person or the community and the likelihood of compliance by the defendant with all the conditions of pretrial release, the court shall, on the basis of available information, take into account such matters as . . . (2) the weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded . . .”); FLA. STAT. ANN. § 907.041(4)(i) (West 2019) (“The pretrial detention order of the court shall be based solely upon evidence produced at the hearing and shall contain findings of fact and conclusions of law to support it.”); D.C. CODE ANN. § 23-1322(e)(2) (West 2017) (“The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account information available concern-

result of the pretrial weighing that is sanctioned by federal and state statutes¹⁰⁵ is not only the costs of detention,¹⁰⁶ but also the violation of due process that implicates a defendant's right to a presumption of innocence, particularly pretrial.¹⁰⁷

The proposed ULC Act allows for judges to continue to act in this pretrial fact-finding role.¹⁰⁸ Section 303(1)(B) of the ULC's proposal allows for the court to consider "available information concerning . . . the weight of the evidence against the individual" to determine risk at a release hearing.¹⁰⁹ The ULC leaves these procedural rights up to state law for release hearings.¹¹⁰ However, most states allow for judges to weigh evidence against defendants before trial when determining whether to release them on bail.¹¹¹ Additionally, pursuant to Article 4 of the ULC Act, "the court shall consider the criteria in Section 303[,]"¹¹² and the individual has a right to present evidence, call witnesses, testify,¹¹³ and cross-examine witnesses in detention hearings.¹¹⁴ In other words, the pretrial and detention hearings become a few minute-long trials without juries, usually conducted without counsel.

The recently drafted Illinois Act also allows for judges to consider the weight of the evidence against the defendant when making decisions of release and when setting conditions on release if it is granted.¹¹⁵ Despite the Illinois Act's efforts to prevent a pretrial detention hearing from limiting a defendant's presumption of innocence,¹¹⁶ it gives judges "broader discretion to determine whether those accused of crimes pose a danger to a specific person or the community at large and whether they are likely to

ing . . . (2) [t]he weight of the evidence against the person . . ."); N.J. STAT. ANN. § 2A:162-20(b) (West 2021) ("In determining in a pretrial detention hearing whether no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may take into account information concerning . . . (b) [t]he weight of the evidence against the eligible defendant, except that the court may consider the admissibility of any evidence sought to be excluded. . . "); *see also* Baughman, *supra* note 10, at 753 (explaining how the Bail Reform Act allows a judge to weigh the evidence against a defendant in determining release).

105. Baradaran & McIntyre, *supra* note 24, at 524; Baradaran, *supra* note 100, at 401.

106. Baradaran, *supra* note 100, at 401.

107. *Id.* at 401-02; *see also* BAUGHMAN, *supra* note 4, at 111 ("This is information that should not be offered this early on in the trial – where usually defense counsel is not even present – and because it ultimately eliminates a defendant's constitutional right of a presumption of innocence.").

108. ULC Act, *supra* note 18, at §§ 303, 403(a).

109. *Id.* § 303(1)(B).

110. *Id.* § 302 cmt.

111. *See* Baradaran, *supra* note 100, at 401 ("[J]udges in most jurisdictions in the United States are weighing evidence against defendants before trial in order to determine whether to release them on bail.").

112. ULC Act, *supra* note 18, at § 403(a).

113. *Id.* § 402(b)(2)-(3).

114. *Id.* § 402(b)(4).

115. Public Act 101-0652, H.B. 3653, 101st Gen. Assemb., Reg. Sess. §§ 110-5(a)(2), 110-6.1(f)(6) (Ill. 2021).

116. *Id.* § 110-6.1(l).

show up in court without being held in jail.”¹¹⁷

To combat this issue, a model bail bill should limit presentation or the weighing of evidence at a pretrial detention hearing. Prosecutors should not be allowed to present information regarding the defendant’s guilt or innocence at initial hearings where bail determinations are made.¹¹⁸ Since the default for most crimes is release, information should only be presented in pretrial hearings when there is a forcible felony, evidence of prior violent crime convictions, and threats to a specific individual in order to assess whether the defendant poses too great an unmitigated “danger to the community” to be released pretrial.¹¹⁹ This shift will refocus the purpose of bail to its original intent—to ensure that defendants return to court for trial¹²⁰—and reestablish the protections of due process and the presumption of innocence in our criminal system.¹²¹

VII. NARROW DETENTION NETS

An optimal state bail system defaults to release for most crimes and has a very narrow detention net.¹²² Most defendants charged with a crime

117. Dan Petrella, *Gov. J.B. Pritzker Signs Sweeping Illinois Criminal Justice Overhaul, Which Will End Cash Bail Starting in 2023*, CHI. TRIB. (Feb. 22, 2021, 5:42 PM), <https://www.chicagotribune.com/politics/ct-jb-pritzker-criminal-justice-bill-20210222-nw7lh3upy5aipap2odh7jaofke-story.html> [<https://perma.cc/V8DZ-YV8Q>]. The Illinois Act does make significant changes by limiting the crimes and circumstances for which pretrial detention may be considered. However, in a detention hearing, judges may have evidence presented to them from both the state and the defendant. Public Act 101-0652 § 110-6.1(f)(1). The defendant has the right to counsel and can testify, present witnesses, and cross-examine witnesses called by the state. *Id.* § 110-6.1(f)(3). Additionally, the rules of evidence do not apply to “the presentation and consideration of information at the hearing” and “[t]he defendant may not move to suppress evidence or a confession” at this stage. *Id.* § 110-6.1(f)(5)–(6). The judge then makes a determination on the question of detention taking into consideration “the nature and circumstances of the offense charged[,]” “the weight of the evidence against the eligible defendant[,]” and “the history and characteristics of the eligible defendant” (including but not limited to physical, mental and emotional characteristics, and criminal history, etc.). *Id.* § 110-5(a)(1)–(3). In essence, the hearing becomes a bench trial where the defendant may not be represented, and the judge has wide latitude to impose detention before the actual trial.

118. BAUGHMAN, *supra* note 4, at 111 (“[N]ow at initial hearings, prosecutors present information about the crime defendant is charged with, some evidence regarding these charges, and whether bail should be set or, in some cases, why bail should not be offered at all. . . . This is information that should not be offered this early on in the trial . . . because it ultimately eliminates a defendant’s constitutional right of a presumption of innocence.”).

119. Baughman, *supra* note 10, at 772.

120. *Id.* at 731 (citing *Hudson v. Parker*, 156 U.S. 277, 285 (1895) (holding that the sole purpose of bail is to ensure the defendant’s appearance at trial); *Barret v. Lewis*, 1 Mart. (o.s.) 189, 192 (La. 1810) (“Bail is required in this territory for the purpose of securing the plaintiff from the flight of the defendant and for no other purpose. It is the same in England.”)).

121. *Id.* at 770.

122. BAUGHMAN, *supra* note 4, at 214 (“[A]n optimal bail system in America . . . would release a larger number of safe indigent defendants . . .”); ULC Guide, *supra* note 44, at 10 (recommending that a net should not be larger than the constitutional net in California, which is limited to serious felonies and some limited misdemeanors); *see also* PRETRIAL JUST. INST., *supra* note 65, at 11 (“The focus should be on implementing a very narrow detention net and providing robust detention hearings that honor the charge of the Supreme Court forty years ago.”).

should be released on their own recognizance from the police station (before a hearing) and should appear in court at a later point. A narrow detention net must establish a presumption in favor of release on recognizance for most defendants.¹²³ This would, of course, mean that almost all misdemeanor and most felony defendants are released before trial. Individuals who are charged with forcible felonies and have a previous criminal history of violent crime should appear at a hearing before obtaining release.¹²⁴ If constitutional principles of due process are followed, there should be no limits to pretrial liberty unless they are necessary to ensure a fair trial.¹²⁵ A model detention net must set aggressive release goals and allow detention only where the government proves, by substantial burden, that a defendant is unable to be safely released.¹²⁶ It must also create benchmarks for those release goals, like 90% release, rather than simply leaving the numbers to chance.¹²⁷ To put it bluntly, “Misdemean-

123. BAUGHMAN, *supra* note 4, at 43 (“Release on recognizance provides an assurance to judges that certain defendants will not be held in pretrial detention. This assurance cannot be guaranteed with any other form of release because of the economic standing of many defendants.”). But “[t]he Act does not stipulate what charges should be eligible for detention.” ULC Guide, *supra* note 44, at 5.

124. Misdemeanor defendants should only be detained for the amount of time that they pose a substantial risk to the safety of specific individuals, proven by government by clear and convincing evidence. An example of such cases includes domestic violence or cases of driving while under the influence of illicit drugs. *See, e.g.*, VT. R. CRIM. P. 3(c) (stating that law enforcement may not issue a citation when misdemeanor is assault against family member, violation of court order, violation of foreign abuse prevention order, misdemeanor offense against vulnerable adult, DUI after prior conviction, violation of hate-motivated crime injunction, violation of condition of release, stalking, simple assault, recklessly endangering another person, failure to register as sex offender, or cruelty to a child); VA. CODE ANN. § 19.2-74(A)(2) (West 2019) (stating that law enforcement may not issue a summons for DUIs, minors driving after consuming alcohol); W. VA. CODE ANN. § 62-1-5a(1) (West 2021) (stating that law enforcement may not issue citations for misdemeanors involving injury to the person); WIS. STAT. ANN. § 968.085(8) (West 2017) (stating that law enforcement may not issue citations in domestic abuse cases).

125. BAUGHMAN, *supra* note 4, at 188 (“[P]retrial restraints of liberty should be limited to only what is necessary and only where there is a proper legal basis” such as “ensuring a person’s attendance at trial and protecting the judicial process from interference by defendant.”).

126. “When pursuing charges is necessary, prosecutors should presume that they should recommend people are released before trial without conditions and alternative-to-prison sentencing options upon conviction, such as community service or probation.” Nicole Zayas Fortier, *Unfettered, Unchecked, Unopposed: The Need for Accountability and Limits*, in CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION 25, 38 (Melba V. Pearson ed., 2020). It is not enough for prosecutors to refrain from making these favorable recommendations. *See* Colbert, *supra* note 48, at 801 (explaining that pretrial detention reform suffered when “[a]t initial appearances, prosecutors refrained from making favorable recommendations for pretrial release” and instead “chose the ‘neutral’ path and took no position, stating only that ‘the People submit’ and leaving it for the judge to decide.”).

127. Jurisdictions rarely distinguish between misdemeanor and felony defendants in bail reform risk assessments. *See* Baughman, *supra* note 1, at 1021; Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 872 (2018) (“Misdemeanor defendants are detained before trial almost as often as felony defendants because they cannot afford bail.”). Eliminating or decreasing the use of misdemeanor detention is especially important because such detention “discriminates against the poor and minorities, especially against African Americans, who often have less options to pay for release.” *Id.* at 882.

ors are less serious crimes and should be treated as such.”¹²⁸ If a state uses a risk assessment, it should distinguish between detainable forcible felony and misdemeanor charges.¹²⁹ But they rarely do.¹³⁰

If we have learned anything from this or the prior two waves of bail reform,¹³¹ reform efforts do not decrease detention unless they set a narrow detention net.¹³² Setting a target benchmark for release is necessary to reduce pretrial detention rates. Risk assessments do not independently guarantee certain or higher release rates. Neither do pretrial services, money bail, or any other bail reform measure.

To illustrate this point, compare Washington, D.C.’s pretrial outcomes with those of Kentucky and Virginia. All three jurisdictions rely on pretrial risk instruments. Yet D.C. provides the best example of a narrow detention net: the jurisdiction prohibits release only for murder and assault with intent to kill and requires a hearing to detain, releasing more than 90% of defendants pretrial.¹³³ By contrast, while Kentucky and Virginia have each increased the use of pretrial services and risk assessments, their release rates fall below the risk assessments’ recommendations.¹³⁴ These results demonstrate that judges vary in their use of or reliance on risk assessments, and that risk assessments and pretrial release services do not necessarily effectuate higher release rates.¹³⁵

128. Baughman, *supra* note 1, at 984; *see also Ex parte Smith*, 493 S.W.2d 958, 959 (Tex. Crim. App. 1973).

129. Baughman, *supra* note 1, 1014–20 (providing examples of Kentucky, Utah, New Jersey, and Colorado).

130. *See generally* Dais, *supra* note 91.

131. Alexa Van Brunt and Locke Bowman have pointed out that in “jurisdictions where financial conditions have become less central to the pretrial process (a key tenet of recent reforms), the balance has tipped toward a greater acceptance of preventive detention,” which has not reduced detention rates. Alexa Van Brunt & Locke E. Bowman, *Toward A Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 709, 759 (2018) (noting bail reform advocates promote “the government’s right to enforce risk-based incarceration in exchange for the elimination of cash bail.”)

132. *Id.* at 708 (arguing that the current trends of bail reforms will “widen the net of detention by failing to fully eradicate the traditional money bail system while also encouraging more intentional forms of preventive detention”); *see* ULC Guide, *supra* note 44, at 5 (“In any jurisdiction . . . the discussion should center on what the net should include, not whether one should exist. [D]etention eligibility nets are essential pieces of pretrial policy, serving to further limit pretrial detention. Advocates must press for a narrow net . . .”).

133. *See* BAUGHMAN, *supra* note 4, at 45 (“Under the DC system, defendants are classified as high, medium, or low risk according to points on a thirty-eight-factor instrument.”); PRETRIAL JUST. INST., *supra* note 7, at 3 (noting Washington, D.C. releases 92% defendants pretrial). D.C. also relies on a risk assessment instrument for assessing risk and prohibits cash bail completely. *See* D.C. CODE ANN. § 23-1321 (West 2017).

134. Baughman, *supra* note 1, at 1014–16; *see* Megan T. Stevenson & Jennifer L. Doleac, *The Roadblock to Reform*, AM. CONST. SOC’Y 5 (Nov. 2018), <https://www.acslaw.org/wp-content/uploads/2018/11/RoadblockToReformReport.pdf> [<https://perma.cc/ZER5-GX4N>] (noting that Kentucky’s pretrial release rate for low and moderate-risk defendants would have been 37% higher if judges had followed the risk assessment recommendations).

135. Baughman, *supra* note 1, at 1014–16 (explaining that the risk assessment tools used in Kentucky and Virginia were not successful in reducing incarceration rates because judges are not required to follow the risk assessment recommendation, which presume

Texas provides a good example of the ability to reduce jail numbers through release on recognizance (ROR).¹³⁶ Between 1983 and 2018, the Texas prison population increased by 329%.¹³⁷ In the last ten years, though, Texas courts began favoring ROR because of the inmate crisis.¹³⁸ As a result, the prison population has decreased, allowing Texas to save \$2 billion by avoiding new prison construction costs and the closure of three prisons.¹³⁹ As the presumption shifts to release, judicial discretion should be reduced as the ROR provides an “assurance to judges that certain defendants will not be held in pretrial detention.”¹⁴⁰

To create a narrow detention net, detention should be an option only for individuals who the government proves are statistically at high risk due to prior violent crime and pose a substantial danger to specific individuals if released pretrial.¹⁴¹ Part of this consideration is limiting the number of violent crimes or previous criminal acts that would increase the likelihood of detention.¹⁴² Illinois sets a good example of what this presumption may look like in its most recent bail reform act.¹⁴³ The Illinois Act requires that “[a]ll defendants shall be presumed eligible for release” unless the defendant has committed a forcible felony or other violent crime and poses a physical threat to a person or persons.¹⁴⁴ Although the effects of the Illinois Act are not yet known, it limits its detention net in a way that will only impose detention on a limited number of defendants.

Therefore, setting a precise goal would help ensure that bail reform actually results in increased pretrial release.¹⁴⁵ A 90% release rate for all individuals arrested is a reasonable goal given empirical data on risk of

release). Some have also criticized pretrial release supervision services for the surveillance costs they often impose on defendants.

136. BAUGHMAN, *supra* note 4, at 44.

137. *Incarceration Trends in Texas*, VERA INST. OF JUST. (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf> [https://perma.cc/49MH-57SP].

138. BAUGHMAN, *supra* note 4, at 44; Ryan Kellus Turner & Henry W. Knight, *Making It Personal in the Age of Bail Reform: The Misunderstanding, Utility, and Limits of Personal Bonds in Texas*, 20 TEX. TECH. ADMIN. L.J. 67, 68–69 (2019) (citing 2017 Texas senate discussions with appellate judges discussing the inmate crisis and whether the state should increase the use of personal bonds).

139. PRETRIAL JUST. INST., *supra* note 7, at 14; *see also Incarceration Trends in Texas*, *supra* note 137 (noting that jail population has increased 509% since 1970 but only 6% since 2000).

140. BAUGHMAN, *supra* note 4, at 43.

141. *Id.* at 92.

142. Baughman, *supra* note 1, at 1018 (For instance, New Jersey limits the number of “violent crimes” subject to pretrial detention.). New Jersey has “proven influential across the country on bail reform.” Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 756 (2020). Essentially, “Advocates must press for a narrow net involving only ‘extremely serious’ charges.” ULC Guide, *supra* note 44, at 5 (citing *United States v. Salerno*, 481 U.S. 739, 750 (1987)).

143. *See generally* Public Act 101-0652, H.B. 3653, 101st Gen. Assemb., Reg. Sess. (Ill. 2021).

144. *Id.* § 110-6.1(e).

145. Baughman, *supra* note 1, at 1014.

release.¹⁴⁶ Only fourteen states currently meet this standard when it comes to misdemeanors, and many fewer would if felonies were taken into account.¹⁴⁷ When pretrial detention is necessary, the detention period should be limited to twenty-four hours or forty-eight hours.¹⁴⁸ In the instances where release is not appropriate, prosecutors should consider alternatives to detention,¹⁴⁹ such as an unsecured bond,¹⁵⁰ deposit bail, conditional release,¹⁵¹ electronic monitoring,¹⁵² or diversion programs. Pretrial detention should be the last resort.

CONCLUSION

As cities and states contemplate new legislation in the bail arena, our hope is that they consider the seven recommendations shared in this invited piece. The most important of these is that a narrow detention net and a presumption of release from the police station should be the goal for about 90% of defendants. We hope this piece will foster more discus-

146. See BAUGHMAN, *supra* note 4, at 187; Baradaran & McIntyre, *supra* note 24, at 537 (“5% of defendants have more than a 5% chance of being rearrested on a violent felony charge, with a few having higher than a 10% chance.”); Dais, *supra* note 91.

147. See PRETRIAL JUST. INST., *supra* note 131, at 11–14 (noting that Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Ohio, Oregon, Rhode Island, Utah, Vermont, and Washington had less than 10% pretrial detention rates as of 2017). Please note that these percentages are 10% of the total population, not 10% of defendants, which is a different consideration than what we are proposing here.

148. ULC Act, *supra* note 18, § 308(b).

149. No release option is superior to release on recognizance for a defendant. Substantial monetary costs to a defendant can be incurred through “attendance requirements” (which require the accused to return to court on a regular basis) or electric home monitoring (which requires a “hook up” fee and regular internet service). Carroll, *supra* note 22, at 187–88. Restrictions on a defendant’s physical liberty with conditional release can also place a substantial burden on a defendant, potentially restricting their ability to find housing or work. *Id.* at 188–90.

150. BAUGHMAN, *supra* note 4, at 43 (“An unsecured bond is where a defendant is released after he contracts to appear before the court on a specified date and promises to pay a set bail amount later if he fails to appear. The defendant pays nothing and puts no deposit or property down in order to obtain release, and only pays the bond if he does not appear in court.”).

151. Conditional release may be a “low-cost option for releasing individuals pretrial, with tailored precautions to ensure the safety of the public.” *Id.* at 52 (noting that risk assessment programs may guide the conditions, including “mandatory drug testing or substance abuse programs, counseling, or admittance to a rehabilitation facility,” that are applied in any particular situation). Judges must carefully consider certain costs to the defendant associated with conditional release; otherwise, it can perpetuate detention. Carroll, *supra* note 22, at 184.

152. “Electronic monitoring may be an extremely effective low-cost pretrial alternative as it allows officials to closely monitor defendants while allowing them freedom to work, meet with attorneys, and remain with family.” See BAUGHMAN, *supra* note 4, at 52–53; see also Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants into Debt*, PROPUBLICA (July 3, 2019, 5:00 AM), <https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt> [https://perma.cc/R84X-M97H] (“When cities cover the cost of monitoring, they often pay private contractors \$2 to \$3 a day for the same equipment and services for which EMASS charges defendants \$10 a day.”). Moreover, as technology develops, the costs of electronic monitoring become lower. See *Defendants Driven into Debt by Fees for Ankle Monitors from Private Companies*, EQUAL JUST. INITIATIVE (July 23, 2019), <https://eji.org/news/defendants-driven-into-debt-by-fees-for-ankle-monitors> [https://perma.cc/K5WZ-G64V].

sion on how to dramatically increase pretrial release—from 60% release nationally to 90%—rather than just focusing on the tools we use to evaluate it. Tracking pretrial data on how to release defendants safely and whether racial bias results from any pretrial interventions is important. Detention pretrial should not be based on failure to appear. Removing the influence of commercial money bail or determinations of release based on wealth is also critical to bail reform. Criminal justice should not be bound by corporate desires to increase arrest and detention, which contradict our basic human rights of liberty and due process. The right to counsel at the critical pretrial hearing should be respected by all states, and if counsel is not provided, states should presumptively release all defendants before trial. States should reject the federal detention model that has proven to only increase detention due to a presumption of detention in the absence of proof otherwise. We fear the ULC Act, though a step in the right direction in some ways, does not demand a narrow detention net,¹⁵³ improperly allows states broad discretion to create many categories of permitted preventative detention, and could result in the status quo or possibly increase pretrial detention. Most of the attempts to reform bail in recent years have failed to reduce detention rates. In essence, bail reform has failed defendants by failing to improve due process and expand pretrial liberty. A simple way to judge a proposed bail bill is to consider whether it presumes release or detention—incarceration or liberty. If the default is release for the majority of people without any action by government or defendant, then it looks more like pretrial reform. Reforming state bail reform requires a dramatically different approach than the one we have relied on so far in the third wave of reform. The seven considerations of this piece provide a good first step towards meaningful change.

153. The ULC draft does require an adopting state to articulate a detention net consistent with its constitution and what offenses it deems “covered offenses.” ULC Act, *supra* note 18, at §§ 308, 403; *see also* ULC Guide, *supra* note 44, at 12 (“However, depending on how a state legislature elects to treat bracketed and other provisions, define its detention net, or otherwise modify the Act, it could become a liability to those seeking to achieve reform and reduce the use of pretrial jailing.”).