

# MODELS OF BAIL REFORM

*Brandon L. Garrett\**

## Abstract

Bail reform is an urgent topic in the United States and internationally, but what constitutes reform and how to accomplish reform goals is contested. Jails are a modern epicenter of incarceration, with a stunning growth in American jail populations over the past four decades despite declines in both arrests and crime. As many as sixty percent of the half million people currently in jails have not been convicted but are instead detained pretrial. Prior waves of bail reform produced a system largely reliant on secured bonds, which require up-front cash payments to avoid jail time before trial. More recent reform efforts have adopted divergent approaches towards changing bail practices. Several states have enacted legislation that has abolished the use of cash bail, reduced the use of cash bail, and conversely, required far greater reliance on cash bail. This Article seeks to shed light on key distinctions in bail reform approaches by focusing on six models: (1) the Procedural Due Process Model; (2) the Risk Assessment Model; (3) the Categorical Model; (4) the Community Services Model; (5) the Equal Protection Model; and (6) the Alternatives to Arrest Model. Each reflects a normative vision of the bail process, targets different legal actors, and raises distinct constitutional and legal questions. This Article recommends a composite model adopting elements of each model, using a separation of powers-informed approach to target pretrial actors whose often-hidden exercise of discretion can otherwise undermine efforts to consistently reform bail. This Article concludes by discussing a comprehensive vision for bail reform inside and outside of the criminal legal system.

INTRODUCTION .....	880
I. THE HISTORY OF BAIL REFORM .....	886
A. <i>English and Early American Bail Practice</i> .....	886
B. <i>First Generation Bail Reform</i> .....	887
C. <i>Second Generation Bail Reform</i> .....	888
D. <i>Third Generation Bail Reform</i> .....	889

---

\* L. Neil Williams, Jr. Professor of Law, Duke University School of Law and Faculty Director, Wilson Center for Science and Justice. Many thanks to Shima Baughman, Russell Gold, John Monahan, Christopher Slobogin, Steven Schwarcz, Sandra Guerra Thompson, and Kate Weisburd for comments on earlier drafts. Beginning in March 2020, I have served as court-appointed monitor in the *ODonnell v. Harris County* federal consent decree regarding misdemeanor bail. That consent decree is described in this Article, as are public reports and findings, but all views regarding relative strengths and limitations of various approaches towards bail and pretrial conditions expressed here are my own. I thank Krystal Dillon for excellent research assistance.

II.	SIX MODELS OF BAIL REFORM .....	890
A.	<i>The Procedural Due Process Model</i> .....	891
1.	Elements of the Procedural Due Process Model .....	891
2.	Adoption of the Procedural Due Process Model .....	897
3.	Limitations of the Procedural Due Process Model .....	902
B.	<i>The Risk Assessment Model</i> .....	903
1.	The Rise of Risk Assessment in Pretrial Decision-making .....	905
2.	Limitations of the Risk Assessment Model .....	908
C.	<i>The Categorical Model</i> .....	910
1.	Adoption of the Categorical Model .....	911
2.	Limitations of the Categorical Model .....	913
D.	<i>The Community Support Model</i> .....	913
E.	<i>The Equal Protection Model</i> .....	916
F.	<i>The Alternatives to Arrest Model</i> .....	918
III.	ASSESSING MODELS OF BAIL REFORM .....	921
A.	<i>Comparing Effectiveness of Bail Reform Models</i> .....	921
B.	<i>Composite Bail Reform Models</i> .....	922
C.	<i>Separation of Powers and Bail</i> .....	924
D.	<i>Selecting No Model</i> .....	926
IV.	A COMPREHENSIVE APPROACH .....	926
A.	<i>Rethinking Court Appearance and Dangerousness</i> .....	927
B.	<i>Rethinking Pretrial Services</i> .....	928
C.	<i>From Detention to Housing</i> .....	929
	CONCLUSION .....	930

## INTRODUCTION

Bail reform is an urgent political and social topic in the United States and internationally.<sup>1</sup> States and localities are enacting and considering a

---

1. See Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 743–44 (2020). Throughout this Article, although state and local terminology varies in ways that lend confusion to public debates, “bail” refers generically to both secured bonds with monetary conditions attached up front, and unsecured bonds, in which there are no such conditions. See generally *infra* Part I (discussing bail reforms that highlight the different types of bail).

wide range of approaches,<sup>2</sup> and many are engaging in heated debates all variously blaming bail policies for higher crime rates,<sup>3</sup> over-incarceration,<sup>4</sup> the spread of COVID-19,<sup>5</sup> and harm to vulnerable persons.<sup>6</sup> Jails are a modern epicenter of incarceration with stunning growth in populations over four decades.<sup>7</sup> As many as sixty percent of the half million people currently detained in jails have not been convicted but are instead detained pretrial.<sup>8</sup> These individuals are disproportionately Black, Latinx, and people with behavioral health needs.<sup>9</sup> There is a far greater understanding that a brief jail stay can harm individuals by disrupting their lives and increasing the risk of recidivism.<sup>10</sup> During the COVID-19 pandemic, jails quickly emerged as national viral epicenters, harming detained persons and the surrounding communities.<sup>11</sup>

The relatively recent prominence of jail detention in the United States raises deep constitutional questions. As the Supreme Court of the United

2. See Beatrix Lockwood & Annaliese Griffin, *The State of Bail Reform*, THE MARSHALL PROJECT (Oct. 10, 2020), <https://www.themarshallproject.org/2020/10/30/the-state-of-bail-reform> [<https://perma.cc/KXZ6-EMLU>].

3. See *id.* For example, New York's bail reform law was partially rolled back three months after it was enacted after law enforcement and others argued it had resulted in higher crime. *Id.*

4. Samuel R. Wiseman, *Bail and Mass Incarceration*, 52 GA. L. REV. 235, 239 (2018).

5. See, e.g., NAT'L ACADS. OF SCI., ENG'G, & MED., *DECARCERATING CORRECTIONAL FACILITIES DURING COVID-19: ADVANCING HEALTH, EQUITY, AND SAFETY* 26–28 (Emily A. Wang et al. eds., 2020).

6. See, e.g., Shannon Scully, *Criminal Justice Reform Means Reforming the Mental Health System*, NAT'L ALL. ON MENTAL ILLNESS (Mar. 5, 2021), <https://www.nami.org/Blogs/NAMI-Blog/March-2021/Criminal-Justice-Reform-Means-Reforming-the-Mental-Health-System> [<https://perma.cc/PG35-R954>].

7. See Wiseman, *supra* note 4, at 245.

8. ZHEN ZENG, *JAIL INMATES IN 2016* 4 (2018).

9. See Cynthia E. Jones, "Give Us Free": *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 938–39 (2013) ("[N]early every study on the impact of race in bail determinations has concluded that African Americans are subjected to pretrial detention at a higher rate and . . . higher bail amounts than . . . white arrestees with similar charges and similar criminal histories."); David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1885–86 (2018); JENNIFER BRONSON & MARCUS BERZOFSKY, *INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12*, at 1 (2017) (finding in a jail inmate survey that twenty-six percent reported experiences that met threshold for serious psychological distress, and forty-four percent were told they had a mental disorder).

10. See Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–14 (2017); CHRISTOPHER T. LOWENKAMP ET AL., *THE HIDDEN COSTS OF PRETRIAL DETENTION* 22 (2013); Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 235 (2018); BRANDON L. GARRETT ET AL., *MONITORING PRETRIAL REFORM IN HARRIS COUNTY* 69 (2022).

11. See Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CAL. L. REV. 117, 119–20 (2022).

States stated in *United States v. Salerno*,<sup>12</sup> “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>13</sup> Nevertheless, the U.S. Constitution plays a sideline role as most judges rely on mechanisms that hinge on poverty—for example, whether people can afford cash bail—to decide whether to detain.<sup>14</sup> The now-dominant cash bail model permits a judicial officer to require secured bonds, for which a person must pay a set bail amount up front as a guarantee of court appearance after release from jail.<sup>15</sup> The officer sets the bond amount by following a calculus based on the risk of nonappearance in court and the public safety risk that the arrestee poses.<sup>16</sup> This wealth-and-dangerousness-based cash bail approach evolved fairly recently and has accompanied an increase in the use of pretrial detention.<sup>17</sup> Mounting evidence suggests that reducing reliance on cash bail can improve public safety, reduce racial disparities, and free large numbers of persons who are otherwise jailed based on lack of wealth.<sup>18</sup>

Part I describes how jail policies and practices are once again in flux, with bipartisan calls for reform and growing media attention to the problem.<sup>19</sup> In response, policy reform efforts have focused on abolishing cash bail in at least one state,<sup>20</sup> or reducing reliance on cash bail.<sup>21</sup>

12. 481 U.S. 739 (1987).

13. *Id.* at 755.

14. *See, e.g.*, Brief for Sandra G. Mayson & Kellen Funk as Amici Curiae Supporting Respondents 14, *In re Kenneth Humphrey*, 482 P.3d 1008 (Cal. 2021) (No. S247278).

15. *See infra* Section I.A. *See also* HARVARD L. SCH. CRIM. JUST. POL’Y PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 6 (2016), <https://www.prisonpolicy.org/scans/cjpp/FINAL-Primer-on-Bail-Reform.pdf> [<https://perma.cc/URG5-AJPT>].

16. *See* PRETRIAL JUST. INST., PRETRIAL JUSTICE IN AMERICA: A SURVEY OF COUNTY PRETRIAL RELEASE POLICIES, PRACTICES AND OUTCOMES 6 (2009). The American Bar Association strongly opposes use of such schedules: “[This Standard] flatly rejects the practice of setting bail amounts according to a fixed bail schedule based on charge.” ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 113 (3rd ed. 2007).

17. The concept of “dangerousness,” or the assessment of public safety and flight risks pretrial, has traditionally been based on the judgment of a judicial officer. *See infra* Section I.C. More recent approaches have sought to rely on empirically-informed metrics. *See infra* Section I.D.

18. *See, e.g.*, GARRETT ET AL., *supra* note 10, at 52.

19. *See, e.g.*, Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J. F. 1098, 1113 (2019); Kamala D. Harris & Rand Paul, Opinion, *Kamala Harris and Rand Paul: To Shrink Jails, Let’s Reform Bail*, N.Y. TIMES (July 20, 2017), <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html> [<https://perma.cc/YLJ6-A5MK>]; Margaret Talbot, *The Case Against Cash Bail*, NEW YORKER (Aug. 25, 2015), <https://www.newyorker.com/news/news-desk/the-case-against-cash-bail> [<https://perma.cc/E8EW-FRNW>].

20. *See* 725 ILL. COMP. STAT. 5/110-1.5 (2021) (explaining that “the requirement of posting monetary bail is abolished”); *infra* Sections II.A.C.

21. *See, e.g.*, Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 591 (2017).

introducing risk assessments pretrial;<sup>22</sup> prioritizing release pretrial;<sup>23</sup> or, conversely, as is the case with a recent Texas law, *increasing* the role of cash bonds pretrial.<sup>24</sup> Still, other proposals, such as California’s approach, do not clarify what the current system should be replaced with.<sup>25</sup> The public and policymakers are engaged in significant political and policy debates regarding how to best reform bail systems.<sup>26</sup>

This Article seeks to shed light on key distinctions between bail reform models.<sup>27</sup> These are: (1) the Procedural Due Process Model; (2) the Risk Assessment Model; (3) the Categorical Model; (4) the Community Services Model; (5) the Equal Protection Model; and (6) the Alternatives to Arrest Model. The first four models have been widely adopted in some form, but the last two, although important, have not been adopted. Part II of this Article provides a taxonomy by defining these bail reform models.

The Procedural Due Process Model focuses on the hearing conducted by a judicial officer, at which a decision is made whether to impose pretrial conditions, and if so, of what type.<sup>28</sup> This approach seeks to make bail hearings more procedurally robust—featuring representation by defense counsel, timely discovery, a timely appeal, full consideration of the person’s circumstances, and a clear and convincing evidence standard—following guidance from the Supreme Court in rulings such as *Salerno*.<sup>29</sup>

Second, the Risk Assessment Model involves the use of actuarial data to prioritize release for individuals who pose a lower risk of nonappearance and recidivism.<sup>30</sup> Such an approach incorporates data,

22. See *infra* Section II.B.

23. See *infra* Section II.C.

24. See, e.g., S.B. 6, 87th Leg., 1st Spec. Sess. (Tx. 2021).

25. See Erwin Chemerinsky, Opinion, *This is Not the Way to Reform California’s Bail System*, THE SACRAMENTO BEE (Aug. 20, 2018), <https://www.sacbee.com/opinion/oped/article217018990.html>.

26. See *infra* Section III.D. For a useful overview, see Lea Hunter, *What You Need to Know About Ending Cash Bail*, CTR. FOR AM. PROGRESS (Mar. 16, 2020), <https://www.americanprogress.org/article/ending-cash-bail/> [<https://perma.cc/8X6U-AU2W>]. Regarding the lack of consensus on reform models, see Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2404 (2018) (“Articulation of common goals has yet to produce a discrete set of common solutions, capable of replication on a larger scale state-to-state.”).

27. For prior syntheses of different approaches to bail reform, see, for example, *Moving Beyond Money: A Primer on Bail Reform*, HARV. L. SCH. CRIM. JUST. POL’Y PROGRAM 14–28 (Oct. 2016), <https://www.prisonpolicy.org/scans/cjpp/FINAL-Primer-on-Bail-Reform.pdf> [<https://perma.cc/SF6K-RNV6>].

28. See Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757, 761–65, 783 (2020) (examining procedural and substantive aspects of due process in the pretrial context, including a critique of the Fifth Circuit’s opinion in *ODonnell v. Harris County*).

29. 481 U.S. 739, 751 (1987).

30. See *infra* Part II.B.

usually collected by a pretrial services agency, regarding a series of factors such as age and criminal history to produce a score for a judge to consider when deciding whether to release the individual pretrial.<sup>31</sup> A wide range of jurisdictions have adopted pretrial risk assessments.<sup>32</sup> Many civil rights groups have raised concerns regarding accuracy and racial bias.<sup>33</sup> Conversely, bail bonds groups have criticized risk assessments because they reduce the role of cash bail.<sup>34</sup>

Third, the Categorical Model designates categories of individuals presumptively detained or presumptively released pretrial.<sup>35</sup> Many jurisdictions permit pretrial preventative detention for certain offenses.<sup>36</sup> Conversely, the Categorical Model may permit presumptive release.<sup>37</sup> Bail reforms have designated low-level offenses for which detention is not permitted or for which release is presumed.<sup>38</sup> The Model is simple to apply at the point of arrest, but it also empowers police and prosecutors to affect jail decisions through arrest and charging discretion. The Model also focuses on charges over other relevant individual circumstances.<sup>39</sup>

Fourth, the Community Services Model focuses on release with support in the community.<sup>40</sup> Providing support regarding pretrial appearance—such as text notifications, assistance with rescheduling, or transportation—can increase court appearance without resorting to detention.<sup>41</sup> However, research is mixed on the efficacy of many more

31. *Id.*

32. *Where Are Risk Assessments Being Used?*, MAPPING PRETRIAL INJUSTICE, <https://pretrialrisk.com/national-landscape/where-are-prai-being-used/> [https://perma.cc/83KE-LBGJ].

33. See Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2277 (2019).

34. See generally *The Use of Pretrial “Risk Assessment” Instruments: A Shared Statement of Civil Rights Concerns*, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Short.pdf> [https://perma.cc/55TD-JPKT] (advocating to “end secured money bail and decarcerate most accused people pretrial without the use of ‘risk assessment’ instruments”).

35. See *infra* Part II.C; see also Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 949 (2020) (advocating for approach separately treating minor and more serious crimes); CONN. GEN. STAT. § 54-64a(a)(2) (2017) (barring secured bond for certain crimes and narrowing use of secured conditions in misdemeanor cases).

36. See, e.g., 18 U.S.C. § 3142; D.C. CODE § 23-1322 (2022); FLA STAT. § 907.041 (2021); MASS. GEN. LAWS ch. 276, § 58A (2022), *invalidated by* *Scione v. Commonwealth*, 114 N.E.3d 74 (Mass. 2019). Other statutes designate “no bond” or detention orders in more limited circumstances. See *infra* Part II.B.

37. See *infra* Part II.C.2.

38. See *infra* Part II.C.

39. See *infra* Part II.F.

40. See *infra* Part II.D; see also Gloria Gong, *The Next Step: Building, Funding, and Measuring Pretrial Services (Post-Bail Reform)*, 98 N.C. L. REV. 389, 391–92 (2020) (discussing the use of community supervision in pretrial reform).

41. See Gong, *supra* note 40, at 392–93.

burdensome pretrial conditions because for many arrestees, simple release may be most effective.<sup>42</sup>

Two additional models have not been widely considered by policymakers. The fifth model, the Equal Protection Model, focuses on measuring and eliminating racial and class disparities in pretrial decision-making.<sup>43</sup> Sixth, the Alternatives to Arrest Model asks officers to make release decisions at the point of arrest rather than after a hearing and some period of detention in a jail.<sup>44</sup>

Each of the six models for bail reform can result in a markedly different approach towards who is detained pretrial, who is released, and under what conditions. The models differentially inform the discretion between pretrial options by using different standards, evidence, and procedures to inform discretion. Each model calls for different roles for defense lawyers, prosecutors, hearing officers, judges, sheriffs, bail bondspersons, and pretrial service agencies. In practice, bail reform models often select overlapping elements of each model. One reason bail reforms can fail is that there are real and underappreciated tensions between models.

In Part III, this Article recommends a composite and separation of powers-inspired approach to the pretrial system. One reason prior reforms often fail is that pretrial actors—including police, prosecutors, judicial officers, sheriffs, and pretrial services—can undermine each other. Executive actors with enforcement discretion (police and prosecutors), administrative actors (sheriffs and pretrial services), and judicial officers, must consistently support pretrial liberty and public safety. Otherwise, one can observe a shell game in which bail actors undermine each other's work or narrow the role of one actor to expand that of another.<sup>45</sup> The goal is to check and balance the often-overlapping discretion of each actor. Without focusing on each actor responsible for bail outcomes, any reform effort will be internally undermined.

This Article concludes by describing a comprehensive vision of bail reform extending beyond the judicial and criminal legal systems. The problem of bail reform has been intractable for many decades. Bail reform success stories are few but offer important lessons. Bail reform must minimize reliance on any form of pretrial detention, reserving jail for only the most serious cases and turning to other social services to

---

42. *See id.* at 392.

43. *See infra* Part II.E.

44. *See infra* Part II.F.

45. The recent en banc ruling from the United States Court of Appeals for the Fifth Circuit in *Daves v. Dallas County*, provides an illustration in which a bail schedule was set by judges but implemented by magistrates, and the court held plaintiffs lacked standing to sue judges, while it remained unclear to what extent magistrates can depart from the bail schedule set by the now-dismissed judges. 22 F.4th 522, 530, 543–44 (5th Cir. 2022).

provide housing and support. We have learned the hard way that only by reducing the reliance on jails as social and legal institutions can we effectively reform bail.

## I. THE HISTORY OF BAIL REFORM

The current variety in pretrial systems in the United States evolved from three distinct waves of bail reform that explain the current state of practice. As the sections below describe, early American practice, in part reacting to the English system, largely relied on pretrial release without any financial cost involved. By the mid-twentieth century, however, financial costs were increasingly imposed in pretrial settings, and policymakers and court systems started to respond out of concern that indigent people were disproportionately detained despite a high likelihood that they would appear in court. By the 1970s, the focus shifted from risk of nonappearance towards the risk of pretrial recidivism. In the 1990s, policymakers adopted a resurgent focus on risk assessments to provide quantitative information about both court appearance and recidivism.

### A. *English and Early American Bail Practice*

Bail reform dates back to the Colonial era in the United States, and to the time of King Edward I of England and the Statute of Westminster of 1275, which reflected debates over abusive practices by sheriffs and displayed a series of legal reforms directed towards detention of criminal defendants, as well as a growing set of English protections in the Bill of Rights, Habeas Corpus Act, and Petition of Right.<sup>46</sup> Following independence, these protections were incorporated into American practice but applied in a distinct detention-averse manner that ensured an almost complete right to release without any financial cost, except for capital cases.<sup>47</sup>

When the U.S. Constitution was ratified and amended, the Suspension Clause protected the privilege of habeas corpus, and the Eighth Amendment protected against the imposition of excessive bail, but the

---

46. See Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4, 5–6 (2018); Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1051–52 (2018); Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 861–62 (2018).

47. See Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 710–11 (2018); Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 919–20 (2013); Gross, *supra* note 46, at 1053–54.



Constitution included no text regarding further bail rights.<sup>48</sup> In contrast, state laws permitted release under a surety; indeed, many states retain constitutional rights to bail.<sup>49</sup> Further, states did not traditionally require any prepayment but rather only a payment upon default, unlike current systems in which the bond must be secured prior to release, including fees that must be paid to bondsmen.<sup>50</sup> That older, traditional system remained in place well into the twentieth century.<sup>51</sup>

### B. *First Generation Bail Reform*

In the first generation of bail reform, courts and policymakers focused on the need to provide individual hearings to assess flight risk rather than relying on fixed or automatic bail schedules.<sup>52</sup> The United States now has one of the only systems in the world in which there is a commercial bail bond industry.<sup>53</sup> In 1951, in *Stack v. Boyle*, the Supreme Court adjudicated an Eighth Amendment Excessive Bail Clause challenge to a practice that set a \$50,000 bond for all persons arrested for conspiring to violate the Smith Act.<sup>54</sup> The Supreme Court emphasized that bail determinations must be individualized and remanded the case for further factfinding without suggesting any limits on imposing unaffordable bond.<sup>55</sup> Perhaps in part due to the ambiguity of the Court's ruling, many jurisdictions continue to follow approaches in which judges employ rigid bail schedules pretrial.<sup>56</sup>

---

48. Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 968–71 (1965) (arguing that the Eighth Amendment's language should be read more broadly). *But see* Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 338 (1982) (“The central flaw in the historical argument for an eighth amendment right to bail is simply that the amendment does not explicitly grant this right.”). Further, as discussed *infra* Part II.A and E, the Due Process and Equal Protection Clauses regulate pretrial detention. *See* Van Brunt & Bowman, *supra* note 47, at 743–48 (asserting that “the use of money bail orders to detain those who cannot pay violates equal protection and due process”).

49. *See* Gross, *supra* note 46, at 1053–54.

50. *See* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 78, 80 (1977).

51. *See* Van Brunt & Bowman, *supra* note 47, at 714.

52. *See generally* Charles E. Ares et al., *The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole*, 38 N.Y.U. L. REV. 67, 71–74 (1963) (examining the Manhattan Bail Project that provided a pre-arraignment investigation).

53. *See* Van Brunt & Bowman, *supra* note 47, at 715–16.

54. *Stack v. Boyle*, 342 U.S. 1, 6–7 (1951).

55. *Id.*

56. Several courts have more recently found use of bail schedules to be unconstitutional on due process grounds. *See, e.g.,* Walker v. City of Calhoun, 901 F.3d 1245, 1271 (11th Cir. 2018); O'Donnell v. Harris County, 892 F.3d 147, 159–61 (5th Cir. 2018), *overruled by* Daves v. Dallas County, 22 F.4th 522 (5th Cir. 2022); Hernandez v. Sessions, 872 F.3d 976, 992 (9th Cir. 2017) (“By maintaining a process for establishing the amount of a bond that likewise fails to consider the individual's financial ability to obtain a bond in the amount assessed or to consider alternative

The first generation of bail reform began with the influential Manhattan Bail Project in 1961, which piloted an alternative approach in which pretrial release would be prioritized based on a person's individual circumstances and the risk of nonappearance. Professor Caleb Foote famously described this system as raising a constitutional crisis in which wealth-based discrimination deprives persons of their liberty.<sup>57</sup> Attorney General Robert F. Kennedy also criticized the system, emphasizing that people were detained on the basis of poverty.<sup>58</sup>

The result of these critiques and reform movements was the Federal Bail Reform Act of 1966, which adopted a presumption that defendants were entitled to pretrial release on personal recognizance or an unsecured bond, with a primary focus on ensuring the appearance of a defendant at trial.<sup>59</sup> Upon signing the Act, President Lyndon B. Johnson stated, "Because of the bail system, the scales of justice have been weighted for almost two centuries not with fact, nor law, nor mercy. They have been weighted with money."<sup>60</sup> Citing the Manhattan Bail Project, President Johnson lauded how the legislation allowed judges to detain "dangerous persons," but to otherwise release individuals based on a "flexible set of conditions."<sup>61</sup>

### C. *Second Generation Bail Reform*

Second generation bail legislation turned from focusing on court appearance to primarily focusing on the risk of offending by "dangerous persons."<sup>62</sup> Beginning in the 1970s, a move to include dangerousness in

---

conditions of release, the government risks detention that accomplishes 'little more than punishing a person for his poverty.'"). For a discussion of the constitutionality of such bail schedules, see Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 12, 15 (2011).

57. Foote, *supra* note 48, at 960 ("[P]retrial imprisonment of the poor solely as a result of their poverty, under harsher conditions than those applied to convicted prisoners, so pervades our system that for a majority of defendants accused of anything more serious than petty crimes, the bail system operates effectively to deny rather than to facilitate liberty pending trial.").

58. See *Testimony by Attorney General Robert F. Kennedy on Bail Legislation Before the Subcommittees on Constitutional Rights and Improvements in Judicial Machinery of the Senate Judiciary Comm. 1*, 88th Cong. (1964) (statement of Robert F. Kennedy, Attorney General, Department of Justice); Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice, 66-67 (1963).

59. See Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966).

60. See Lyndon B. Johnson, *Remarks at the Signing of the Bail Reform Act of 1966*, THE AM. PRESIDENCY PROJECT (June 22, 1966), <https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-bail-reform-act-1966> [<https://perma.cc/ZJ34-NCVY>].

61. *Id.*

62. See Van Brunt & Bowman, *supra* note 47, at 731 (noting that "[b]y 1984, 34 states and the District of Columbia had laws on their books allowing consideration of a defendant's 'dangerousness' in the bond decision").

pretrial release decision-making took hold.<sup>63</sup> Beginning with the District of Columbia, jurisdictions enacted provisions permitting preventative detention without bond of persons who committed violent crimes deemed to pose a safety risk, so long as certain due process protections were followed.<sup>64</sup> The District of Columbia adopted one of the first pretrial services agencies that interviewed defendants to make recommendations to the court regarding pretrial release and conditions and provided follow-up supervision and services pretrial.<sup>65</sup>

The federal government followed a dangerousness-focused approach with the Bail Reform Act of 1984, which permitted detention without bond based on a showing of clear and convincing evidence that an individual posed a danger or a flight risk (and that release on a personal recognizance, an unsecured bond, or other conditions, would not reasonably assure the public's safety).<sup>66</sup> The Supreme Court then affirmed the legality of the Act in *Salerno*, where the Court adjudicated an Excessive Bail Clause challenge to the Act.<sup>67</sup> Most states then adopted the dangerousness-focused approach, but often in combination with money bail schemes (unlike the D.C. model, which incorporated the use of a pretrial services agency).

Thus, the approach focuses chiefly on future dangerousness and the use of cash bail to secure pretrial detention of individuals deemed to be dangerous by carefully considering criminal history and arrest charges. A cash bond is a blunt instrument, however, for detaining persons who pose some risk as “dangerous persons.” Even if judges can reliably identify such persons, those who can pay the fee to a bondsman can often obtain their release quite promptly.<sup>68</sup> In contrast, persons who cannot afford the fee are detained irrespective of the risk that they pose.

#### D. Third Generation Bail Reform

A third reform movement focuses on incorporating new types of information in the bail calculus, particularly regarding the central focus of the second generation of reform: future dangerousness. One example

---

63. See John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 2–3, n.7, n.9, 13 (1985).

64. See District of Columbia Court Reform and Criminal Procedures Act of 1970, Pub. L. No. 91-358, 84 Stat. 473; *United States v. Edwards*, 430 A.2d 1321, 1332–33 (D.C. 1981) (finding D.C. Court Reform Act constitutional).

65. See Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, PRETRIAL JUST. INSTIT. 13 (2010).

66. See Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984), 18 U.S.C. §§ 3141–3156 (1982 ed., Supp II); Ann M. Overbeck, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 U. CINN. L. REV. 153, 153–55 (1986).

67. *United States v. Salerno*, 481 U.S. 739, 741 (1987).

68. For recent litigation challenging the use of such cash bail schedules, see, for example, *Daves v. Dallas Cnty., Tex.*, 984 F.3d 381 (5th Cir. 2020), *reh'g granted* 22 F.4th 522 (2022).

is the use of risk assessment instruments, as described in the next Part, to provide data regarding the questions of risk of nonappearance and recidivism.<sup>69</sup> A judge—in addition to information concerning the charges, criminal history, and any pretrial services reports—would receive information about risks of nonappearance and recidivism.

The current state of reform is hard to fully define given how contested bail reform approaches continue to be.<sup>70</sup> Whether there is an emerging fourth generation of bail reform movements or deep disagreement across a host of dimensions is unclear. In the past decade and a half, there has been a flurry of state-level legislative activity concerning pretrial policies, with 500 enactments between just 2012 and 2017.<sup>71</sup> As will be discussed in the next Part, those new statutes include a wide range of—sometimes inconsistent—approaches. Many states have adopted risk assessment instruments. Still, other states have adopted categorical approaches, stating that secured or cash bond cannot be imposed for a list of arrest offense types. While states have adopted new standards for bail hearings, bail reform still remains at a crossroads, with several competing models perhaps replacing the prior models.

One lesson is that, after decades of bail reform, no consensus has emerged, and the current moment is divided. Quite inconsistent approaches to bail reform have cycled through a range of jurisdictions. Democratic experimentation, differing community values, and local control over criminal policy and practice can explain these differences. Uniformity is not necessarily desirable in matters of policy. However, as we explore these models carefully, inconsistencies and limitations of models emerge. Some approaches towards bail reform cannot accomplish their own goals, even on their own terms. The next Part seeks to clarify the discussion by setting out each model in detail.

## II. SIX MODELS OF BAIL REFORM

The bail reform law and policy space contains several distinct and not necessarily compatible approaches, with none emerging as the dominant model. In Part II, the sections will describe a broader set of possible approaches than in the past and an increased willingness to reconsider

---

69. See *infra* Part II.C.

70. See Van Brunt & Bowman, *supra* note 47, at 771 (describing how “[t]hird wave” reformers must understand that their efforts to transform pretrial detention practices will continue to face powerful forces of inertia and resistance”).

71. See Amber Widgery, NAT’L CONF. STATE LEGISLATURES, *Trends in Pretrial Release: State Legislation* 1 (2015), <https://www.ncsl.org/research/civil-and-criminal-justice/trends-in-pretrial-release-state-legislation.aspx> [https://perma.cc/ZP9G-MUKT]; NAT’L CONF. STATE LEGISLATURES, *Trends in Pretrial Release: State Legislation Update* (2018), <https://www.ncsl.org/research/civil-and-criminal-justice/trends-in-pretrial-release-state-legislation.aspx> [https://perma.cc/ZP9G-MUKT].

prior approaches. Part II will also show that there is no consensus regarding how to proceed. The six models are: (1) the Procedural Due Process Model; (2) the Risk Assessment Model; (3) the Categorical Model; (4) the Community Services Model; (5) the Equal Protection Model; and (6) the Alternatives to Arrest Model.

### A. *The Procedural Due Process Model*

One approach toward ensuring a sound pretrial process is to assure that the bail hearing is procedurally robust. The Supreme Court has held that a three-part cost-benefit test, set out in *Mathews v. Eldridge*,<sup>72</sup> applies when considering whether sufficient process is provided under the Due Process Clause.<sup>73</sup> The *Mathews* test asks that the court balance: (1) the private interest affected by official action; (2) the risk of an erroneous deprivation of that interest through procedures used as compared to any substitute procedures; and (3) the government's interest and costs of any additional procedures.<sup>74</sup> While the Court has noted that, in criminal procedure contexts, a more traditional "fundamental fairness" test may apply, the Court has applied the *Mathews* test to procedures for pretrial detention and involuntary civil commitment.<sup>75</sup> Lower courts have largely done the same when evaluating procedural due process challenges to pretrial procedures. A separate line of Supreme Court rulings that predate *Mathews* focus on conditioning access to courts on the ability to pay and any procedures used when wealth-based decisions are made pretrial.<sup>76</sup> The Procedural Due Process Model is largely focused on the judicial officer who presides over bail hearings—both the chief strength and the central limitation of the model. A robust and fair bail hearing does not necessarily mean that the judicial officer exercises discretion soundly. Further, a bail setting is a more complex process than commonly appreciated as a range of other actors can impact the quality and quantity of the decision-making.

#### 1. Elements of the Procedural Due Process Model

The Procedural Due Process Model focuses on procedural compliance as a remedy for a cash bail system in which traditionally rigid cash bail schedules operated on individuals irrespective of their ability to pay or the risk they posed. The goal is to permit a robust pretrial hearing with

---

72. 424 U.S. 319 (1976).

73. *Id.* at 339.

74. *Id.*

75. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion); *Heller v. Doe by Doe*, 509 U.S. 312, 330–31 (1993); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

76. *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). As discussed further in Section E, *infra*, still additional access-to-courts cases engage in both due process and equal protection analysis of procedures that impact indigent defendants.

representation by defense counsel, discovery, and full consideration by the judge of the person's case under a rigorous evidentiary standard. The Supreme Court of California recently emphasized this approach, and it was adopted in part in recent legislation in Illinois, in a federal consent decree, and it was reflected in the landmark District of Columbia bail legislation revised in 1992.<sup>77</sup>

This model focuses on procedural due process, which has also been the main focus of rulings under the U.S. Constitution regarding pretrial decision-making. All pretrial approaches must comply with the Constitution, and each distinct model of reform also raises distinct constitutional questions. The requirements of procedural due process during the pretrial process are informed by the Supreme Court's ruling in *Salerno*—a ruling that settled certain basic questions but left quite a bit unsettled by failing to provide sufficient guidance to jurisdictions as they consider which approach to take in pretrial decision-making. Simply put, as in many areas of constitutional law, the Court set a constitutional floor without a great deal of definition, allowing jurisdictions room to improve upon the minimal process guaranteed but also making it more difficult to identify clear constitutional violations.

The *Salerno* Court held that pretrial detention was permissible under the federal Bail Reform Act of 1984 only where the government provided a robust, adversarial, on-the-record hearing, and a judge made a finding by clear and convincing evidence that detention was necessary.<sup>78</sup> The *Salerno* Court found that the Act's procedures were not facially invalid under the Fifth Amendment's Due Process Clause such that there was no set of circumstances under which the Act would be invalid. The Court emphasized that the government's "regulatory" interest in community safety is "overwhelming" and can outweigh an individual's liberty interest in "appropriate circumstances."<sup>79</sup> The Court concluded that the procedures provided under the Act could sufficiently assure the accuracy of future dangerousness determinations.<sup>80</sup> Further, the Court found that

---

77. See *United States v. Salerno*, 481 U.S. 739, 750–51 (1987) ("When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat."); *United States v. Fidler*, 419 F.3d 1026, 1028 (9th Cir. 2005) ("[T]he detention is not based solely on the defendant's inability to meet the financial condition, but rather on the district court's determination that the amount of the bond is necessary to reasonably assure the defendant's attendance at trial or the safety of the community."); *In re Humphrey*, 482 P.3d 1008, 1020 (Cal. 2021) ("[W]e similarly interpret our Constitution to bar a court from causing an arrestee to be detained pretrial based on concerns regarding the safety of the public or the victim, unless the court has first found clear and convincing evidence that no other conditions of release could reasonably protect those interests.").

78. *Salerno*, 481 U.S. at 751–52.

79. *Id.* at 750–52.

80. *Id.* at 751–52.

they did not violate the Excessive Bail Clause of the Eighth Amendment, due to the government's compelling interests in assuring public safety pretrial.<sup>81</sup>

In finding the Bail Reform Act appropriately regulatory and valid, the *Salerno* Court cited to prior cases that held that under the Due Process Clause, the government must make a strong evidentiary showing when seeking to deprive a person who is presumed innocent and not yet convicted of any crime of their liberty.<sup>82</sup> Further, the Court detailed the procedures provided under the Act and emphasized its "numerous procedural safeguards," including that an applicant is entitled to a "prompt detention hearing."<sup>83</sup> The Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes."<sup>84</sup> The Act provides for a right to counsel at detention hearings, for defendants to testify and present witnesses, that the Government must prove its case by clear and convincing evidence, and that a judicial officer must make written findings based on statutorily enumerated factors.<sup>85</sup> Additionally, it provides that immediate appellate review is available.<sup>86</sup> These "exacting" procedural protections, however, were set out as evidence of facial validity and not as due process requirements.<sup>87</sup> Further, the Court declined to address whether the Excessive Bail Clause imposes substantive limits on the power to declare classes of arrestees bailable or not.<sup>88</sup> The *Salerno* Court's focus was procedural, and the Court's accompanying body of rulings set out due process boundaries, but they do not specify in further detail what pretrial procedures must consist of.

Many jurisdictions do not provide the central protections that the federal Act provides. However, this raises the question: which of the "numerous procedural safeguards" found important in *Salerno* must be present to show a due process violation?<sup>89</sup> Are many jurisdictions violating the Due Process Clause, or is procedural due process insufficiently clear? Lower courts have struggled with these issues. Some lower courts have found sufficiently stark departures from *Salerno* to be

---

81. *Id.* at 752–53.

82. *Addington v. Texas*, 441 U.S. 418, 431–33 (1979); *Schall v. Martin*, 467 U.S. 253, 263–64 (1984).

83. *Salerno*, 481 U.S. at 747, 755.

84. *Id.* at 747.

85. *Id.* at 742.

86. *Id.*

87. *Id.* at 752.

88. *Id.* at 754.

89. *See* Van Brunt & Bowman, *supra* note 47, at 734 ("After the D.C. Court Reform Act and *Salerno*, states added provisions allowing for public safety determinations in bail setting, but often without the due process protections included in the Bail Reform Act and relied upon by the Supreme Court in affirming the legislation's constitutionality.").

procedural due process violations.<sup>90</sup> Further, local jurisdictions can build upon the constitutional floor and err on the side of providing robust procedural protections.

One key protection, as noted, is the standard of proof: the defendant shall be presumed eligible for release, and the state bears the burden of providing by clear and convincing evidence that the defendant poses a risk of flight or a public safety threat. While most jurisdictions adopt a clear and convincing evidence standard, some adopt a lower burden of proof or leave relevant burdens unclear.<sup>91</sup> Where localities have not required strong evidence, but rather mechanically apply a cash bail schedule that is not tied to any risk of flight or public safety threat, courts have been more likely to find due process violations.<sup>92</sup>

A second question is how carefully judges must consider indigency or ability to pay when deciding whether to order cash bail. A federal court recently held that federal judges must consider indigence in each case, and noted that there was evidence that state judges did consider indigency.<sup>93</sup> The Fifth Circuit, after examining *Salerno*, rejected a preliminary injunction request to require pretrial release for persons who are indigent and lack ability to pay bail for being unduly broad.<sup>94</sup> Further, determination of indigency and ability to pay may require pretrial services or other social workers to interview a person before the hearing to gather data. Such determinations require a process, spending funds, and some investigation to gather information about a person's financial resources, or lack thereof, during a brief time period. Other information may also inform pretrial release decisions, and similar questions arise as to whether procedural fairness governs how a hearing officer addresses such information. Thus, another question is whether an arrestee's ability to comply with the conditions of release should factor into a hearing officer's decision, and whether it matters what type of conditions those consist of.<sup>95</sup>

---

90. *Id.* at 751–72; *see, e.g.*, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 775 (9th Cir. 2014) (en banc) (finding a state law that barred bail for non-citizens who committed certain offenses unconstitutional and stating that it did not permit individual determinations of flight risk or public safety threat as set out in *Salerno*).

91. *See* UNIF. PRETRIAL RELEASE AND DETENTION ACT prefatory n. (UNIF. L. COMM'N 2020) (noting that “most existing state pretrial detention regimes include procedural standards quite similar to the Bail Reform Act,” regarding the standard of proof).

92. *See, e.g.*, *ODonnell v. Harris Cnty.*, 892 F.3d 147, 163 (5th Cir. 2018) (requiring a more robust bail hearing to replace use of a secured-money-bail schedule), *overruled by* *Daves v. Dallas Cnty.*, 984 F.4th 522 (5th Cir. 2022). *But see* *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc) (finding failure to adopt a presumption against the use of cash bail not unconstitutional).

93. *Rasmussen v. Garrett*, 489 F. Supp. 3d 1131, 1163 (2020).

94. *Daves*, 984 F.3d at 412.

95. *United States v. Munchel*, 991 F.3d 1273, 1279–81 (D.C. Cir. 2021).



A range of other pretrial hearing procedures are not commonly provided, including the right to counsel, factual findings and written opinions, or the right to an appeal.<sup>96</sup> The provision of indigent defense representation was emphasized by the Court in *Salerno*. There is evidence that having a lawyer can be highly impactful at pretrial hearings.<sup>97</sup> Since 1998, the American Bar Association has recommended that counsel be present at all bail hearings, and in 2007, recommended a clear and convincing evidence standard for pretrial decision-making.<sup>98</sup> Despite *Rothgery v. Gillespie County*'s<sup>99</sup> ruling that a defendant is entitled to counsel at all critical stages of a case, most states treat that ruling as insufficiently addressing the question and hold that an attorney is not required or provided in misdemeanor pretrial hearings.<sup>100</sup> In the past, individuals were often not provided with representation at bail hearings. Having a lawyer present to represent individuals at bail hearings may add to fair process but may also add to legitimacy and rights protection.<sup>101</sup> However, the Supreme Court has not definitively ruled whether the Sixth Amendment right to counsel extends to bail hearings as a "critical stage" of prosecution. In *Gerstein v. Pugh*,<sup>102</sup> the Court suggested that all pretrial procedures that "would impair defense on the merits" must involve counsel.<sup>103</sup>

---

96. NAT'L ASS'N PRETRIAL SERVS. AGENCIES, *National Standards on Pretrial Release*, Standards 1.6-1.7 (2020), [https://cdpsdocs.state.co.us/ccjj/committees/PRTF/Handout/2020\\_NAPSA\\_StandardsOnPretrialRelease.pdf](https://cdpsdocs.state.co.us/ccjj/committees/PRTF/Handout/2020_NAPSA_StandardsOnPretrialRelease.pdf) [<https://perma.cc/ZN55-U7LV>].

97. Professor Paul Heaton studied a pilot program to provide such representation in Philadelphia, finding substantial impacts not on detention rates, but on likelihood of bail violations and future arrests. See Paul Heaton, *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities*, 96 IND. L.J. 701, 703–04 (2021).

98. A.B.A., *Expanded Pretrial Release* (May 20, 2022), [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defense/resources/covid-19-resources/expanded-pretrial-release/](https://www.americanbar.org/groups/legal_aid_indigent_defense/resources/covid-19-resources/expanded-pretrial-release/) [<https://perma.cc/D69R-2YQL>].

99. 554 U.S. 191 (2008).

100. *Id.* at 212. John 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. 3, 831, 840–41 (2017) (noting that in thirty-two states, a defendant is not required to be provided with counsel at pretrial hearings). Further, even in jurisdictions where there is a pretrial right to counsel, counsel may not be provided in practice. Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1023–24 (2013).

101. See Douglas Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1726–27 (2002); see also Douglas 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, 817–18 (2020).

102. 420 U.S. 103 (1975).

103. *Id.* at 122; see also Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 A.B.A. 23 (2016); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513 (2013) (analyzing the cruciality of effective assistance of counsel especially at the bail hearing stage).

It also remains an open question whether due process requires that the judicial officer's findings be set out in writing as the federal Bail Reform Act provides. The Fifth Circuit, in its ruling in *ODonnell v. Harris County*,<sup>104</sup> emphasized that written opinions were not required by the Due Process Clause.<sup>105</sup> If the findings are not required in writing, then it may be difficult to ensure that judges are complying with the standard for pretrial detention. Reviewing recordings of hearings or observing oral findings in person may be practically challenging.<sup>106</sup> Nor is it as clear how to appeal a decision that does not set out its factual findings or basis in writing.

The hearing itself can involve more or less trial-like procedures, including other features highlighted in *Salerno*. The District of Columbia statute provides: "The person shall be afforded an opportunity to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise."<sup>107</sup> Further, that statute makes it clear that the person may testify, but that testimony "shall not be admissible on the issue of guilt in any other judicial proceeding."<sup>108</sup> Lawyers might otherwise discourage their clients from speaking at pretrial hearings due to a concern that they may incriminate themselves with admissions.

Still additional questions arise in jurisdictions that do not require any particular timing regarding conducting pretrial hearings.<sup>109</sup> Challenges have been brought by detained individuals regarding policies of delayed bail hearings, including policies of not conducting hearings on weekends.<sup>110</sup> In some jurisdictions, a pretrial hearing—separate from a probable cause determination hearing—is not required in misdemeanor

---

104. 892 F.3d 147 (5th Cir. 2018), *overruled by* *Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022).

105. *Id.* at 160 ("We decline to hold that the Constitution requires the County to produce 50,000 written opinions per year to satisfy due process.").

106. For a detailed analysis of misdemeanor hearing videos, see for example, *National Association for Public Defense Harris Cnty. Misdemeanor Assessment Report*, NAT. ASS. FOR PUB. DEF. (July 6, 2021), <https://www.publicdefenders.us/files/Harris%20County%20Report%20July%206%202021%20FINAL.pdf> [<https://perma.cc/5BYY-KXSN>].

107. D.C. CODE ANN. § 23-1322(d)(4) (West 2017).

108. *Id.* at § 23-1322(d)(3).

109. Baughman, *supra* note 35, at 960 n.60 (noting that twelve states and the District of Columbia set out explicit timeframes for conducting pretrial hearings).

110. *Mitchell v. Doherty*, 530 F. Supp. 3d 744 (N.D. Ill. 2021) (challenging county practice of not conducting pretrial hearings on weekends and dismissing claim but providing opportunity to file amended complaint).

cases.<sup>111</sup> It is common for hearings, particularly in misdemeanor cases, to be extremely brief, lasting just a few minutes at most.<sup>112</sup>

Appeals of pretrial decisions may have quite limited or undefined processes, which may in turn affect the quality of and the rights protections at the bail hearings themselves. One noteworthy feature of the ODonnell Consent Decree is the requirement that a bail review, before a judge, take place on the next business day after the pretrial hearing.<sup>113</sup> However, in many jurisdictions, appeals may be delayed, and few jurisdictions regulate their timing.<sup>114</sup> Appellate rights regarding bail determinations are often highly limited.<sup>115</sup> If an appeal takes so long that lengthy detention persists before any reconsideration can take place, there may be no practical remedy for an unconstitutional or improper detention.

To conclude, there is a range of approaches to the bail hearing process, and procedural due process rulings that do not clearly answer which are required. However, the jurisdictions adopting a more robust procedural due process model are building upon the constitutional floor, as described next, to provide something more robust.

## 2. Adoption of the Procedural Due Process Model

A range of procedural recommendations designed to improve pretrial hearings, often going beyond the minimum constitutional floor set out in *Salerno*, are being implemented in a comprehensive way across large jurisdictions. Leading examples include recent Illinois legislation, a New Mexico constitutional amendment, the Harris County ODonnell Consent Decree, and a ruling by the California Supreme Court. This Section discusses each in turn.

In 2021, Illinois lawmakers adopted a statewide reform, the “Illinois Pretrial Fairness Act,” as part of a package of criminal justice measures.<sup>116</sup> The Illinois statute adopts a rule that: “All defendants shall be presumed eligible for pretrial release, and the State shall bear the

---

111. *Id.* at 756. North Carolina recently enacted legislation, in response to concerns regarding such delays, requiring that a first appearance normally be conducted within 72 hours. N.C. GEN. STAT. ANN. § 15A-601, *amended by* NC S.L. 2021-182 (2021).

112. *See, e.g.*, National Association of Criminal Defense Lawyers, *Three Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts* 16–17 (2011); *see also* Sarah Ottone & Christine Scott-Hayward, *Pretrial Detention and the Decision to Impose Bail in Southern California*, 19 CRIMINOLOGY, CRIM. JUST. L. & SOC’Y 2, 33 (2021) (noting that in observations of fifteen courts in Los Angeles County, most hearings were “short and uncontested”).

113. Consent Decree at \*5–6, ODonnell v. Harris Cnty., No. 16-cv-01414 (S.D. Tex. Nov. 21, 2019) [hereinafter ODonnell Consent Decree] (presenting text of Local Rule 9.13, adopted as a court rule prior to enactment of the Consent Decree).

114. *See* Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2421 (2019).

115. *Id.*

116. 725 ILL. COMP. STAT. ANN. 5/110-6-6.1 (effective Jan. 1, 2023).

burden of proving by clear and convincing evidence” that the defendant poses a specific public safety threat.<sup>117</sup> In setting pretrial conditions on release, the statute—which abolished the requirement of posting monetary bail—required that the judge find that “no condition or combination of conditions” set out in the statute “can mitigate the real and present threat to the safety of any person or persons or the defendant’s willful flight.”<sup>118</sup> The statute sets out factors to inform a dangerousness decision,<sup>119</sup> but also emphasizes that the decisions involved should be “individualized,” and that “no single factor or standard should be used exclusively.”<sup>120</sup>

---

117. *Id.*

118. *Id.* at 5/110-1.5 (abolishing monetary bail, with narrow exceptions regarding interstate compacts); *id.* at 6.1.

119. Those factors are:

(1) The nature and circumstances of any offense charged, including whether the offense is a crime of violence, involving a weapon, or a sex offense.

(2) The history and characteristics of the defendant including:

(A) Any evidence of the defendant’s prior criminal history indicative of violent, abusive or assaultive behavior, or lack of such behavior. Such evidence may include testimony or documents received in juvenile proceedings, criminal, quasi-criminal, civil commitment, domestic relations, or other proceedings.

(B) Any evidence of the defendant’s psychological, psychiatric, or other similar social history which tends to indicate a violent, abusive, or assaultive nature, or lack of any such history.

(3) The identity of any person or persons whose safety the defendant is believed to pose a threat, and the nature of the threat;

(4) Any statements made by, or attributed to the defendant, together with the circumstances surrounding them;

(5) The age and physical condition of the defendant;

(6) The age and physical condition of any victim or complaining witness;

(7) Whether the defendant is known to possess or have access to any weapon or weapons;

(8) Whether, at the time of the current offense or any other offense or arrest, the defendant was on probation, parole, aftercare release, mandatory supervised release or other release . . . ;

(9) Any other factors . . . deemed by the court to have a reasonable bearing upon the defendant’s propensity or reputation for violent, abusive or assaultive behavior, or lack of such behavior.

*Id.* at § 5/110-6.1(g)(1)–(9).

120. *Id.* at § 5/110-6.1(f)(7).

Prior to pretrial hearings, the state must provide discovery, including copies of the defendant's criminal history, statements by the defendant to be relied on by the state, and any police reports.<sup>121</sup> The defendant has the right to counsel at such hearings.<sup>122</sup> A revocation of pretrial release may occur; similarly, only if the court "finds clear and convincing evidence that no condition or combination of conditions of release would reasonably assure the appearance of the defendant for later hearings or prevent the defendant from being charged with a subsequent felony or class A misdemeanor."<sup>123</sup>

A constitutional amendment adopted in 2017 in New Mexico similarly enhances the procedures to be followed during pretrial hearings, relying also in part on the Due Process Clause of the New Mexico Constitution.<sup>124</sup> The amendment states that: "The prosecutor must prove by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."<sup>125</sup> Before the hearing, the prosecutor must disclose all evidence that "the prosecutor intends to rely on at the hearing" and "all exculpatory evidence known to the prosecutor."<sup>126</sup> A defendant has a right to be represented by counsel and to have counsel appointed if the defendant is indigent.<sup>127</sup> The statute also sets out a series of factors to consider regarding the question of pretrial release.<sup>128</sup>

121. *Id.* at § 5/110-6.1(f)(1).

122. *Id.* at § 5/110-6.1(f)(3).

123. *Id.* at § 5/110-6(b)(4).

124. *See* N.M. STAT. ANN. § 5-409 (West); *see also* State *ex rel.* Torrez v. Whitaker, 410 P.3d 201, 216 (N.M. 2018) (quoting State v. Brown, 338 P.3d 1276) ("[T]he Due Process Clause of the New Mexico Constitution requires that a defendant's protections at a pretrial detention hearing include 'the right to counsel, notice, and an opportunity to be heard.'"); Commentary, N.M. STAT. ANN. § 5-409 (West 2020).

125. N.M. STAT. ANN. § 5-409(F)(4) (West). The New Mexico Supreme Court has explained that "the nature and circumstances of a defendant's conduct in the underlying charged offense(s) may be sufficient, despite other evidence, to sustain the [prosecutor's] burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community." State v. Ferry, 409 P.3d 918, 921 (N.M. 2017). If the prosecutor meets this initial burden, the prosecutor must also demonstrate by clear and convincing evidence that "no release conditions will reasonably protect the safety of any other person or the community." *Id.*

126. N.M. STAT. ANN. § 5-409(F)(2) (West).

127. *Id.* § 5-409(F)(3). *See* ADMIN. OFF. OF THE CTS. OF N.M., Key Facts and Law Regarding Pretrial Release and Detention 3 (2017), [https://www.nmcourts.gov/wp-content/uploads/2020/11/REVISED-Pretrial-Release-and-Detention-Key-Facts-9\\_28.pdf](https://www.nmcourts.gov/wp-content/uploads/2020/11/REVISED-Pretrial-Release-and-Detention-Key-Facts-9_28.pdf) [<https://perma.cc/H2MC-KJ7S>], for further procedures implementing the amendment.

128. Those factors include but are not limited to:

- (a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence;

The federal constitutional standard was cited by the California Supreme Court in a ruling that found a due process violation in the use of money bail without considering whether the defendant had the ability to pay, whether less restrictive alternatives could adequately protect the public and the victim, or whether it could ensure a defendant's appearance in court.<sup>129</sup> The court did not set out in detail what procedures should be followed in pretrial hearings. However, the court noted that "[a] court's procedures for entering an order resulting in pretrial detention must also comport with other traditional notions of due process to ensure that when necessary, the arrestee is detained 'in a fair manner.'"<sup>130</sup> Further, "Among those fair procedures is the court's obligation to set forth the reasons for its decision on the record and to include them in the court's minutes. Such findings facilitate review of the detention order, guard against careless or rote decision-making, and promote public confidence in the judicial process."<sup>131</sup> Similarly, an Arizona court rule adopted in 2017 bars the imposition of monetary conditions imposed "solely because the person is unable to pay the bond," instead requiring an "individualized determination" and the imposition of only the "least onerous type of condition."<sup>132</sup>

The O'Donnell Consent Decree, consisting of another influential model, focuses on procedural due process protections at bail hearings.

- 
- (b) the weight of the evidence against the defendant;
  - (c) the history and characteristics of the defendant;
  - (d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;
  - (e) any facts tending to indicate that the defendant may or may not commit new crimes if released;
  - (f) whether the defendant has been ordered detained under Article II, Section 13 of the New Mexico Constitution based on a finding of dangerousness in another pending case or was ordered detained based on a finding of dangerousness in any prior case; and
  - (g) any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, provided that the court shall not defer to the recommendation in the instrument but shall make an independent determination of dangerousness and community safety based on all information available at the hearing.

N.M. STAT. ANN. § 5-409(F)(6) (West).

129. *In re Kenneth Humphrey*, 482 P.3d 1008, 1013, 1018 (Cal. 2021).

130. *Id.* at 1021.

131. *Id.*

132. ARIZ. R. CRIM. P. 7.3(c)(2)(A) ("The court . . . must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the defendant is unable to pay the imposed monetary condition.").

The Fifth Circuit affirmed a federal judge's order that the cash bail system in Harris County, Texas, violated the Due Process Clause because it adopted a "flawed procedural framework" in which bail decisions by individual judges were arbitrary in practice.<sup>133</sup> After three years of litigation, in 2019, the parties reached a settlement consisting of a consent decree.<sup>134</sup> The ODonnell Consent Decree requires far more robust procedural protections at misdemeanor bail hearings. Judicial officers must make findings "by clear and convincing evidence" that the arrestee has the ability to pay the amount required or does not have that ability to pay but that "no less-restrictive condition or combination of conditions" could "reasonably assure" against flight or safety of the community.<sup>135</sup> All misdemeanor defendants are represented by a public defender or other counsel to prepare necessary discovery for hearings.<sup>136</sup> Harris County has implemented a system for electronic discovery to ensure that counsel has the necessary documents to prepare for misdemeanor bail hearings.<sup>137</sup> Following the hearing, the defendant has a right to an appeal at a bail review that must be conducted the next business day. Further, the court implemented an electronic court notification system and other support systems that will improve access to court after the bail decision is made.<sup>138</sup>

Additional litigation is pending in other federal courts, and some of the remedies flowing from that litigation track the procedural due process approaches reflected in the legislation, court rulings, and consent decrees discussed.<sup>139</sup> For example, in a civil rights case from Alamance County, North Carolina, a preliminary consent judgment has adopted key

---

133. *ODonnell v. Harris Cnty.*, 892 F.3d 147, 154 (5th Cir. 2018).

134. *ODonnell Consent Decree*, *supra* note 113, at \*5–6.

135. *Id.*

136. *Id.* at \*6 (arrestees "must be represented by counsel" at bail hearings).

137. *GARRETT ET AL.*, *supra* note 10, at iv.

138. *Id.*

139. *See, e.g.*, *Walker v. City of Calhoun*, 901 F.3d 1245, 1272 (11th Cir. 2018) (finding that the lower court abused its discretion in granting preliminary injunction in favor of the arrestee and concluding procedural due process analysis did not warrant relief); *see also* *Edwards v. Cofield*, No. 3:17-cv-321-WKW, 2018 WL 4101511, at \*1, \*3 (M.D. Ala. Aug. 28, 2018) (denying a motion for preliminary injunction and defendants' motion for summary judgment challenging pre-trial bail practices); *Buffin v. City and Cnty. of San Francisco*, No. 15-cv-04959-YGR, 2018 WL 424362, at \*1 (N.D. Cal. Jan. 16, 2018) (denying motions for summary judgment in a class action challenge to pre-trial bail); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1373 (N.D. Ala. 2018) (distinguishing *Walker* and granting a preliminary injunction to enjoin pre-trial bail practices). For a description of the American Bar Association's role in pending Fifth, Sixth, and Eleventh Circuit litigation, see Lorelei Laird, *ABA Files Amicus Brief Challenging Money Bail System*, ABA J. (Aug. 10, 2017), [http://www.abajournal.com/news/article/aba\\_amicus\\_brief\\_money\\_bail\\_5th\\_circuit](http://www.abajournal.com/news/article/aba_amicus_brief_money_bail_5th_circuit) [<https://perma.cc/8ZHA-BSB8>]. In addition, the Fifth Circuit reversed an injunction that called for immediate release of any inmate not provided with a hearing within forty-eight hours because it was overly expansive. *ODonnell v. Harris Cnty.*, 892 F.3d 147, 166–67 (5th Cir. 2018), *overruled by* *Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022).

elements of the general approach described, including the use of a *Salerno* standard and a requirement that judges make findings that comport with the standard.<sup>140</sup>

### 3. Limitations of the Procedural Due Process Model

While due process rights offer crucial rights at pretrial hearings, there are several respects in which a model chiefly focused on those process rights is, at the very least, incomplete. One set of concerns is internal and practical, and the other is external and more substantive.

Beginning with internal critiques, when judging a procedural due process approach on its own terms, there are real questions regarding how well courts should ensure a robust and meaningful pretrial. There may be limited public access to bail hearings, often conducted physically inside a jail facility without a recording or record of what transpired, and it may be difficult to ascertain whether judicial officers are following the required hearings process as a result.<sup>141</sup> There is evidence that bail officer compliance with new procedures can be highly inconsistent.<sup>142</sup>

Further, even if judicial officers do follow procedural due process standards, they will retain discretion to apply those standards to the facts before them. Those facts may be limited. Even a more procedurally robust hearing may still rely on quite limited information if scant discovery is available to the lawyers. Even if a more robust presentation is made by the lawyers, the hearing officer or judge still retains broad discretion to reach pretrial decisions. That discretion may still be exercised in a manner that is racially biased, punishes the poor, or unduly focuses on perceptions of dangerousness. Indeed, because even the more robust pretrial procedures often do not require a detailed written opinion or appeal, it may be difficult to challenge faulty exercises of discretion. Nor is it clear whether judges are taking the presumption against pretrial detention, expressed by the clear and convincing evidence standard, seriously. Where a right to cash bail still exists, there is also the concern

---

140. Order Granting Preliminary Injunction, No. 1:19-CV-01126 (2020).

141. Amanda Woog & Nathan Fennell, *Power and Procedure in Texas Bail-Setting*, 74 SMU L. REV. 475, 486–87 (2021) (“[B]ail-setting predominantly occurs in a ‘black box’ where the only people aware of what was actually said in the hearings are a magistrate, the (in all likelihood) unrepresented person arrested, and possibly other state actors like a pretrial services agent or bailiff. It is extremely difficult to monitor judges’ behavior when the public cannot watch what they are doing or read what happened in the courtroom.”).

142. Thus, even after a federal court required ability-to-pay findings, researchers found that such findings were made less than half of the time before setting bail. See, e.g., Andrea Woods et al., Symposium, *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia*, 54 GA. L. REV. 1235, 1269–70 (2020).



that the poor may still be detained due to poverty, particularly if the ability to pay is not determined or considered by the judge.<sup>143</sup>

Further, hearings take time, and robust hearings are even longer, making this approach resource intensive. It also potentially causes delays that place people in jail—who will ultimately be released—while they await their pretrial hearings. Additionally, this approach may face practical challenges in rural jurisdictions where pretrial hearings cannot be promptly conducted, resulting in further delays and pretrial detention of individuals waiting for a hearing. Put simply, one downside of the procedural due process approach on robust pretrial hearings is the focus on pretrial hearings. Releasing people upon arrest or booking without waiting for a judicial officer to conduct a review is a far better outcome if the ultimate result will be release.

Second, and more fundamentally, what the procedural due process approach does not alter—given the focus on process—is the substance of what is being assessed by the hearing officer or judge. The standards involve findings of clear and convincing evidence regarding flight risk or dangerousness. However, what does that evidence consist of? How does a hearing officer or judge decide how much evidence is sufficient? What should inform the advocacy of public defenders or prosecutors at these bail hearings? What is the empirical basis to determine that a person poses a substantial risk? Those questions are not answered by an approach that focuses on procedural, rather than substantive, rights.

The next approach, grounded in actuarial data, seeks to fill that pretrial information gap with empirical information designed to inform questions regarding risk of nonappearance or dangerousness. However, the same aspects of the pretrial process that pose practical and substantive challenges for accomplishing procedural due process also pose challenges for the use of risk assessment.

### B. *The Risk Assessment Model*

The use of risk assessments to inform pretrial decision-making and prioritize release for lower risk individuals is fairly new, although the use of risk assessment in criminal legal decision-making generally dates back many decades.<sup>144</sup> The entire generation of modern bail statutes that followed the federal Bail Reform Act of 1984, along with similar state laws adopted in almost every state, changed the focus from the risk that a defendant would fail to appear in court to an assessment of the risk that

---

143. See Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 25 (2005) (“[O]nly a handful of states inquire specifically into the defendant’s ability to pay a bond if set.”).

144. Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CAL. L. REV. 439, 450 (2020).

a defendant would commit a new crime.<sup>145</sup> However, these statutes all asked judges to predict failure to appear or commission of new crime without the benefit of any empirical evidence.<sup>146</sup> In *Salerno*, the Court assumed that the Bail Reform Act's provisions ensured some minimal level of "accuracy" without evidence that some concept of accuracy was being achieved in practice.<sup>147</sup>

In contrast, a risk assessment approach uses actuarial data to predict the likelihood that a person will not appear in court or reoffend before trial by using a list of risk factors to produce a score that a judge can consider when deciding whether to release an individual.<sup>148</sup> In general, risk assessments have been increasingly used in a variety of criminal contexts to prioritize efforts, including alternatives to incarceration.<sup>149</sup> The generally accepted definition of risk assessment describes it as "the process of using risk factors to estimate the likelihood (i.e., probability) of an outcome occurring in a population."<sup>150</sup> "Risk factors" are variables that: (1) statistically correlate with outcomes and (2) precede those outcomes in time.<sup>151</sup> In the case of pretrial risk assessments, the goal is to empirically validate which variables correlate with reoffending and nonappearance in court for the population of persons facing criminal charges.<sup>152</sup>

Such risk assessments require a person (usually a pretrial services staffer or social worker) to score an arrestee's risk. Some instruments require an interview, which means that to gather the information, the arrestee must be willing to answer questions asked by the social worker.<sup>153</sup> Other instruments focus just on static factors that can be inputted by looking at administrative data without an interview, such as age, crime of arrest, criminal history, and history of court nonappearance.<sup>154</sup> It can take time to produce those scores, however, and

---

145. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 506–07 (2012).

146. *Id.* at 507.

147. *United States v. Salerno*, 481 U.S. 739, 751 (1987).

148. *See* Garrett & Monahan, *supra* note 144, at 448–49.

149. *Id.* at 449–50.

150. *See* Helena Kraemer et al., *Coming to Terms with the Terms of Risk*, 54 ARCHIVES OF GEN. PSYCHIATRY 337, 340 (1997).

151. *See* Garrett & Monahan, *supra* note 144, at 448–49.

152. *See id.*

153. *See, e.g.*, VA. PRETRIAL RISK ASSESSMENT INSTRUMENT INSTRUCTION MANUAL 11 (VA. DEP'T OF CRIM. JUST. SERVS. 2019).

154. Advancing Pretrial Policy & Research, *About the Public Safety Instrument*, <https://advancingpretrial.org/psa/factors/> [<https://perma.cc/8R93-847A>] ("The PSA uses nine factors to generate scores that predict three outcomes—failure to appear pretrial, new criminal arrest while on pretrial release, and new violent criminal arrest while on pretrial release. Decision-makers use the PSA scores along with a Release Conditions Matrix to inform pretrial release decisions.").

that work can burden local social services, resulting in delays that could extend the detention of individuals waiting to be scored. The score is shared with a pretrial decision-maker. The risk assessments are not binding on judges, but they can inform judicial discretion. As a result, the model is potentially compatible with a procedural due process approach; the goal is to inform pretrial decision-making. To the extent that the goal is to replace consideration of other individual characteristics with certain set and measurable risks, however, the goal is quite inconsistent with the due process model, which seeks to help a person be heard before a judicial officer. The approach does seek to weaken the unfettered discretion of judicial officers, and at the very least, seeks to inform them using validated empirical data. It is a less judge-centered approach, and it can correspondingly empower, or at least rely upon, social services that conduct the risk assessments.

### 1. The Rise of Risk Assessment in Pretrial Decision-making

In recent years, a growing number of jurisdictions have incorporated pretrial risk assessments into bail systems.<sup>155</sup> The approach has garnered both endorsements and criticisms. The American Bar Association recommends the use of pretrial risk assessment, as does the National Association of Counties, the Conference of State Court Administrators, and the Conference of Chief Justices.<sup>156</sup> The Model Penal Code, revised

---

155. National Conference of State Legislatures, Amber Widgery, *Trends in Pretrial Release: State Legislation* 1 (2015); National Conference of State Legislatures, *Trends in Pretrial Release: State Legislation Update* (2018) (describing how, for example, at least fourteen states have adopted statistical risk assessment pretrial since 2012). *See, e.g.*, ALASKA STAT. § 33.07.010 (2018) (establishing pretrial services program to provide pretrial risk assessment); IND. CODE § 35-33-8-3.8 (2017) (mandating courts consider release of defendants that score low risk); ARIZ. CODE OF JUD. ADMIN. § 5-201 (2017) (authorizing courts to consider use of pretrial risk assessment tools by pretrial services).

156. A.B.A., *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-1.10 (2002), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pretrialrelease\\_blk/#10-1.10](https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk/#10-1.10) [<https://perma.cc/Q6HB-NFTM>]; NATIONAL ASSOCIATION OF COUNTIES, RESOLUTION ON IMPROVING PRETRIAL JUSTICE PROCESS, in LEGISLATIVE CONFERENCE 2017: ADOPTED INTERIM POLICY RESOLUTIONS 11, 11 (2017), <https://www.naco.org/sites/default/files/attachments/Final%20Adopted%20Interim%20Resolutions%20-%202017%20Legislative%20Conference.pdf> [<https://perma.cc/L5NF-BCXX>]; ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADMINISTRATORS, 2012-2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE, FINAL PAPER 11, [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0015/23802/Evidence-Based-Pre-Trial-Release-Final.pdf](https://www.ncsc.org/__data/assets/pdf_file/0015/23802/Evidence-Based-Pre-Trial-Release-Final.pdf) [<https://perma.cc/H9GX-K7AB>]; Thomas H. Cohen and Christopher Lowenkamp, *Revalidation of the Federal Pretrial Risk Assessment Instrument (PTRA): Testing the PTRA for Predictive Biases*, 46 CRIM. JUST. & BEHAVIOR 234 (2019), <https://journals.sagepub.com/doi/pdf/10.1177/0093854818810315> [<https://perma.cc/S4LK-MESJ>]; CONFERENCE OF CHIEF JUSTICES, RESOLUTION 3: ENDORSING THE CONFERENCE OF STATE COURT ADMINISTRATORS POLICY PAPER ON EVIDENCE-BASED PRETRIAL RELEASE (Jan. 30, 2013), [https://ccj.ncsc.org/\\_\\_data/assets/pdf\\_file/0020/23654/01302013-](https://ccj.ncsc.org/__data/assets/pdf_file/0020/23654/01302013-)

by the American Law Institute in 2017, encourages use of “actuarial instruments or processes to identify offenders who present an unusually low risk to public safety.”<sup>157</sup>

The state of New Jersey—perhaps most prominently, and apparently quite successfully—has adopted the Public Safety Assessment (PSA) developed by Arnold Ventures LLC.<sup>158</sup> Research has shown that quantitative assessments are more reliable in their predictions than those of individual decision-makers.<sup>159</sup> One study found that forty-two percent of people would be released pretrial if the state of New York used a risk assessment instrument to make decisions concerning pretrial release, rather than use of bail and subjective judicial assessments.<sup>160</sup>

New Jersey adopted the PSA risk assessment statewide pursuant to the Criminal Justice Reform Act.<sup>161</sup> It is freely available and designed to remove factors associated with racial disparities in pretrial detention, such as arrest history, instead relying on factors such as conviction history.<sup>162</sup> It relies on static factors and not on information gleaned from interviews with a subject, including because it is used during early pretrial hearings.

New Jersey has, since adopting these reforms, experienced a fairly dramatic reduction in jail population (although there has not been as great a change in racial disparities regarding detention)<sup>163</sup>: a fifty-five percent

pretrial-release-endorsing-cosca-paper-evidencebased-pretrial-release.pdf [https://perma.cc/MQ P9-KL7F].

157. MODEL PENAL CODE: SENTENCING § 9.08(3) (AM. LAW. INST., Proposed Final Draft 2017).

158. See PUBLIC SAFETY ASSESSMENT: NEW JERSEY RISK FACTOR DEFINITIONS – DECEMBER 2018, at 1, <https://www.njcourts.gov/courts/assets/criminal/psariskfactor.pdf?cacheID=IDYJVkr> [https://perma.cc/XEN9-WLJ4]; New Jersey Criminal Justice Reform Act, 2014 N.J. Sess. Law Serv. Ch. 31 (West) (codified at N.J. STAT. ANN. §§ 2A:162-15 to -26).

159. William M. Grove et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, 12 PSYCH. ASSESS. 19, 19 (2000).

160. Jon Kleinberg et al., *Human Decisions and Machine Predictions*, 133 Q. J. ECON. 237, 238 (2018) (“[O]ne policy simulation shows crime reductions up to 24.7% with no change in jailing rates, or jailing rate reductions up to 41.9% with no increase in crime rates.”).

161. See PUBLIC SAFETY ASSESSMENT: NEW JERSEY RISK FACTOR DEFINITIONS – DECEMBER 2018, at 1, <https://www.njcourts.gov/courts/assets/criminal/psariskfactor.pdf?cacheID=IDYJVkr> [https://perma.cc/XEN9-WLJ4]; New Jersey Criminal Justice Reform Act, 2014 N.J. Sess. Law Serv. Ch. 31 (West) (codified at N.J. STAT. ANN. §§ 2A:162-15 to -26).

162. See LAURA AND JOHN ARNOLD FOUNDATION, PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2–3, <https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/PSA-Risk-Factors-and-Formula.pdf> [https://perma.cc/VV32-UZ3L]; Jon Shuppe, *Post Bail*, NBC NEWS (Aug. 22, 2017), <https://www.nbcnews.com/specials/bail-reform/> [https://perma.cc/FJ3U-BFP8].

163. See N.J. JUDICIARY, CRIMINAL JUSTICE REFORM REPORT TO THE GOVERNOR AND THE LEGISLATURE: JAN. 1 - DEC. 31, 2018, at 27 (2019), <https://www.njcourts.gov/courts/assets/criminal/2018cjrannual.pdf> [https://perma.cc/2DSL-R2US] (“Although the total jail population

decline in pretrial jail population, from almost 9,000 people in 2015 to about 5,000 people at the end of 2018.<sup>164</sup> In New Jersey, risk assessments do not just inform judges but also provide information to law enforcement who are encouraged to release low-risk individuals on a summons rather than arresting the person.<sup>165</sup> One added noteworthy aspect of the New Jersey approach is the narrower definition used for violent offenses in its adoption of the risk assessment.<sup>166</sup>

The experience has been relatively more mixed in other statewide pretrial risk assessment efforts. For example, Kentucky similarly adopted the PSA through a combination of legislation and judicial orders. In 2011, Kentucky passed a law requiring the use of risk assessment pretrial.<sup>167</sup> In 2013, Kentucky adopted a PSA as part of a years-long reform effort to expedite release of lower risk pretrial offenders.<sup>168</sup> Many judges did not follow the risk assessment recommendations.<sup>169</sup> One prosecutor created bumper stickers objecting to the use of risk assessment, stating: “Catch and release is for fish not felons.”<sup>170</sup> In 2017, in response to resistance by judges, the Kentucky Supreme Court issued a rule making the program “uniform” for judges, expanding the applicability of risk assessment to new classes of defendants, and asking pretrial services to provide biannual reports regarding judicial use of the risk assessment.<sup>171</sup> Professor Megan Stevenson has analyzed data from Kentucky from 2009

---

has decreased, with reductions in all demographic categories, the racial and ethnic makeup within New Jersey’s jail population has remained largely the same.”).

164. *Id.* at 39 fig.17. The U.S. Court of Appeals for the Third Circuit ultimately rejected a challenge to the Criminal Justice Reform Act under due process and other constitutional grounds. *Holland v. Rosen*, 895 F.3d 272, 278–79 (3rd Cir. 2018), *aff’g* 277 F. Supp. 3d 707 (D.N.J. 2017).

165. N.J. JUDICIARY, *supra* note 163, at 18 (“[U]nder the [Criminal Justice Reform] system, the percentage of complaint-summons issued increased sharply. In 2017, law enforcement and judicial officers issued 98,473 summonses to 138,763 defendants (71 percent) and released them.”).

166. See Shima Baradaran Baughman et al., *Reforming State Bail Reform*, 74 SMU L. REV. 447, 472 n.142 (2021).

167. Public Safety and Offender Accountability Act, H.B. 463, 2011 Gen. Assemb., Reg. Sess. (Ky. 2011) (codified at scattered sections of the KY. REV. STAT. ANN.).

168. See Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 308–10 (2018) (chronicling the development of relevant law in Kentucky).

169. Robert Veldman, Note, *Pretrial Detention in Kentucky: An Analysis of the Impact of House Bill 463 During the First Two Years of Its Implementation*, 102 KY. L. J. 777, 778, 796 (2013) (discussing how some judges in Kentucky were overriding the Pretrial Services’ recommendations).

170. Alysia Santo, *Kentucky’s Protracted Struggle to Get Rid of Bail*, THE MARSHALL PROJECT (Nov. 12, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/11/12/kentucky-s-protracted-struggle-to-get-rid-of-bail> [<https://perma.cc/7CUM-L8P5>].

171. SUPREME COURT OF KY., Amended Order, *In Re: Authorization for the Non-Financial Uniform Schedule of Bail Administrative Release Program*, 2016-10, <https://kycourts.gov/Courts/Supreme-Court/Supreme%20Court%20Orders/201610.pdf> [<https://perma.cc/ABX7-REEF>].

to 2016 (predating the 2017 Supreme Court rule).<sup>172</sup> Professor Stevenson found that the adoption of pretrial risk assessment had an effect in 2011, but that the effect immediately began to fall.<sup>173</sup> When the Kentucky Supreme Court adopted the PSA in 2013, the same effect occurred.<sup>174</sup> By 2015, release rates were lower than those prior to the 2011 legislation.<sup>175</sup> Professor Stevenson also found urban regions to be more likely to experience a decline in pretrial release rates.<sup>176</sup>

## 2. Limitations of the Risk Assessment Model

The use of risk assessment in pretrial settings has important limitations, and it has been subjected to a series of academic and political criticisms. One quite prominent set of criticisms came from a coalition of 110 civil rights groups that issued a joint statement calling for bail reformers to reject risk assessment: “Pretrial risk assessment instruments are not a panacea for racial bias or inequality.”<sup>177</sup> That critical statement and those of others have raised several distinct questions. First, critics have asked whether certain risk instruments are predictively valid.<sup>178</sup> Second, critics have asked whether they might reinforce rather than reduce biases, including racial bias, in pretrial outcomes specifically.<sup>179</sup>

172. Stevenson, *supra* note 168, at 346.

173. *Id.* at 355, 357, 357 fig.6.

174. *Id.* at 357 fig.6.

175. *Id.* at 357.

176. *Id.* at 364.

177. THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE USE OF PRETRIAL “RISK ASSESSMENT” INSTRUMENTS: A STATEMENT OF CIVIL RIGHTS CONCERNS 1, <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf> [<https://perma.cc/G3A3-LAGA>] (“These tools are often presented as a transparent and equitable alternative to current systems of secured money bail . . . [i]n reality, however, these tools can defer the responsibility of determining who to detain pretrial and who to release. Furthermore, implementation of these tools has not curtailed the continued over-incarceration of people of color pretrial—people who should otherwise be legally entitled to due process of law before being torn away from their families, homes, and careers.”).

178. For a review, suggesting “that pretrial risk assessments predict pretrial outcomes with acceptable accuracy, but also emphasize the need for continued investigation of predictive validity across gender and racial/ethnic subgroups,” see Sarah Desmarais et al., *Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature*, 48 CRIM. J. & BEHAV. 398, 398 (2021).

179. See, e.g., Mayson, *supra* note 33, at 2230–31, 2296; David Arnold et al., *Racial Bias in Bail Decisions*, 113 Q. J. OF ECON. 1885, 1889 (2018). For example, former Attorney General Eric Holder questioned the use of risk assessment, stating: “Using group data to make an individualized determination, I think, can result in fundamental unfairness.” Joshua Barajas, *Holder: Big Data is Leading to ‘Fundamental Unfairness’ in Drug Sentencing*, PBS NEWS HOUR (July 31, 2014, 6:29 PM), <https://www.pbs.org/newshour/politics/holder-big-data-leading-fundamental-unfairness-drug-sentencing> [<https://perma.cc/267T-TNBX>]. For a discussion of the constitutional claims potentially raised in the area, see Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L. J. 1043 (2019).

Third, critics have pointed to a lack of transparency of certain risk assessment instruments marketed by private companies who have not made public the factors they relied upon in complex algorithms or validation data.<sup>180</sup> Another set of critics, citing to the mixed results regarding implementation of pretrial risk assessments, fear that using risk assessment is too incremental of an approach. For example, Professor Jessica M. Eaglin has argued that risk assessment is not a sufficiently bold approach towards the problem of over-detention of individuals before trial.<sup>181</sup>

Offering a different critique, however, the bail bond industry advocates have criticized risk assessment because they seek to return to a greater reliance on secured cash bonds rather than risk instruments to decide who should be detained before trial.<sup>182</sup> The American Bail Coalition has argued that proponents of risk assessments must not “‘moneyball’ criminal justice by replacing judges with their fancy computers and artificial intelligence.”<sup>183</sup>

Further, a risk assessment approach has certain practical and functional limitations. Even if the empirical information it provides is less biased and more predictive than a judicial officer’s own judgment, that judicial officer still retains discretion to use that risk assessment information or to ignore it. In some jurisdictions, judicial officers have been hostile to such information and have declined to rely on the risk assessments.<sup>184</sup> At a more basic, practical level, the risk assessment must be filled out, often by staff, and it may be expensive, requiring trainings and time, and leading to delays and additional detention for people awaiting assessment (although many do not require a defendant interview in an effort to make the use of risk assessments more efficient).<sup>185</sup> The risk assessments have been geared towards bail hearings; they may not as

180. See *Northpointe Suite Case Manager*, EQUIVANT, <https://www.equivant.com/north-pointe-suite-case-manager/> [<https://perma.cc/24DM-6XP2>].

181. Jessica M. Eaglin, *Against Neorehabilitation*, 66 S.M.U. L. REV. 189, 211–12 (2013).

182. Jeffrey Clayton, *How the 3rd Generation of Bail Reform Imploded*, LAW360 (Nov. 25, 2018), <https://www.law360.com/articles/1102190/how-the-3rd-generation-of-bail-reform-imploded> [<https://perma.cc/74SG-C3D9>].

183. See American Bail Coalition, *Alaska “Catch and Release” Bail Reform Plan Crafted by Texas Bail Reform Guru Rolled Back by Governor backed Legislation* (July 16, 2019), <https://ambailcoalition.org/alaska-catch-and-release-bail-reform-plan-crafted-by-texas-bail-reform-guru-rolled-back-by-governor-backed-legislation/> [<https://perma.cc/Y59B-HBDT>].

184. See *supra* notes 177–80 and accompanying text.

185. See Sarah L. Desmarais & Evan M. Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys*, SAFETY AND JUSTICE CHALLENGE 1, 9 (2019) <https://www.safetyandjusticechallenge.org/wp-content/uploads/2019/02/Pretrial-Risk-Assessment-Primer-February-2019.pdf> [<https://perma.cc/NY4U-6BVX>] (“Implementation requires staff time and training, not only for those who will be administering the tool, but also for those other stakeholders who will receive their results, including judges and magistrates, defense attorneys, and prosecutors.”).

easily inform earlier diversion efforts that might avoid the need to detain a person for a hearing (although an instrument may “help clarify where there are unmet needs” by collecting data on behavioral health needs, for example).<sup>186</sup> Further, if other aspects of a hearing are procedurally unfair, the risk assessment may similarly play only a thin role in an otherwise cursory hearing without defense representation, discovery, robust standards for decision-making, or appeal rights.

One response to each of these critiques and practical limitations of a more data-driven risk assessment is to turn to a categorical model. The Categorical Model itself has the benefit of simplicity. Still, the Categorical Model has accompanying limitations including a double-edged nature, which can both promote broad eligibility for release and categorical eligibility for detention.

### C. *The Categorical Model*

In a categorical model, the law designates individuals or categories of individuals who are presumptively detained or released pretrial. Some statutes set out categories of both types: presumptive detention and release. Recent and prior bail reform efforts have included both types of categorical rules as well.

Categorical detention based on arrest charges has been a part of bail statutes for decades. The federal system,<sup>187</sup> the District of Columbia, and twenty-two states permit pretrial preventative detention,<sup>188</sup> and others do so in limited circumstances such as in first-degree murder cases.<sup>189</sup> In none of these approaches is preventative detention or release automatic—it is presumptive.<sup>190</sup> Thus, under the federal Bail Reform Act of 1984, a judge may release a person under a personal or unsecured bond with conditions, or may detain based on a showing of clear and convincing evidence that an individual poses a danger or a flight risk.<sup>191</sup> The approach combines a procedural due process approach (assuring due process at hearings) and an expanded category of individuals subject to preventative detention as well as categories eligible for release.<sup>192</sup> The

---

186. *Id.*; *see id.* at 9–10 (“[T]he results of pretrial risk assessment tools may provide empirical evidence to support requests for increased resources and funding to address unmet needs through enhanced community treatment services, housing programs, etc.”).

187. *See, e.g.*, *United States v. Watkins*, 940 F.3d 152, 156, 160 (2nd Cir. 2019) (discussing residual clause of the federal Bail Reform Act stating that bail can be withheld for a “crime of violence”).

188. *Pretrial Preventive Detention*, NAT’L CTR. FOR STATE COURTS 1, 6 (Feb. 2020) [https://www.ncsc.org/\\_data/assets/pdf\\_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf](https://www.ncsc.org/_data/assets/pdf_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf) [<https://perma.cc/CFM8-P92M>].

189. *See, e.g.*, N.J. STAT. ANN. § 2A:162-16(a)–(b) (West 2017).

190. Bail Reform Act of 1984, Pub. L. No. 98-473, § 3142(e), 98 Stat. 1976 (1984).

191. *See id.* at § 3142.

192. *See id.*



Act's presumptions in favor of detention for certain offenses may explain why detention rates have steadily climbed despite the procedural protections adopted as part of the Act.<sup>193</sup>

One important practical difference where categorical release rules are concerned is that they can obviate the need for a pretrial hearing and can release persons at the point of booking or summons in lieu of arrest. For the options discussed above, so long as the enhanced procedures or risk assessments are part of what is considered at a pretrial hearing, a person must be detained until the hearing occurs, which may take twenty-four to forty-eight hours.<sup>194</sup> An automatic release for a certain class of persons can avoid the need for that jail time, and many states enact presumptions of release or unsecured bonds for certain types of offenses, often misdemeanor or lower level offenses.<sup>195</sup> Conversely, however, categorical detention approaches still require a hearing to ensure procedural due process before a person is detained.

### 1. Adoption of the Categorical Model

A wide range of bail statutes have set out categorical approaches, including both eligibility for preventative detention for certain types of offenses and a presumption of release for others. Thus, the New Jersey statute permits preventative detention after a hearing for certain offenses.<sup>196</sup> The New Mexico statute, in addition to requiring a heightened standard for detention, sets out conditions for preventative detention of a felony defendant.<sup>197</sup> A Connecticut statute restricts the use of financial conditions for certain felony offenses and misdemeanor crimes.<sup>198</sup> In contrast, a new Texas law requires that secured bonds be used and forbids unsecured personal bonds for a range of violent offenses.<sup>199</sup>

The Illinois bail reform statute states that a person may only be denied pretrial release if charged with “a forcible felony offense” or certain stalking, domestic violence, firearms, sexual assault, or trafficking

---

193. See Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FED. PROBATION 52, 52 (2017).

194. See, e.g., N.J. STAT. ANN. § 2A:162-16(a)–(b) (West 2017).

195. See National Conference of State Legislatures, *Pretrial Release: Guidance for Courts*, <https://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx> (2020) [<https://perma.cc/P3NN-9PXM>] (surveying state statutes).

196. N.J. STAT. ANN. § 2A:162-16(a)–(b) (West 2017).

197. N.M. CONST. art. II, § 13 (2016).

198. CONN. GEN. STAT. ANN. § 54-64a(a)(2) (2017).

199. Texas S.B. 6 § 5(b–2)(1) (2021), <https://legiscan.com/TX/text/SB6/2021/X1> [<https://perma.cc/7PT8-7TVE>].

crimes.<sup>200</sup> Persons arrested for misdemeanors that do not fall within those itemized crimes may not be detained pretrial and need not receive a hearing.<sup>201</sup> New York adopted a bail reform statute in 2019 that set out nine categories of felonies that remained eligible for cash bail, while all other felonies and misdemeanors became ineligible for cash bail.<sup>202</sup> The statute's adoption sparked criticism regarding the lack of a larger public safety exception to pretrial release.<sup>203</sup> On January 1, 2020, new amendments to the statute expanded the list of charges in which judges can set money bail, together with other changes, including more conditions of release and data reporting requirements.<sup>204</sup>

Adopting a similar approach, the federal ODonnell Consent Decree incorporated a court rule, the Amended Local Rule 9 of the Harris County Criminal Courts at Law, which took effect on February 16, 2019.<sup>205</sup> That rule rescinded the secured money bail schedule that had been in place and instead provided for a new set of procedures, requiring prompt release of misdemeanor arrestees except for six “carve-out” categories of arrestees.<sup>206</sup>

In response to concerns about the constitutionality of the use of bail, the Maryland Court of Appeals adopted rules intended to end the use of cash bail by barring the use of financial conditions that would result in a defendant being detained solely because of that financial incapability.<sup>207</sup> As a result, according to a study, detention rates have increased as judges have issued “no bond” detention orders rather than using cash bail.<sup>208</sup> The

200. See 725 ILL. COMP. STAT. ANN. 5/110-6.1(a)(1)–(6) (LexisNexis 2023); see, e.g., *id.* at (a)(1) (“[T]he defendant is charged with a forcible felony offense for which a sentence of imprisonment, without probation, periodic imprisonment or conditional discharge, is required by law upon conviction, and it is alleged that the defendant’s pretrial release poses a specific, real and present threat to any person or the community.”).

201. See *id.* at § 5/110-6.1(b).

202. See N.Y. CRIM. PROC. § 510.30(2) (2012); see also Michael Rempel & Krystal Rodriguez, *Bail Reform in New York: Legislative Provisions and Implications for New York City*, CTR. FOR CT. INNOVATION 1, 1 (2019) (describing New York’s new legislation “eliminating both money bail and pretrial detention in nearly all misdemeanors and nonviolent felonies”).

203. See Emmanuel Hiram Arnaud & Beulah Sims-Agbabiaka, *New York Bail Reform: A Quick Guide to Common Questions and Concerns*, 106 CORNELL L. REV. ONLINE 1, 18 (2020).

204. N.Y. CRIM. PROC. § 510.30(1)(a)–(h) (2020).

205. *ODonnell v. Harris Cnty.*, 892 F.3d 147, 166–67 (5th Cir. 2018), *overruled by Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022).

206. See Memorandum and Opinion Approving the Proposed Consent Decree and Settlement Agreement and Granting the Motion to Authorize Compensation of Class Counsel, *ODonnell*, 2019 WL 6219933 at \*9–10.

207. See MD. R. 4-216.1(e)(1)(A) (2021) (“A judicial officer may not impose a special condition of release with financial terms in form or amount that results in the pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition.”)

208. See Lynh Bui, *Reforms Intended to End Excessive Cash Bail in Md. Are Keeping More in Jail Longer*, *Report Says*, WASH. POST. (July 2, 2018), <https://www.washingtonpost.com/local/>

University of Baltimore Pretrial Justice Clinic analyzed data from Prince George’s County, and found that, while cash bail declined eleven percent, detention without bond rose almost fifteen percent.<sup>209</sup> Professor Colin Starger, who analyzed data regarding the fallout of the Maryland changes, commented: “In a time where judges are politically accountable, there’s a fear you’re going to release someone who will go on to commit a crime so there’s a lot of public pressure to detain people.”<sup>210</sup> That experience suggests a cautionary tale regarding the use of categorical approaches; the approach can be interpreted by judges in a manner that expands detention far beyond the intent of rule drafters.

## 2. Limitations of the Categorical Model

The foregoing discussion highlights how the Categorical Model can have a double-edged effect. It may allow simple mechanisms, based on the arrest charges, to identify people who can be released at the point of booking. However, the models that designate categories for presumptive release also conversely identify people who are presumptively detained. Those people may not be automatically detained; they will still be entitled to due process protections described earlier.<sup>211</sup> In practice, however, these crime categories may reinforce a focus on arrest charges as the metric for deciding who should be detained or not. The approach is simple, but it is also reducing the individual, case-specific information that might otherwise be relied upon. Further, such approaches may enhance the existing discretion of law enforcement and prosecutors, regarding what charges to pursue, to then affect pretrial detention decisions. Put simply, police and prosecutors may “upcharge” to secure pretrial detention. The approach may take discretion away from hearing officers and judges, but it preserves and potentially enhances the discretion of police and prosecutors.

### D. *The Community Support Model*

The Community Support Model emphasizes providing social services to improve pretrial outcomes. Such a model may require pretrial services, including a pretrial services agency, to provide such support. Thus, when the District of Columbia led the way with its early adoption of bail reforms, it created one of the first pretrial services agencies in the country.

---

public-safety/reforms-intended-to-end-excessive-cash-bail-in-md-are-keeping-more-in-jail-longer-report-says/2018/07/02/bb97b306-731d-11e8-b4b7-308400242c2e\_story.html [https://perma.cc/AEC3-QTWA].

209. *Id.*

210. *Id.*

211. *See supra* Part II.

The agency's Social Services and Assessment Center<sup>212</sup> is not simply a referral agency—it provides comprehensive mental health and substance abuse treatment services.<sup>213</sup> The Harris County, Texas, consent decree sets out categories of misdemeanor offenses that automatically result in release at the point of booking.<sup>214</sup> Similarly, regarding pretrial appearance, providing text messages and other notifications or assistance with rescheduling and transportation can provide the support needed to increase court appearances without resorting to detention.

The delivery mechanisms for pretrial services vary. In some jurisdictions, the services are not government services, but rather nonprofits. In Santa Clara County, California, a defendant can choose a nonprofit that supports them upon release.<sup>215</sup> In other jurisdictions, the pretrial services agency is a nonprofit.<sup>216</sup> Still, in other jurisdictions, private providers conduct pretrial supervision, and they charge user fees to indigent individuals who must, therefore, be able to pay or incur debt to secure release.<sup>217</sup> These are not mutually exclusive options; a government pretrial services agency, for example, may contract with private companies to provide services, like electronic monitoring, which can involve substantial fees assessed to persons charged with crimes.<sup>218</sup>

Often, social services are set out in terms of required conditions of release, where failure to comply can result in pretrial detention.<sup>219</sup> The conditions appropriate for release are not always clearly described in statutes or local rules, leaving considerable discretion to local hearing officers and judges.<sup>220</sup> The California Supreme Court emphasized:

---

212. *Pretrial Services Agency for the District of Columbia*, Treatment and Related Resources, [https://www.psa.gov/?q=programs/treatment\\_services](https://www.psa.gov/?q=programs/treatment_services) [<https://perma.cc/5RST-GWS4>].

213. *Id.*

214. *See supra* note 206.

215. Services Through Reentry Resource Centers and Their Partners During COVID-19, SCCGOV, <https://reentry.sccgov.org/home> [<https://perma.cc/R7KV-VXXU>].

216. *See* National Conference of State Legislatures, *supra* note 195.

217. Colin Doyle, Chiraag Bains, & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, CRIM. JUST. POL'Y PROGRAM 4 (2019) (“Pretrial services should be fully funded by the government—people should not be forced to pay a “user fee” to fund pretrial services or monitoring.”); *see also* Alicia Bannon, Mitali Nagrecha, & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUST. 1, 7 (2010) (describing the user fees as “staggering total”).

218. For recent legislation requiring the waiving of ignition interlock fees for person who have income at or below 150% of the federal poverty guidelines, or who receive certain types of public assistance, *see, e.g.*, N.C. GEN. STAT. § 20–179.5(b)–(c) (2022).

219. *See, e.g.*, 18 U.S.C. CODE § 3154(7) (2018) (stating that “pretrial service functions shall include . . . [a]ssist[ing] persons released under this chapter in securing any necessary . . . social services”).

220. *See* John S. Goldkamp, *Judicial Responsibility for Pretrial Release Decisionmaking and The Information Role of Pretrial Services*, 57 FED. PROB. 28, 29 (1993).

The experiences of those jurisdictions that have reduced or eliminated financial conditions of release suggest that releasing arrestees under appropriate nonfinancial conditions—such as electronic monitoring, supervision by pretrial services, community housing or shelter, stay-away orders, and drug and alcohol testing and treatment—may often prove sufficient to protect the community.<sup>221</sup>

Which conditions are useful or sufficient, however, is often not specified.

Some bail reform statutes have focused on specifying certain conditions for pretrial release. The Illinois legislation emphasizes that the conditions for release should be the “least restrictive” and requires specific findings to justify electronic monitoring, GPS monitoring, and home confinement conditions.<sup>222</sup> The 2020 amendments to the New York bail statute did so, expanding the list of such conditions (but without providing funding for implementation of those new supervised release options).<sup>223</sup> The ODonnell Consent Decree’s requirement that Harris County provide investment in the community supports release options as well as social work assistance.<sup>224</sup>

As with each of the other models, this model also has limitations and faces criticisms. Additional resources may be required to adequately fund these support systems.<sup>225</sup> Further, while the research regarding pretrial release is quite powerful in showing that detention is usually counterproductive, the research regarding the effects of imposing particular conditions of release is decidedly mixed. A growing body of research has shown that support services can reduce court nonappearance,

221. *In re Humphrey*, 482 P.3d 1008, 1020 (Cal. 2021).

222. See H.B. 3443, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021).

223. See *New York’s Amended Bail Statute: Questions and Answers from the Webinar on Bail Reform Revisited*, CTR. FOR CT. INNOVATION 1, 6 (2020), [https://www.courtinnovation.org/sites/default/files/media/document/2020/060920\\_Bail\\_Reform\\_Webinar%20QA\\_Answers\\_6.2.9.2020\\_FINAL.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2020/060920_Bail_Reform_Webinar%20QA_Answers_6.2.9.2020_FINAL.pdf) [<https://perma.cc/PK7X-CZNK>] (“[N]either the original nor amended bail reforms allocated funding for the new conditions and requirements ordered by the legislation, including Supervised Release.”).

224. See Consent Decree, *supra* note 113, at ¶ 54 (calling for a budget of at least \$850,000 per year to be spent to mitigate causes of nonappearance); see *id.* at ¶ 30 (describing pretrial defense counsel access to social workers and essential support staff).

225. See, e.g., Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release* 1, 7 (2017), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2747&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2747&context=faculty_scholarship) [<https://perma.cc/L53M-P7RS>] (noting that Washington D.C. “benefits from an experienced and well-funded pretrial services agency”).

at least to some degree.<sup>226</sup> However, there is little evidence that pretrial supervision conditions generally improve outcomes.<sup>227</sup>

There is evidence that, for low-risk individuals, supervision-type conditions can produce worse outcomes and interfere with reentry and success.<sup>228</sup> Simple release may often be the most constructive pretrial release condition. That is what community bail funds have aimed to accomplish by raising funds to post bail.<sup>229</sup> However, whether judges will exercise their discretion to focus on release, as opposed to a range of other conditions, is more equivocal.<sup>230</sup>

### E. *The Equal Protection Model*

None of the models in this Part thus far squarely address the central equal protection concern that individuals may face disparate pretrial outcomes due to their race, poverty, or both. Indeed, there is evidence that both race and poverty play a crucial role: the dramatic racial disparities in pretrial jail populations may result from racial disparities in wealth and access to credit, all of which cash bail systems exacerbate.<sup>231</sup> Thus, when cash bail schedules were eliminated as part of misdemeanor bail reform

---

226. See Brice Cooke et al., *Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court*, 1, 15–16 (2018), <https://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf> [<https://perma.cc/RX7S-ES7Z>] (finding from a study in New York City, that a redesign in the court summons resulted in a reduction of the failure-to-appear rate by 6.4%, and pre-court message reminders resulted in a reduction of the failure-to-appear rate by 26%); Alan J. Tomkins et al., *An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court*, 48 CT. REV. 96, 100 (2012) (finding from a Nebraskan study that revealed postcard reminders decreased failure-to-appear rates); Christopher T. Lowenkamp et al., *Assessing the Effects of Court Date Notifications Within Pretrial Case Processing*, 43 AM. J. CRIM. JUST. 167, 177–78 (2018) (finding no palpable effect of court notification programs on failure-to-appear rates but noting the practice should be continued for further research).

227. See Kristin Bechtel et al., *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 AM. CRIM. JUST. 443, 459–61 (2017) (“Neither bond type, drug-testing, nor supervision were associated with reductions in arrest/combined outcomes during pretrial release.”).

228. See Heaton et al., *supra* note 10, at 772; see also Jenny Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 192–93 (2020).

229. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599–606 (2017).

230. See Carroll, *Beyond Bail*, *supra* note 228, at 184–90 (raising concern that reforms can shift release from money conditions to other pretrial release conditions that can themselves impose financial and other costs).

231. See Stevenson & Mayson, *supra* note 225, at 7–9 (summarizing research); see also Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. ECON. & ORG. 511 (2018).

in Harris County, Texas, racial disparities in pretrial release outcomes disappeared.<sup>232</sup>

The Equal Protection Clause is not irrelevant to the rights of pretrial detainees. The Clause can supplement and combine with a procedural due process approach and the other approaches described so far. As this Article will develop, it is problematic that bail reform approaches have not often included explicit measures designed to measure and counteract disparate impacts and inequity. As a doctrinal matter, the Equal Protection Clause should be highly relevant. While courts often treat due process and equal protection claims separately, equal protection and due process claims should be viewed together, as a shared “equal process” claim, based on the Supreme Court’s ruling in *Bearden v. Georgia*<sup>233</sup> and related access to justice rulings.<sup>234</sup> In *Bearden*, the Court considered “whether the Fourteenth Amendment prohibits a State from revoking an indigent defendant’s probation for failure to pay a fine and restitution.”<sup>235</sup> The Court explained in *Bearden* that: “Due process and equal protection principles converge in the Court’s analysis” where defendants are subject to criminal punishment based on wealth.<sup>236</sup> The Court cited to court rulings, procedural due process rulings, and the Equal Protection Clause, noting that the scheme at question, served to “deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine.”<sup>237</sup>

This model is so untested that it may be premature to describe limitations, much less criticisms, as with the prior models. Unfortunately, there has been little focus—outside of research studying pretrial systems—on the disparities engendered by pretrial systems. To be sure, several of the statewide bail reform statutes have called for the collection

---

232. See GARRETT ET AL., *supra* note 10, at 26, 27, 39–40 (describing share of misdemeanor cases with pretrial release by race and noting elimination of racial disparities in pretrial outcomes, but also the persistence of racial disparities in misdemeanor arrest patterns).

233. 461 U.S. 660 (1983)

234. *Id.* at 665–67; see generally Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397 (2019) (developing equal process theory).

235. *Bearden*, 461 U.S. at 661.

236. *Id.* at 665. The ODonnell Consent Decree requires that defendants collect and maintain data concerning race and ethnicity of misdemeanor arrestees, as well as break downs that include race and zip-code information. ODonnell Consent Decree, *supra* note 113, at ¶ 85, ¶ 87. Those data are to be examined in public reports. *Id.* at ¶ 85. Further, the Monitor in the case may examine such data and release results, as has occurred in the case. See, e.g., Brandon L. Garrett et al, *Third Report of the Court-Appointed Monitor*, ODonnell v. Harris Cnty., Sept. 3, 2021, 1, 2 [https://www.ncsc.org/\\_data/assets/pdf\\_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf](https://www.ncsc.org/_data/assets/pdf_file/0026/63665/Pretrial-Preventive-Detention-White-Paper-4.24.2020.pdf); <https://perma.cc/M3ZD-2UZV>.

237. *Bearden*, 461 U.S. at 672–73.

of pretrial data, including demographic information.<sup>238</sup> Other state courts have conducted detailed analyses of outcomes under bail reform schemes; New Jersey is a noteworthy example.<sup>239</sup> Some litigation remedies have addressed not only procedural protections but also the possibility of reducing disparities regarding class and race. They have largely sought to do that by adopting one or more of the models discussed above and have often not carefully examined what data exists and how racial disparities should be evaluated.<sup>240</sup> To be aware of racial disparities, litigation remedies could require data collection and auditing.<sup>241</sup> Going further, they could require that race conscious measures be adopted. Risk assessments can be designed with an eye towards addressing racial disparities in outcomes,<sup>242</sup> and they have been criticized when they fail to do so or reinforce racial disparities.

#### F. *The Alternatives to Arrest Model*

A final model that has not been widely adopted or considered is to avoid arrests entirely. Particularly for misdemeanors and lower level offenses, one can avoid arrest entirely—much less a pretrial hearing or possibility of detention—by issuing a citation and release or by diverting a person to treatment or other arrest alternatives.<sup>243</sup> Arrests can impose a

238. See 20 ILCS 3930/7.7(c)(3) (2021) (requiring the collection, by a Pretrial Practices Oversight Board, of data regarding “the number of persons detained in the jail pretrial . . . the demographics of the pretrial jail population, [including] race, sex, sexual orientation, gender identity, age, and ethnicity”). In contrast, the new Texas legislation requires the submission of monthly reports that include numbers of defendants released on different types of bonds, as well as data concerning repeat offending, but not demographic information. See 71 TEX. GOV. CODE 71.035(a) (2018).

239. See Glenn A. Grant, *Report to the Governor and Legislature* 1, 10 (2019), at <https://www.njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf> [<https://perma.cc/N3KU-6PD7>] (describing decline in jail population for all races, but also that “Black defendants continued to make up [fifty-five] percent of the jail population in 2019”).

240. Regarding approaches towards measuring racial disparities in pretrial outcomes, see, for example, Crystal Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 343–57 (2020).

241. See Carroll, *Beyond Bail*, *supra* note 228.

242. See, e.g., Jon Kleinberg et al., *Human Decisions and Machine Predictions* 1, 32 (Nat’l Bureau of Econ. Rsch. Working Paper No. 23180, 2017), <https://www.nber.org/papers/w23180> [<https://perma.cc/8KX0-PGE4>] (using an algorithm to show that “it is possible to reduce the share of the jail population that is minority—that is, reduce racial disparities within the current criminal justice system—while simultaneously reducing crime rates relative to the judge”).

243. *Citation in Lieu of Arrest: Examining Law Enforcement’s Use of Citation Across the United States*, INT’L ASS’N OF CHIEFS OF POLICE 4 (2016), <https://www.theiacp.org/sites/default/files/all/c/Citation%20in%20Lieu%20of%20Arrest%20Literature%20Review.pdf>. [<https://perma.cc/48QP-6SJX>] (“[A] citation is a written order, in lieu of a warrantless arrest, that is issued by a law enforcement officer or other authorized official, requiring a person to appear in a designated court or governmental office at a specified time and date.”). For an overview and a literature review of law enforcement’s use of citations across the United States. See generally *id.*



wide range of serious collateral consequences, as Professor Eisha Jain and others have detailed.<sup>244</sup> Avoiding arrest is socially desirable where feasible and consistent with other public safety goals. More formalized citation and release policies could be implemented as part of a bail reform agenda designed to maximize pretrial liberty and public safety.

One advantage of this approach is that it occurs earlier in the process without relying on the discretion of judicial officers to recommend arrest versus supervision by a pretrial services agency. A person can avoid detention entirely. Even people who are released on unsecured bond under bail reforms may be held for many hours during screening or awaiting a bail hearing.<sup>245</sup> A release in the field, without an arrest, avoids screening-related detention, as well as an arrest record itself. Particularly after the COVID-19 pandemic, it became all the more urgent to consider alternatives to holding people in detention facilities, even if they would have been ultimately released.<sup>246</sup>

A limitation of arrest alternative approaches is that such programs necessarily rely on the discretion of law enforcement to refer individuals for release with a citation or to some other type of diversion at arrest, often using unclear and discretionary criteria.<sup>247</sup> Perhaps as a result of such programs, there is mixed evidence concerning the utilization of such approaches.<sup>248</sup> Basic citation and release programs are common but typically limited to the lowest level criminal cases, and come with broad police discretion whether to grant a citation and release in eligible categories of cases. According to one survey, twenty-four states have created a presumption of such citation and release for low-level cases, but leave it to the discretion of officers whether to issue a citation rather than arrest.<sup>249</sup> States may set out particular crimes eligible for a citation, and some states require that officers “shall” issue citations for certain

---

244. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 809 (2015).

245. PAMELA METZGER ET AL., ENDING INJUSTICE: SOLVING THE INITIAL APPEARANCE CRISIS 5–6 (2021).

246. See *Decarcerating Correctional Facilities During Covid-19*, NAT'L ACADEMIES OF SCI., ENG'G., AND MED. 26–28, 50 (2020) (describing decline in jail populations during pandemic and need for decarceration as a response to pandemic risk).

247. Regarding uncertain empirical research on the role that officer discretion plays, see INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 243, at 6 (“Existing research on police officer discretion, although expansive, does not clearly define the impact of it on the use of citation in lieu of arrest.”).

248. *Id.* at 4–5 (describing decades-old national data and some more recent evidence from surveys regarding use of such approaches and noting: “[E]xisting literature simply does not provide the broad, contemporary data and analysis necessary to paint a clear picture of citation use across the country, nor does it deliver the information necessary for law enforcement executives to make evidence-based decisions about citation use.”).

249. *Citation in Lieu of Arrest*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 2018), [https://www.ncsl.org/Documents/Citation\\_in\\_Lieu\\_of\\_Arrest2018.pdf](https://www.ncsl.org/Documents/Citation_in_Lieu_of_Arrest2018.pdf). [<https://perma.cc/M9A7-HNNQ>].

offenses.<sup>250</sup> Some states set out risk of nonappearance or dangerousness as considerations, effectively placing the police officer in the position of a hearing officer making a pretrial determination.<sup>251</sup>

Still, other approaches, often described as law enforcement assisted diversion (LEAD), involve officers diverting individuals from arrest to behavioral health treatment.<sup>252</sup> LEAD was first launched in that form in 2011 in King County, Seattle,<sup>253</sup> and has now been launched or piloted in dozens of jurisdictions nationwide.<sup>254</sup> The approach requires connecting case manager social workers and services to individuals once they are diverted at the point of arrest, preventing the person from being booked or jailed.<sup>255</sup> In addition to behavioral health services, some of these programs connect individuals with housing and employment options.<sup>256</sup> Preliminary research suggests these programs have positive effects on recidivism rates and social outcomes.<sup>257</sup> There is some preliminary evidence concerning the cost effectiveness of such programs as well.<sup>258</sup> However, due to the broad discretion officers often exercise, it is hard to assess the effectiveness of the programs because eligibility depends on discretion that may vary between officers. Indeed, the developers of LEAD have reframed the program recently with a focus less centered on

250. *Id.*; see, e.g., KY. REV. STAT. ANN. § 431.015(1)(a) (West 2018) (“[A] peace officer shall issue a citation.”).

251. See Baughman, *supra* note 35, at 967–71 (setting out state statutes of each type).

252. LEAD NAT. SUPPORT BUREAU, <https://www.leadbureau.org> [<https://perma.cc/9FXN-7BLD>] (“Law Enforcement Assisted Diversion (LEAD) is a community-based diversion approach with the goals of improving public safety and public order, and reducing unnecessary justice system involvement of people who participate in the program.”).

253. *Lead*, PUB. DEF. ASSOC., <http://www.defender.org/projects/lead> [<https://perma.cc/7PB3-7H3K>].

254. *Id.*

255. *About Lead*, LEAD NAT. SUPPORT BUREAU, <https://www.leadbureau.org/about-lead> [<https://perma.cc/49M9-VGU6>].

256. *Assessing the Impact of Law Enforcement Assisted Diversion (LEAD): A Review of Research*, IACP & UC CTR. FOR POLICE RSCH. AND POL’Y 10–11, <https://www.theiacp.org/sites/default/files/IDD/Review%20of%20LEAD%20Evaluations.pdf> [<https://perma.cc/5QKM-MDZH>].

257. *Id.* at iv (“Several studies report statistically significant reductions in misdemeanor and felony arrests among LEAD participants when compared to similarly situated individuals who are not engaged with a LEAD program. However, this finding is not universal.”); see also *id.* at 12–13. One challenge is that given the discretion involved in such programs and the manner in which they have been implemented, “[r]elatively few evaluations of LEAD have appeared in peer-reviewed publications. While randomized controlled trials provide the strongest evidence of program impact, it is not possible to use these methods in evaluations of LEAD.” *Id.* at vi.

258. *Id.* at iv (“Few studies have examined the cost effectiveness of LEAD programs. However, researchers generally find that the criminal justice and health care costs associated with LEAD participants are substantially lower than their non-participant counterparts.”).

police and their discretion while allowing service providers more of a role.<sup>259</sup>

In conclusion, there are real benefits to consider regarding not only categorical or other approaches to non-eligibility for pretrial detention but also non-eligibility for arrest. However, non-arrest or citation and release policies have been far too limited and have not been sufficiently considered as part of bail reform conversations.

### III. ASSESSING MODELS OF BAIL REFORM

This Part turns to the choice of which bail reform model to select and whether the choice is exclusive at all because more than one model can be adopted as part of a single reform package. Many of the reform approaches, including the statutes and consent decrees set out in Part II, adopt approaches that incorporate elements of more than one model. This Part develops the tensions involved in selecting one model or drawing from more than one model of pretrial decision-making. This Part begins by restating the strengths of each model and summarizing what empirical data exists concerning their effectiveness. Next, this Part discusses mixed or hybrid models that combine aspects of different models. Third, this Part discusses a separation of powers theory for selecting models aimed at checking the power and discretion of the various pretrial decision-makers. Finally, this Part warns against bail reform approaches that are not clear about which, if any, model to adopt, and the result of poor or no guidance to pretrial decision-makers.

#### A. *Comparing Effectiveness of Bail Reform Models*

To summarize the strengths of the different models described in Part I: (1) the procedural due process approach centers its reforms on assuring a robust set of processes and standards for bail hearings and decisions by judicial officers; (2) the risk assessment approach provides quantitative information to the decisionmaker; (3) the categorical approach sets out classes of crimes for which no pretrial detention is permitted, avoiding the need for a bail hearing; and (4) the community services approach focuses on supporting success without detention in the community. The first two models focus on judicial officers and their decisions regarding bail. The third focuses on police and prosecutors' charging decisions, while the fourth focuses on pretrial services and social services agencies. Additional models have not been widely adopted: (5) the equal protection approach focuses on disparities in decision-making, which could

---

259. See LEAD NATIONAL SUPPORT BUREAU, <https://www.leadbureau.org> [<https://perma.cc/BJP5-Q9AW>] (“[W]e have developed a new option for LEAD operations that decenters law enforcement as gatekeepers to LEAD services (while retaining traditional LEAD for jurisdictions where that itself represents a meaningful paradigm shift).”).

implicate all actors in the system; and (6) use of alternatives to arrest which depends on law enforcement for implementation but avoids decision-making by other actors.

There is mixed evidence regarding the success of any of these approaches taken alone, and often, they are taken together. The limitations of each of these models, discussed in the previous Part, often relate to the manner in which another pretrial actor can undercut the intent of the reform. Thus, judges may ignore risk assessment information supplied by a pretrial services agency. Alternatively, a judge may fail to refer people to release when supervised by a pretrial services or community provider. Or police or prosecutors may pursue charges that are not eligible for release under a categorical model. A successful approach can seek to balance the discretion of each of these pretrial actors. Most prominently, the Washington D.C. bail reform model includes elements of each of several models. In doing so, it involves judicial officers, law enforcement, prosecutors, and a pretrial services agency, and ideally seeks to bring each of them together to accomplish common goals. This Article turns to these composite approaches next.

### B. *Composite Bail Reform Models*

Composite bail reforms combine elements of more than one approach. Thus, one common combination is to include some types of offenses that involve categorical detention with some role for risk assessment to inform decision-making for arrestees eligible for detention. The New Jersey approach permits detention for narrow categories of offenses but uses risk assessment to inform decisions for the majority of offenses.<sup>260</sup> Local bail reform efforts have taken that form. For example, North Carolina statutory provisions require detention for capital offenses and several other serious offenses, but otherwise state that judicial officials should impose a secured bond “[i]f the judicial official determines that the defendant poses a danger to the public.”<sup>261</sup> Several jurisdictions in North Carolina supplement that approach with the use of pretrial risk assessment,<sup>262</sup> which state law does not preclude.<sup>263</sup>

A different approach combines risk assessment with a categorical rule requiring release for persons who score low on that assessment, obviating

---

260. *See supra* notes 158–61 and accompanying text.

261. N.C. GEN. STAT. § 15A- 534(d2)(1); N.C. GEN. STAT. § 15A- 534(d3) (amended 2021).

262. *Recommendations for Strengthening The Unified Court System of North Carolina*, N.C. COMM’N ON THE ADMIN. OF L. & JUST., app. C at 40 n.121 (Oct. 2016) [NCCALJ Final Report], [https://www.nccourts.gov/assets/documents/publications/nccalj\\_final\\_report.pdf?VersionId=xahbJ\\_Q8O\\_XYD2w.IGCrOOoBeMSeDv2i](https://www.nccourts.gov/assets/documents/publications/nccalj_final_report.pdf?VersionId=xahbJ_Q8O_XYD2w.IGCrOOoBeMSeDv2i) [<https://perma.cc/W4G3-UJ5G>].

263. *Id.* at app. C at 32; *see also* N.C. GEN. STAT. § 15A-533(b).

the need for any pretrial hearing.<sup>264</sup> Other hybrid approaches include a procedural due process approach enhancing pretrial hearings standards and procedures, but also providing for categorical eligibility for release. The Illinois statute takes that approach, as does the O'Donnell Consent Decree.<sup>265</sup>

One reason why combinations of models may be helpful is that each model focuses, to some extent, on a different pretrial actor. The procedural due process approach brings in public defenders at hearings but also enhances the discretion of pretrial judicial officers to make bail decisions. Categorical approaches can remove cases from the discretion of that judicial officer by making some people eligible for release before a hearing. For the more challenging cases, risk assessments may inform pretrial judicial officers, if they follow the risk assessments, and enhance resources and the role of pretrial services workers.

Some jurisdictions have adopted elements of all or most of the models and have attempted to guide and inform the discretion of these various pretrial actors. Doing so does not necessarily involve any tension between the approaches, but it can create a separation of powers check between different actors that each have discretion. However, creating a separation of powers check requires carefully thinking through how to construct mutually reinforcing checks on pretrial discretion.

One leading example of a composite approach is perhaps the longest running bail reform, often hailed as a model, in Washington, D.C. That approach, most recently codified in the Bail Reform Amendment Act of 1992, sets out a presumption of pretrial release and requires following the Procedural Due Process Model, requires clear and convincing evidence, and requires imposing the least restrictive conditions possible.<sup>266</sup> However, the statute does permit preventative detention in several instances, including where there was a crime of violence and “serious risk” of obstruction of justice or flight.<sup>267</sup> The District of Columbia created a pretrial services agency, which provides a range of treatment-related services and referrals.<sup>268</sup> The agency also uses its own in-house

---

264. *Interview Process & Release Alternatives*, KY. CT. OF JUST., <https://kycourts.gov/Court-Programs/Pretrial-Services/Pages/default.aspx> [<https://perma.cc/G597-ZM3Z>].

265. See *supra* notes 116–21, 133–35 and accompanying text.

266. D.C. CODE § 23-1321(a)–(c) (describing presumption of pretrial release and least restrictive conditions requirement); D.C. CODE 23-1322(b)(2) (“If, after a hearing pursuant to the provision of subsection (d) of this section, the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community, the judicial officer shall order that the person be detained before trial.”).

267. D.C. CODE § 23-1322(2)(b)(A)–(D).

268. PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA, *Treatment and Related Services*, [https://www.psa.gov/?q=programs/treatment\\_services](https://www.psa.gov/?q=programs/treatment_services) [<https://perma.cc/D74D-LE7K>]

risk assessment instrument to inform pretrial recommendations to the judge.<sup>269</sup> The concern with such a composite approach is that a variety of actors each have discretion, some of which operate inconsistently, depending on the crime charged or the circumstances in each case. Thus, judges may not follow the recommendations of a pretrial services agency, or judges may view their role differently.

### C. *Separation of Powers and Bail*

One way to consider the design of a composite approach is from a separation of powers and balance of powers perspective. Each model, to some degree, emphasizes the discretion of a different actor. The categorical detention approach prioritizes the discretion of police and prosecutors. The Procedural Due Process Model empowers judicial officers as well as defense lawyers. The Risk Assessment Model empowers pretrial services and judicial officers (and, to some extent police, if policing data largely informs the risk assessment). The Community Release Model empowers pretrial services by giving them discretion to supervise release, although often only with approval of judicial officers. One challenge, again, is that these actors' interests and discretion may not be aligned.

For each model, the discretion of the various actors involved matters deeply, and each actor can, and sometimes does, undermine the goals of others. If, for example, prosecutors believe a risk assessment tool is too lenient, they may advocate for harsher approaches and may influence judges in turn.<sup>270</sup> If prosecutors view categorical approaches as too lenient, they may pursue charges for offenses that include a presumption of release. Or judges may choose to ignore recommendations from pretrial services, defense lawyers, or prosecutors. The variations could be expanded across each of the relevant actors—from police to sheriffs,

---

(“The Pretrial Services Agency for the District of Columbia (PSA) is committed to assessing accurately the extent of defendant drug involvement and providing or facilitating treatment as appropriate. Assuring that defendants appear for scheduled court hearings is central to PSA’s mission. The connection between substance use disorders and crime has been well established. Success in reducing rearrest and failure to appear for court depends on two key factors—identifying and treating drug use and establishing swift and certain consequences for continued drug use.”).

269. *Court Support*, PRETRIAL SERVS. AGENCY FOR THE DISTRICT OF COLUMBIA [https://www.psa.gov/?q=programs/court\\_support](https://www.psa.gov/?q=programs/court_support) [<https://perma.cc/9CM5-ULQ8>] (“PSA uses a risk assessment instrument that examines relevant defendant data to help identify the most appropriate supervision levels for released defendants. The assessment scores various risk measures specific to the District’s defendant population (e.g., previous failure to appear for court, previous dangerous and violent convictions in the past 10 years, suspected drug disorder problems, current relationship to the criminal justice system, among numerous others).”).

270. Matthew DeMichele et al., *What do Criminal Justice Professionals Think About Risk Assessment at Pretrial?*, 83 FED. PROB. 32 (June 2019).

pretrial services staff, prosecutors, defense lawyers, hearing officers, and reviewing judges.

A composite approach can ideally balance these competing actors' discretion and power. The Uniform Law Commission's model approach includes procedural due process protections but also certain categorical presumptions and an option to adopt limitations on authority to arrest.<sup>271</sup> Thus, judicial review serves as a check on the discretion of arresting officers and prosecutors. To prevent an overuse of detention and pretrial hearings, lawmakers and local actors can design categories of offenses for presumptive or required release pretrial.

Pretrial judicial officers are needed to ensure that such rules are followed by the various actors and that custodians, such as sheriffs, diligently comply with releases that occur under those rules. Public defenders and appeals to judges can, in turn, serve as a check to ensure that judicial officers have adequate information and that their discretion is reviewable. To the extent that judicial officers rely on hunches and inadequate information about systematic consequences, risk assessments may supplement and inform their discretion. To the extent that risk assessments rely on inadequate and biased data, the equal protection approach provides an additional layer of protection. Public data concerning pretrial decision-making can provide the public with information concerning the exercise of these various actors' decision-making to inform assessments of the system and public accountability. Often such data is lacking.<sup>272</sup>

A composite approach recognizes the complexity of the pretrial system, which does not only depend on actions of hearing officers but also police, sheriffs, prosecutors, public defenders, and appellate judges. That complexity raises reform challenges, and getting the balance right poses practical challenges to litigants and policymakers.<sup>273</sup> Ignoring the need to balance discretion of each of these actors, however, can result in failed reform. The next section discusses how leaving reform to the discretion of local actors may produce no meaningful change.

---

271. *Uniform Pretrial Release and Detention Act*, UNIF. L. COMM'N (2020), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=92ae74f6-5e4e-4a2f-f981-db06f5e77b44&forceDialog=0>.

272. See William E. Crozier et al., *The Transparency of Jail Data*, 55 WAKE FOREST L. REV. 821, 826 (2020) (discussing lack of adequate data often needed to assess policy and respective roles of pretrial actors).

273. See *supra* note 45 regarding the ruling by the Fifth Circuit, en banc, on standing to sue various bail actors in a system of wealth-based pretrial detention, and how the divided roles of those actors resulted in a finding that the plaintiffs lacked standing to sue the judges that set the policy.

#### D. *Selecting No Model*

A common approach towards bail, unfortunately, is to provide nothing particularly definitive at all: selecting no model for approaching bail decisions, but rather allowing local jurisdictions to use their discretion without guidance or requirements. As a prominent recent example, California nominally eliminated the use of cash bail statewide, but also permitted local jurisdictions to set out their own approaches towards pretrial detention that could include reliance on cash bail.<sup>274</sup> Thus, this approach permitted local courts and judges to devise their own rules.<sup>275</sup> That approach can preserve local discretion, but without guidance, can result in fragmentation across a jurisdiction.

Many states, without enacting a statute explicitly calling for it, have long adopted hands-off approaches at the state level, and as a result, wide variation in approaches is common at the local level.<sup>276</sup> Local experimentation can be desirable. However, if the goal is to rethink a bail system, the statute or court order should designate a preferred approach.

#### IV. A COMPREHENSIVE APPROACH

Setting bail seems simple on its face, but it involves a complex set of actors whose work is often hidden from public view. The previous Part sought to explore the ways in which various models for bail reform empower different actors in the pretrial system, advocating for a composite approach that targets each of these actors in a separation of powers-inspired fashion. That Part highlighted the promise of focusing on each of these pretrial actors, but also described the challenge of appropriately checking the discretion of each. Whatever the bail reform goals, it is important to pay attention to the ways in which one actor's discretion may run contrary to the discretion of another. Judges may fail to review magistrates' bail rulings. Public defenders may fail to advocate for clients. Police may increase or decrease arrests for charges that may result in jail detention. Sheriffs may refuse to release people whose bail determinations are invalid. Jail conditions may cause people to be pressured to plead guilty rather than challenge unfair or unlawful

---

274. California Money Bail Reform Act, S.B. 10 (Cal. 2018).

275. Chemerinsky, *supra* note 25.

276. For a study finding “tremendous intra-county variation in bail practices, as well as a nationwide decline in the use of nonfinancial release and doubling of bail amounts,” between 1990 to 2009, see Katherine Hood & Daniel Schneider, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 126, 126–27 (2019). For example, North Carolina provides certain broad guidance, but leaves it to local judges to implement bail policies, requiring that they do so in writing. N.C. GEN. STAT. § 15A-535 (2021) (providing that the senior resident superior court judge “must devise and issue recommended policies to be followed . . . in determining whether, and upon what conditions, a defendant may be released before trial”).



detention. Composite reform efforts seek to address the challenge of a confusing and surprisingly complex system by differently empowering actors at each stage to check each other's power and discretion. This Part suggests that there are overriding principles that can help ensure the success of such a hybrid or composite reform effort.

A complementary, but still broader, way of conceiving the challenge is to think of police interactions with civilians as a funnel and diverting people along the way to prevent the more serious outcomes (such as arrest, then jail, then pretrial detention, and carceral sentences). One common theme in several of the models is to divert individuals from the booking and pretrial detention system, if possible, to create alternatives to that court-centered process. As the funnel narrows, the goal is to ensure that each actor places the presumption on pretrial liberty and carefully considers whether detention is warranted. They can exercise greater care if a greater volume of cases has already been funneled out earlier in the process. The more cases that are diverted earlier at the point of arrest or booking, the more attention judicial officers can pay to carefully conducting pretrial hearings, providing pretrial services, or reviewing hearing outcomes on appeal. Thus, each subsequent actor could do its work more robustly if earlier actors narrowed the funnel. The sections below describe ways in which that can be done, while still adopting a more comprehensive approach.

#### *A. Rethinking Court Appearance and Dangerousness*

The underlying standards regarding pretrial detention, focused on court appearance and dangerousness, could be far more narrowly focused on risks of flight from the jurisdiction and very specific dangerous conduct. Instead, the standards have included broad and ill-defined definitions of court nonappearance, which is typically not due to flight. The standards have included broad definitions of repeat offending that can sweep in minor offenses. Creating a workable definition of court appearance and rethinking when court appearance is even necessary can support a reimagining of pretrial detention as well. Court rules can clearly set out options for rescheduling court appearances.<sup>277</sup> Such rules can also clearly set out when lawyers may appear and when there is no need for the defendant to appear. Remote appearances may be feasible to accommodate a lack of access to transportation.

Similarly, categorical rules can identify broad sets of offenses for which pretrial detention is not an option. Such individuals could be entitled to release at the point of booking. For those categories of persons

---

277. For more on the impact of clarity of notifications and forms about court appearance and their impact, see, for example, Alissa Fishbane et al., *Behavioral Nudges Reduce Failure to Appear for Court*, 370 *SCI.* 682, 682 (2020).

not so entitled, however, a hearing should adopt strong procedural protections. Reduced quantity can improve quality. Robust hearings are more feasible if there are fewer of them and if they are focused on more serious cases. Further, empirical data, including risk assessments, could be used to inform decision-making at those hearings along with options concerning community treatment and release. Empirical data concerning class and race disparities in pretrial outcomes can and should be monitored to identify invidious patterns in pretrial decision-making from arrest through bail, dispositions in cases, and outcomes after disposition.<sup>278</sup> Thus, a hybrid model, including elements of community release, equal protection, procedural due process, and risk assessment models, should operate together to improve bail decision-making by greatly reducing the number of persons subjected to pretrial process.

### B. *Rethinking Pretrial Services*

Shifting government spending from pretrial detention to community support could support new thinking about how to improve social outcomes and public safety pretrial. Some research has attempted to evaluate the cost and effectiveness of pretrial approaches.<sup>279</sup> A reinvestment model, though, has never been explicitly adopted, in which savings from reduced reliance on jail detention are shifted to community-based approaches. Nonprofits, and most prominently the MacArthur Foundation with its Safety and Justice Challenge, have supported such approaches with outside funding.<sup>280</sup> Whether those models will be sustained by jurisdictions that see the long-term value in the approach remains to be seen. Alternatively, pretrial agencies can provide services at the point of arrest, avoiding the pretrial process entirely. Those models,

---

278. The O'Donnell Consent Decree calls for such ongoing analysis. *See* O'Donnell Consent Decree, *supra* note 113, at 40–41 (requiring defendants to collect and maintain misdemeanor case data, including regarding arrestee demographics, and generate reports regarding such data, and requiring that the County create a web-based data platform).

279. *See, e.g.*, Dottie Carmichael et al., *Liberty and Justice: Pretrial Practices in Texas*, TEX. A&M UNIV. PUB. POL'Y RES. INST. (2017). Regarding the challenges of evaluating several key costs, *see* Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1406 (2017).

For example, there exists limited empirical evidence on how to quantify the loss of liberty imposed by pre-trial detention. Nor does there exist any quantitative evidence on the effects of pre-trial detention on deterrence more generally. In addition, I do not discount the possibility that some costs and benefits may be difficult to quantify, such as trust in, and legitimacy of, legal institutions.

*Id.*

280. *Jails, Reframing Public Defense: Making the Case for the System-Wide Benefits of Effective Defenders*, NAT'L LEGAL AID & DEF. ASS'N 3 (2016), <https://safetyandjusticechallenge.org/wp-content/uploads/2021/06/NLADA-SJC-reframing-public-defense-toolkit.pdf> [<https://perma.cc/4872-VY9Q>].

however, may need to address underlying lack of social services and lack of adequate affordable and supportive housing.

### C. From Detention to Housing

Many particularly difficult situations that judicial officers confront pretrial involve individuals who are unhoused and have behavioral health needs. Large percentages of pretrial populations involve people who are unhoused, have serious behavioral health needs, or both.<sup>281</sup> Sheriffs are not necessarily the best local agents to take on the substantial needs that flow from inadequate alternative, supportive, and affordable housing. Indeed, as Professor Aaron Kittman has explored, sheriffs have advocated for funding to build jail beds, have made arguments that jails pay for themselves, and they generally may have a strong fiscal interest in housing a large detainee population.<sup>282</sup>

In turn, it is possible that the lack of adequate housing and funding to provide such housing to indigent and homeless individuals is substantially related to the judge's decision that housing a person in jail is the only viable option. Conversely, jailing a person may cause them to lose eligibility for public housing.<sup>283</sup> The lack of affordable housing can mutually reinforce jail populations in a cycle of detention and dispossession, increasing the unhoused population.<sup>284</sup> For people who are homeless and would likely return to the same neighborhood where they are repeatedly being arrested, a judge may view jail as the only way to end the offending conduct or impose detention because of court nonappearance where homeless persons face unique barriers to court appearance and representation by counsel.<sup>285</sup> To jail a person because of homelessness is not constructive or just, but it may occur for a range of reasons, including homeless people's inability to pay even small cash bail to secure release, lengthy criminal history due to overenforcement of

---

281. See, e.g., Margot Kushel et al., *Revolving Doors: Imprisonment Among the Homeless and Marginally Housed Population*, 95 AM. J. PUB. HEALTH 1747, 1747–48 (2005).

282. Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 865 (2021) (“[S]heriffs and commissioners make jail construction happen, often for reasons that have little to do with local public safety.”).

283. For the federal rule that defines someone as no longer “chronically homeless” and eligible for Section 8 housing if they are detained in a facility for more than 90 days, see 24 C.F.R. § 91.5, § 578.3.

284. Madeline Bailey et al., *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, VERA INST. OF JUST. 1 (2020), <https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/08/homelessness-brief-web.pdf> [<https://perma.cc/G68A-37ZA>] (“[H]omelessness is between 7.5 and 11.3 times more prevalent among the jail population, and in some places the rate is much higher.”).

285. *Id.* at 6 (describing difficulty providing notice to unhoused persons). In addition, “[p]rosecutors may choose to advocate for higher bail for people without a residential address, traditional family support, or stable employment, under the argument that the absence of these ties lessens the likelihood that they will return to court when ordered.” *Id.* at 7.

quality of life offenses, and difficulty appearing in court.<sup>286</sup> For people with behavioral health needs and who lack treatment, judges may view detention in jail as a way to ensure treatment. In domestic violence cases, if the person lacks another address, a protective order combined with release may be ineffective. In such situations, the lack of housing alternatives for indigent persons may contribute to detention in jail.

If housing options exist, they should be identified before bail decisions are made. Some LEAD programs focus on linking individuals with housing at the point of arrest, but a lack of adequate housing options is a common limitation of those programs.<sup>287</sup>

A more fundamental lesson is that bail reform, or reforming arrest policies, does not address the underlying social need for affordable, and for some people, supportive, housing. Unhoused people should not be housed in jails. A way to reform overreliance on jails is to rely less on them to solve social problems that they can instead exacerbate.

#### CONCLUSION

“It is no credit to the legal profession in this country that we have allowed our bail system to continue for well over a century and a half without fundamental changes,” wrote Professor Wayne LaFave in 1965 as modern bail reform conversations had just begun.<sup>288</sup> In subsequent decades, lawmakers redefined bail systems across the country but magnified concerns that motivated bail reform efforts dating back centuries: the unnecessary, unfair, and potentially unconstitutional pretrial detention of individuals because they cannot pay.

What bail reform consists of has not been coherently described, and as a result, policy agendas and legislative priorities have not been clearly set out. To end rigid reliance on cash bail and accomplish public safety, jurisdictions must break apart the conflicting models of bail reform. Each of the six models targets different pretrial actors who can each undermine each other’s decision-making during the pretrial process or provide a check to reinforce a common mission. This Article calls for a separation of powers approach to regulate each of those pretrial actors. Two new models, an Equal Protection Model and the Alternatives to Arrest Model,

---

286. *Id.* at 7–8; *see also id.* at 8 (“If there is no cash bail set, release is still often based on a person’s willingness and ability to comply with additional conditions set by the court, including that they provide a physical address where the courts may reliably contact them or appear for all hearings or appointments.”).

287. *See* INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 243, at iii (“Several studies have found that LEAD successfully reduced homelessness for participants and that securing housing may reduce recidivism among these individuals. However, identifying enough housing options to support demand is a commonly noted challenge.”).

288. Wayne R. LaFave, *Alternatives to the Present Bail System*, 1965 U. ILL. L.F. 8, 8 (1965).

are also advanced to systematically assess disparities in outcomes and to move pretrial decision-making before arrest.

There is a path forward after decades of debates over bail reform, resulting in inconsistent and internally contradictory bail reform approaches and a massive jail population. This Article explores how the bail system is far more complex than it may appear from the outside, involving substantial discretion by a range of actors, such as magistrates, sheriffs' staff, pretrial services social workers, prosecution case-screener, and bail bondspersons, who largely operate outside of the public view. Reformers should examine comprehensive approaches that regulate each of the actors within the bail system. Quality requires limiting quantity. Bail reform must limit the influx of cases by focusing diversion and support efforts outside of the criminal system. To fully reform the bail system, the need to consider bail decisions should itself be minimized. A comprehensive program of reducing reliance on jail may finally accomplish long overdue and fundamental bail reform.

