ARTICLES

Taming Dangerousness

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In every courtroom across the country each day, judges determine whether thousands of individuals are either released or held before trial. These speedy and seemingly minor decisions have profound impacts on an accused's fate and on national incarceration rates. Indeed, over the last fifty years, these individual decisions have led to a 400% increase in pretrial detention in the United States. This increase in pretrial detention accounts for 99% of the jail growth in the last fifteen years, despite record decreases in arrest and crime rates. At the same time, the United States has witnessed three meaningful periods of bail reform in the 1960s, the 1980s, and beginning of the 2010s. Despite the hundreds of statutory iterations attempting to improve pretrial reform, these three bail reform movements have collectively failed to improve pretrial detention rates, and new legislation is making matters worse.

This Article argues that bail reform efforts and most of the scholarly literature have focused on dangerousness—or perceived government obligations to protect public safety—to the exclusion of explicating the key underlying rights to pretrial liberty. The scholarship on bail has neglected a rigorous focus on the underlying constitutional rights that dictate release. In failing to focus on liberty, the trend of pretrial commentary has inadvertently presumed detention as a default due to the supposed risk of danger posed by the accused. It has failed to remind judges of the meaningful constitutional protections they are obligated to provide defendants in this early pretrial period. In reality, the interests of pretrial liberty and public safety do not conflict. Neglecting pretrial liberty rights has in fact led to the increased likelihood of crime and negative downstream effects on individuals and entire communities.

This Article recognizes and articulates a unique right to pretrial liberty. It asserts that at the root of contemporary judicial failure to protect

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constitutional rights is a lack of recognition of the precise individual rights recognized in this early pretrial period, leaving judges to overemphasize concerns about dangerousness of the accused. It seeks to remedy this deficiency by articulating four distinct constitutional rights that create a near universal right of pretrial liberty: the rights to due process, equal protection, counsel, and protection from excessive bail. It argues that in any given case the right to liberty is characteristically invoked to protect one of these complementary interests: the presumption of release; the right to prepare a vigorous defense; a prohibition of judicial fact-finding before trial; and the right to financial parity. The upshot is not a mechanical algorithm for producing correct criminal justice outcomes, but an illumination of the constitutional stakes at issue in any given pretrial determination. This Article aims to shift the focus of courts from the prevailing unfounded obsession with dangerousness to a deeper understanding of the doctrinal stakes underlying liberty.

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INTRODUCTION

For at least the last forty years, the focus of bail reform has been a consideration of the confines of the government's right to protect the public against dangerous defendants. There has not been a focus on the individual right to liberty, which, although protected by the Due Process Clause and other constitutional provisions, has not had the benefit of explication in early criminal hearings. In most pretrial determinations, the right of pretrial liberty is not recognized as a distinct right, but it is defined here as the freedom the accused enjoys before trial because they have not been found guilty of a crime.[1] While there is no direct constitutional recognition of an independent right to pretrial liberty, there are several overlapping rights that provide a constitutional foundation for this right. The right to due process, granted by the Fifth and Fourteenth Amendments, along with its judicial progeny, protects an individual from a deprivation of liberty before a determination of guilt at trial and provides that detention pretrial is the carefully circumscribed exception.[2] The Fourteenth Amendment also provides a right to equal protection that prohibits discrimination against an individual based on their

1. *See* Ingraham v. Wright, 430 U.S. 651, 673–74 (1977) ("While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment. It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law." (footnote and citation omitted)); *In re* Winship, 397 U.S. 358, 364 (1970) ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." (omission in original) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958))); *see also* Stack v. Boyle, 342 U.S. 1, 4 (1951) ("This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (citation omitted)).

2. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1 ("[N]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); *see also, e.g.*, Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 759 (2011).

financial status.[3] The right to protection from excessive bail granted by the Eighth Amendment prevents a judge from setting a high bail to prevent an individual from obtaining release.[4] The Sixth Amendment provides a right to a jury and access to counsel at all critical hearings.[5] While all of these rights have constitutional backing, there has been very little development of these constitutional rights in the *early stages* of the criminal process. In the absence of development of a robust liberty right, an obsession has festered with preventing societal danger posed by the accused. This may be in part because detention decisions may not be written; an individual may not have counsel; or the accused may not be able to appeal quickly, and by the time they do, the matter may be moot. As a result, the liberty right is not carefully protected in federal or state statutes, and pretrial detention rates have risen over 400% in the last fifty years.[6]

The essence of the problem is that pretrial liberty is articulated by long-standing, though vague, constitutional principles and protected piecemeal through individual constitutional rights that clearly apply at trial but not universally pretrial.[7] But a single liberty right not recognized can impair multiple distinct legal interests.[8] Consider a situation that occurs in many courtrooms across the country each day. Bethany Edmond, a homeless woman, was arrested for three misdemeanor violations and taken to jail.[9] Unable to afford her $1,500 bond and not granted an attorney in a cursory hearing, Edmond was denied release.[10] These

3. U.S. CONST. amend. XIV, § 1 ("[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *see also, e.g.*, Griffin v. Illinois, 351 U.S. 12, 17–19 (1956) ("[A] State can no more discriminate on account of poverty than on account of religion, race, or color.").

4. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .").

5. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.").

6. *See* LÉON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 1 (2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf [https://perma.cc/4EKY-BXNX] (detailing the 433% increase in pretrial detention between 1970 and 2015, and pointing to the use of monetary bail as a causal factor).

7. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); *see also English Translation of Magna Carta*, BRIT. LIBR.: MAGNA CARTA (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/57NM-6YGK] (translating clause 39 of the Magna Carta (1215): "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."); Bill of Rights 1688, 1 W. & M. Sess. 2, c. 2 (Eng.) ("That excessive Baile ought not to be required nor excessive Fines imposed . . . ."); Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1111 (2019) ("On a strong reading, the Constitution protects the fundamental right of pretrial liberty unless the state can, as required under equal protection, show that there is no alternative to detention available to meet its interests. On a weak reading, the Constitution protects pretrial liberty with certain (as yet undefined) procedures, but if the state offers those procedures, courts may not have to rigorously inquire into whether alternatives to detention are available to meet the state's interest.").

8. *See* Funk, *supra* note 7, at 1102–10 (arguing that pretrial detention based on money bail can violate constitutional rights to equal protection, substantive due process, and procedural due process).

9. [Proposed] Memorandum in Support of Plaintiffs' Motions for a Temporary Restraining Order & Class-Wide Preliminary Injunction at 6, Torres v. Collins, No. 20-cv-00026 (E.D. Tenn. Feb. 16, 2020).

10. *Id.*

two acts—being jailed and not being assigned an attorney—arguably violated her right to due process as well as her Sixth Amendment right to counsel. Her near-automatic detention also may have violated her right to due process, and the lack of consideration that she only had thirty-six cents to her name may also have violated her equal protection rights.[11] Due to this denial of pretrial liberty, Edmond went to jail and slept on the floor, losing access to vital medication and being separated from her young children, whom she saw daily prior to incarceration.[12] Although these distinct rights arise from the same act, they each possess a unique constitutional basis that tracks the specific harm the right is designed to avoid. Without an articulation of a broader right encompassing these individual rights, they lack adequate protection, and the importance of Edmond's liberty interest is lost.

Meaningful constitutional analysis requires careful specification of the precise liberty interests that counterbalance the government interest to protect against public danger. Because the right of liberty allows for freedom even after an arrest, it may conflict with the state's constitutional prerogative to protect public safety.[13] The federal government also maintains, where national or federal interests trump, a right to protect the public from harm.[14] However, thus far, courts have failed to articulate a liberty–dangerousness standard that adequately encompasses the various underlying and distinct legal interests at play. And although the right to protect the public from danger is largely regarded as self-evident in both federal and state realms,[15] the right to pretrial liberty is not. Neither the justifications nor the standards are broadly understood when it comes to the right of pretrial liberty. Thus, judicial application of this conflict is notoriously incoherent and inconsistent—in both the federal and state bail arenas.[16]

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11. *See id.*

12. *Id.* at 6–7.

13. The states hold inherent police power to protect the health and safety of their citizens. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Mugler v. Kansas, 123 U.S. 623, 661 (1887) (holding that the state legislature's police powers provide the power "to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety").

14. The federal government typically relies on the commerce and tax clauses to protect public safety in criminal matters. *See* Mulford v. Smith, 307 U.S. 38, 48 (1939) ("Any rule . . . which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress."). The federal government maintains jurisdiction where there is a federal or national issue including interstate trafficking of drugs or people, fraud involving mail, or immigration crimes. *See, e.g.*, 21 U.S.C. § 841 (drug trafficking); 18 U.S.C. § 1341 (mail fraud); 8 U.S.C. § 1326 (immigration crime involving "[r]eentry of removed aliens"). This jurisdiction derives from the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."), the Tax Clause, *id.* cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ."), and various constitutional powers to regulate immigration, *see, e.g.*, *id.* cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . . .").

15. *See supra* notes 13–14.

16. *See generally* Shima Baradaran Baughman, *Eliminating Unnecessary Detention* (2024) (unpublished manuscript at 10–28) (on file with author) (providing a statutory path forward that allows jurisdictions to reduce pretrial detention by 90%).

Notwithstanding, the right to pretrial liberty has consistently been established in common law principles[17] and protected by the Supreme Court.[18] With the first generation of bail reform in the 1960s, the function of the pretrial system was to ensure that the accused appeared at trial.[19] But starting in the 1980s, the primary purpose for the pretrial system became to protect the public from danger posed by the accused.[20] Regardless, the Supreme Court has made clear that no imprisonment or punishment should be allowed before trial,[21] imprisonment should occur "in ordinary circumstances" *after* a finding of guilt,[22] and pretrial detention is a "carefully limited exception" to the societal norm of pretrial liberty.[23] As such, the Court has affirmed that the default is pretrial liberty.[24] Despite continued and careful articulation of these pretrial rights by courts, federal detentions have increased innumerably since the beginning days of bail reform.[25] Pretrial

17. *See* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 552 (Boston, Little, Brown & Co. 1898) (discussing the need for sufficient evidence since defendants are innocent "unless it be proved legally to the contrary"); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 311 (2d ed. Boston, Little, Brown & Co. 1871) ("The presumption of innocence is an absolute protection against conviction and punishment" unless the defendant confesses in open court or proof "places the guilt beyond any reasonable doubt"); People v. Van Horne, 8 Barb. 158, 167 (N.Y. Gen. Term 1850) ("If it could be ascertained to a moral certainty that the accused would appear and stand his trial, there would be no valid objection to admitting him to bail. For as I have already stated, the object of imprisonment before trial is not the punishment of the delinquent, but merely to secure his appearance in court when his trial is to be had.").

18. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (connecting pretrial liberty rights to the Magna Carta, and requiring that courts not impose punishment "without due process of law"); Speiser v. Randall, 357 U.S. 513, 526 (1958) (asserting that there should not be any imprisonment until after a finding of guilt based on evidence presented to the fact finder); Tot v. United States, 319 U.S. 463, 466 (1943) (holding that "[p]roof of some sort" is required before the fact finder can find a defendant guilty); Powell v. Alabama, 287 U.S. 45, 52 (1932) (establishing that guilty defendants were presumed innocent "until convicted").

19. *See* Bail Reform Act of 1966, Pub. L. No. 89-465, § 3146(a)–(b), 80 Stat. 214, 214; United States v. Cramer, 451 F.2d 1198, 1200 (5th Cir. 1971) ("[S]ince adoption by the Congress of the Bail Reform Act of 1966, 'conditions of [pretrial] release in a non-capital case are for the sole purpose of reasonably assuring the presence of the defendant at trial.'" (alteration in original) (footnote omitted) (quoting Brown v. United States, 392 F.2d 189, 190 (5th Cir. 1968) (per curiam))).

20. *See* Shima Baradaran Baughman, Lauren Boone & Nathan Jackson, *Reforming State Bail Reform*, 74 SMU L. REV. 447, 450 (2021) ("[J]udges gained a multitude of other reasons through the 1960s and 1980s to detain individuals before trial in the name of 'preventative detention.'").

21. Hudson v. Parker, 156 U.S. 277, 285 (1895) (stating that no imprisonment or punishment is allowed before trial).

22. Bandy v. United States, 81 S. Ct. 197, 197 (1960) ("[O]ne charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt."); *accord Hudson*, 156 U.S. at 285.

23. United States v. Salerno, 481 U.S. 739, 755 (1987) (upholding provisions for pretrial detention in the Bail Reform Act of 1984 as "carefully limited exception[s]").

24. *E.g.*, *Salerno*, 481 U.S. at 755 ("In our society liberty is the norm . . . .").

25. *See* Baradaran, *supra* note 2, at 752 & n.164. For an interesting prediction of the results of the third wave of bail reform, see Daniel C. Richman, *The Story of* United States v. Salerno*: The Constitutionality of Regulatory Detention* 23 (Fordham Legal Stud., Research Paper No. 82, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=706623 [https://perma.cc/NU4V-BJYN]. This paper critiques the U.S. Supreme Court's decision to uphold the Bail Reform Act of 1984 based on defendants' dangerousness because "very little in the majority's opinion offers doctrinal assurance that

detentions among the states have also risen 433% since 1970,[26] showing that liberty is actually the exception in the early stages of criminal cases. The right to pretrial liberty has been overshadowed by the government's dangerousness consideration and has created excessive incarceration and unpredictability in who may be released pretrial.[27] As judicial focus has disproportionately and unjustifiably shifted to public safety, detention has become the norm, rather than the limited exception.

Many bail scholars agree that pretrial detention should be the exception but have resigned themselves to figuring out how to make a preventive detention scheme that better calculates which defendants are dangerous and which are safe. Some scholars have focused on statutory solutions or theoretical discussions of risk assessments and on reducing the use of money bail or racial bias in pretrial detention determinations.[28] There has not been a look beyond the face value of these rights, or a historical dive into the meaning and purpose of the rights relevant to the pretrial liberty determination. With an increased focus on danger and public safety by courts and policy advocates,[29] scholars have also focused on these questions rather than the justifications for release.[30] A few scholars have considered the constitutional rights surrounding bail, including the impact of the

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the state's compelling interest in preventing future crime will not, someday, be allowed to justify the '*indefinite* preventive detention of individuals acquitted or not even charged.'" *Id.*

26. *See* DIGARD & SWAVOLA, *supra* note 6, at 1.

27. *See* John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis*, 88 U. CHI. L. REV. 1285, 1298 (2021) (outlining the problem of government subsidization of incarceration and "financing of all pretrial restraints on liberty"); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 494, 516 (2018) (noting that "[w]hatever the reasons, '[t]he goal of most criminal justice decisionmakers is to detain defendants who pose a risk to public safety — particularly those who appear likely to commit crimes of violence — and to release those who do not'" and that "[a]s for statutory law, every state already authorizes judges to order conditions of release to protect 'public safety,' but the current standards are varied, ambiguous, and often irrational" (second alteration in original) (quoting LAURA & JOHN ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 1 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF-research-summary_PSA-Court_4_1.pdf [https://perma.cc/SN8J-Z5QT])).

28. *See, e.g.*, Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 890–902 (2020) (describing suggested reform measures to improve risk assessments); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2281–94 (2019) (suggesting reforms in assessments to limit racial bias); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 787 (2017) (describing how limiting the heavy usage of cash bail and pretrial detention would decrease the heavy financial, societal, and individual costs related to pretrial detention). *See generally* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 109–92 (2007) (criticizing the use of certain actuarial methods in pretrial risk assessments).

29. *See generally* PRETRIAL JUST. INST., WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING (2019), https://www.prisonpolicy.org/scans/pji/where_pretrial_improvements_are_happening_jan2019.pdf [https://perma.cc/AY6W-BW76] (describing efforts in many states to further study, implement, or change current pretrial assessment measures).

30. *See, e.g.*, Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 721 (2018); John B. Howard, Jr., Note, *The Trial of Pretrial Dangerousness: Preventive Detention After* United States v. Salerno, 75 VA. L. REV. 639, 640–41 (1989); John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 6 (1985).

Eighth Amendment's Excessive Bail Clause,[31] Sixth Amendment's right to counsel,[32] Due Process Clause,[33] and Equal Protection Clause,[34] but thus far, no one has attempted to parse out and define the relevant constitutional rights and how they overlap to protect pretrial liberty.[35] And until now, there has been no recognition of a stand-alone "right to pretrial liberty" that encompasses several important constitutionally grounded rights.

Those who wish to reduce pretrial detention lack a set of defined substantive protections for the exercise of the right of pretrial liberty. As a result, pretrial liberty is sacrificed for the sake of public safety, but these values are not necessarily conflicting.[36] The accused pose a greater risk of danger if they are detained, rather than released, pretrial.[37] Consider risk assessment tools whose hallmark mission was to increase pretrial liberty, yet have led to increased detention or judges failing to comply,[38] overprediction, and algorithmic bias against people of color and

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31. U.S. CONST. amend. VIII. *See generally, e.g.*, Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121 (2009) [hereinafter Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984*] (examining the Eighth Amendment's Excessive Bail Clause and the little effect it has had); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344 (2014) (discussing electronic monitoring as an alternative to excessive bail); Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328 (1982) (examining the history of bail, and arguing that the Eighth Amendment guarantees a right to bail).

32. U.S. CONST. amend. VI. *See generally, e.g.*, Douglas L. Colbert, *Thirty-Five Years After* Gideon*: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1.

33. U.S. CONST. amends. V, XIV; *see, e.g.*, Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 614–15 (2018); Heaton et al., *supra* note 28, at 782–86 (outlining the potential violation of procedural and substantive due process rights by current methods of pretrial detention); TRACEY MEARES & ARTHUR RIZER, THE SQUARE ONE PROJECT, THE "RADICAL" NOTION OF THE PRESUMPTION OF INNOCENCE 5 (2020), https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/05/CJLJ8161-Square-One-Presumption-of-Innocence-Paper-200519-WEB.pdf [https://perma.cc/23W5-SZXR] (describing pretrial detention's violation of the presumption of innocence). *See generally, e.g.*, Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397 (2019); Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757 (2020); Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986).

34. U.S. CONST. amend. XIV; *see, e.g.*, Heaton et al., *supra* note 28, at 769–72 (describing potential violations of equal protection based on wealth-based discrimination and the criticism of money bail schedules). *See generally, e.g.*, Garrett, *supra* note 33.

35. However, scholars have certainly focused on the underlying rights of pretrial liberty, including the importance of access to counsel in early hearings. *See, e.g.*, Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700 (2013) ("Law's most powerful role in the struggle to ensure adequate representation to the poor in criminal cases will be in its capacity to generate and direct the political will to produce institutional change."). *See generally, e.g.*, Colbert, *supra* note 32; Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513 (2013).

36. *See* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 46 (2009) (pointing out how mass incarceration perpetuates crime by sending nonviolent offenders into prison).

37. *See infra* notes 52, 57 and accompanying text.

38. *See* John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1759 (2018) (explaining that actual implementation of the Colorado Pretrial Assessment Tool (CPAT) showed how risk assessment tools may "overstate defendants' true levels of risk"); Joshua J. Luna, Comment, *Bail Reform in Colorado: A Presumption of*

the poor.[39] These discretionary points and threats to safety are based in the lack of measurable and articulable pretrial liberty rights.[40] Despite evidence that pretrial release is safe,[41] courts will continue to overemphasize the public safety argument without a clearly articulated right to liberty.

The United States has seen two prior attempts at state and federal bail reform: first in the 1960s, and later in the 1980s.[42] These efforts were ultimately unsuccessful in reducing detention and had the result of expanding detention on the basis of dangerousness.[43] Prior to these first two waves of reform, judges could only order pretrial detention when the defendant was a flight risk or had been charged with a capital offense; after these efforts, judges were permitted to consider several factors and weigh evidence in ruling on pretrial detention.[44] The current third

Release, 88 U. COLO. L. REV. 1067, 1095 (2017) (highlighting evidence that judges do not always follow CPAT's recommendation, and detailing one instance where a judge disregarded the CPAT system that recommended an "unsecured personal recognizance bond, but . . . instead [gave] a $1,500 bond").

39. *See* Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/8SR9-BYLC]. Broward County, Florida implemented a risk assessment tool that overpredicted who would commit a violent crime 80% of the time. *Id.* The tool was "somewhat more accurate than a coin flip" in predicting who would re-offend, was twice as "likely to falsely flag black defendants as future criminals" than white defendants, and demonstrated evidence of judges disregarding the scores. *Id.*

40. California's lauded reform efforts aimed at ending money bail permitted local courts and judges the discretion regarding what policies to adopt, which directly impacts whether pretrial liberty is enhanced. *See* Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 443 (2020); *see also* Erwin Chemerinsky, *This Is Not the Way to Reform California's Bail System*, SACRAMENTO BEE (Aug. 22, 2018, 8:30 AM), https://www.sacbee.com/opinion/op-ed/article217018990.html (explaining the dangers of discretion in money-bail decisions). In one Texas county, bail reform efforts resulted in judges maintaining discretion on pretrial release and hearing officers departing from recommendations of pretrial services 66% of the time. ODonnell v. Harris County, 892 F.3d 147, 153–54 (5th Cir. 2018).

41. *See* SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 81 (2018).

42. *See id.* at 23–27.

43. *See id.* at 25 (noting that bail reform legislation allowed courts to detain individuals who were deemed dangerous to the community and those who had substantial evidence against them for a serious crime).

44. *Id.* at 21–22; Bail Reform Act of 1966, Pub. L. No. 89-465, § 3146(a)–(b), 80 Stat. 214, 214 (mandating pretrial release "unless the [judicial] officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. . . . In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings."); Act of Oct. 12, 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1837, 1980 (codified at 18 U.S.C. § 3142(g)) ("The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—(1) the nature and circumstances of the offense charged, . . . (2) the weight of the evidence against the person; (3) the history and characteristics of the person, including—(A) his . . . past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and (B) whether, at the time of the current offense or arrest, he was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local

wave of reform will also fail to achieve its aims without an appropriate consideration of the constitutional rights at play and a careful detention scheme that takes those into account. This has irreparable individual costs for those who are not released before trial, which many scholars have articulated, including longer incarceration periods, loss of employment, harms in obtaining future employment and housing, loss of child custody, and liberty costs.[45] To avoid more judicial confusion and future iterations of bail reform that fail to increase liberty and cause further harm, this Article takes a closer look at the underlying rights of pretrial liberty. It highlights the failure of courts to recognize these early constitutional rights and frames them together for the first time to create a stand-alone right of pretrial liberty.

This Article proceeds as follows. In Part I, this Article identifies four interests that are vindicated by the right of pretrial liberty.[46] The disaggregation of these interests is an essential first step in addressing the current confusion. These four interests each demand their own constitutional consideration, because they emerge from distinct segments of the Constitution and have not been articulated carefully with regard to pretrial release. These interests protect, respectively, the presumptive right to release pretrial; a defendant's interest in preparing a vigorous legal defense before trial; the right to a jury determination of all facts at trial rather than a judge before trial; and the right to avoid discrimination based on financial means in obtaining release before trial. Then, in Part II, this Article demonstrates how these four liberty interests work together and why neglecting any of them causes the circumvention of pretrial liberty. Though difficult judgments and individualized assessments will, of course, always remain, hopefully this proposed constitutional framework will produce more reliable and constitutionally sound outcomes than the judicial bedlam that presently prevails, thus providing a useful vantage for future statutory reform in criminal justice.

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law; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.").

45. *See, e.g.*, Jeffrey Fagan, *Race and the New Policing*, *in* 2 REFORMING CRIM. JUST. 83, 98 (Erik Luna ed., 2017) ("[A] spell of pretrial detention adversely affects the disposition and sentence in criminal cases, and creates personal hardships for defendants with work or school commitments or child-care duties. These hardships are skewed heavily toward Blacks."); Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 5 (2017); MEARES & RIZER, *supra* note 33, at 20–21 (articulating the costs to individuals of pretrial detention, including "imped[ing] a defendant in defending her case," loss of employment leading to the use of "under-resourced, court-appointed attorneys," permanent harm to individual reputation, mental anguish of detention, higher likelihood of accepting a plea bargain when innocent, and the inability to demonstrate suitability for probation programs).

46. In this Article, "rights" refer to the fundamental rights expressly guaranteed by the Constitution, including due process, equal protection, protection from excessive bail, and right to counsel. The term "interests," on the other hand, is used as a broader reference to the logic and principles that justify those rights, as well as reasonable inferences that can be drawn from the Constitution's textual description of individual rights. These interests protect the presumptive right to release pretrial; a defendant's interest in preparing a vigorous legal defense before trial; the interest in a jury determination of all facts at trial rather than a judge before trial; and the interest in avoiding financial discrimination in obtaining release before trial.

I. THE INTERESTS UNDERLYING PRETRIAL LIBERTY

This Part identifies four unique interests underlying the right to pretrial liberty: the right of presumptive release; the right of legal defense; the judicial fact-finding prohibition; and the right to financial parity. Each concerns a distinct interest that an accused individual might seek to vindicate in a pretrial release hearing. Each of these four interests is present (though unrecognized) in most contemporary bail hearings, since challenges to bail are rarely brought based on these constitutional rights due to the lack of appreciation for the right of legal defense. Moreover, courts have not carefully considered or articulated these interests, further exacerbating the problem.

A complete understanding of the interests and how they intersect can more rigorously protect a defendant in early constitutional hearings and also enhance pretrial safety. In an ideal world, the protection of each interest would require its own set of standards protected by strict scrutiny under the Fifth or Fourteenth Amendment's Due Process Clause and the Sixth Amendment right to counsel.[47] But regardless of whether protection of these interests is formally articulated into elemental rights, cogent constitutional scrutiny is not possible until these interests have been disaggregated and separately evaluated. At best, there are ritual incantations of these four interests weaved through judicial precedent, but routine neglect of these interests in daily hearings. In practice, defendants may allege any and all of these interests in a pretrial hearing. But because each of these interests requires a distinct constitutional analysis and justification, I think it is most helpful to imagine four independent interests, each precisely oriented toward the protection of a specific and singular interest: liberty.

The following Sections discuss each of the four underlying interests of pretrial liberty in order. All four interests must be considered in tandem as they all intersect to provide the liberty rights a defendant is entitled to before trial. The right to presumptive release secures other pretrial liberty rights, including the right to "unhampered preparation" of a legal defense.[48] The right to a jury determination of all criminal facts protects a defendant from infliction of punishment before conviction and preserves due process and the presumption of innocence.[49]

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47. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.").

48. Stack v. Boyle, 342 U.S. 1, 4 (1951); *see* Powell v. Alabama, 287 U.S. 45, 68–69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

49. *See Stack*, 342 U.S. at 4 ("Unless this right to [freedom] before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."). A relevant clarifying note here is that although the presumption of innocence is not discussed here as a separate right of pretrial liberty, it undergirds the right to presumption of release and due process. *See* Baradaran, *supra* note 2, at 728 ("One of the most significant protections that accompanied the presumption of innocence was the constitutional right to pretrial release through bail."); *Stack*, 342 U.S. at 4 ("This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."); Coffin v. United States, 156 U.S. 432, 453 (1895) ("The

Similarly, the right to financial parity avoids trampling the due process protection that requires defendants to be treated fairly before trial. All of these interests converge to form a stand-alone right of pretrial liberty, but it is also important to consider them each separately to uncover their unique protections.

In discussing the pretrial liberty right, this Article examines judicial doctrines and at times takes a historic dive beyond American jurisprudence. While U.S. courts have protected an individual right to liberty for over a century, the roots of our liberty rights trace back several centuries to the Magna Carta.[50] This body of constitutional law predates any of the waves of bail reform starting in the 1960s,[51] and understanding the original meaning of pretrial liberty is informative in this inquiry. These doctrinal examinations can help magnify the interpretations of existing federal and state constitutional rights. In this Article, where liberty is

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principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."); Bell v. Wolfish, 441 U.S. 520, 582 n.11 (1979) (Stevens, J., dissenting) ("[T]he presumption . . . of innocence that is indulged until evidence has convinced a jury to the contrary beyond a reasonable doubt colors all of the government's actions toward persons not yet convicted." (citation omitted)). *But see id.* at 533 (majority opinion) ("Without question, the presumption of innocence plays an important role in our criminal justice system. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."). Though courts have asserted that the presumption of innocence applies only at trial, the principles of due process apply to prohibit deprivations of liberty until a determination of guilt even before trial. *See* Baradaran, *supra* note 2, at 761–62. Additionally, while the federal Bail Reform Acts of 1966 and 1984 expanded courts' ability to deny bail and detain defendants pretrial, neither Act eliminated the application of the presumption of innocence pretrial. *See id.* at 740 ("However, and importantly, the [1966] Act did preserve the presumption that all noncapital defendants should be released on bail." (citing 18 U.S.C. § 3142(j))); *id.* at 750 n.158 ("[T]here was still cause to believe that Congress thought the presumption of innocence still applied to bail since the 1984 Act specifically mentioned that nothing in the Act was intended to modify or limit the presumption of innocence. Arguably, if the presumption of innocence did not apply pretrial at all, it would not be necessary for a bail statute to even mention it." (citation omitted)). The Due Process Clause provides independent protections for defendants pretrial. *Id.* at 759 ("[T]he Due Process Clause has provided independent pretrial protections to liberty and the right to a trial before a determination of guilt."); *see also* MEARES & RIZER, *supra* note 33, at 25 ("[D]etaining individuals or setting a high bail as a form of punishment is in clear violation of the right to due process as articulated in the 5th and 14th Amendments."); United States v. Scott, 450 F.3d 863, 874 (9th Cir. 2006) ("Moreover, the assumption that [the defendant] was more likely to commit crimes than other members of the public, without an individualized determination to that effect, is contradicted by the presumption of innocence: That an individual is charged with a crime cannot, as a constitutional matter, give rise to any inference that he is more likely than any other citizen to commit a crime if he is released from custody. Defendant is, after all, constitutionally presumed to be innocent pending trial, and innocence can only raise an inference of innocence, not of guilt." (footnote omitted)).

50. *See* BRIT. LIBR.: MAGNA CARTA, *supra* note 7 (translating clause 39 of the Magna Carta: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.").

51. *See Coffin*, 156 U.S. at 460 ("Whilst Rome and the Mediaevalists taught that wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis. The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime.").

discussed, it is typically in the context of the rights of an accused pretrial, though there are references to the constitutional right to liberty writ large where appropriate. The right to pretrial liberty, identified and dissected here, involves a narrower set of both constitutional provisions and body of precedent, but to the extent the broader rights are implicated they will be referenced in the various Sections dealing with the individual liberty interests. The deprivation of these four interests leads to substantial harms to individuals and society, as unnecessary pretrial detention actually threatens public safety by creating more dangerous defendants.[52] The next Sections explore the four individual interests, their constitutional roots, underlying protections, and the misunderstanding of these interests by lower courts.

A. THE PRESUMPTIVE RELEASE RIGHT

The first interest of pretrial liberty is what is referred to here as the right of presumptive release for defendants before trial. The presumptive release right prohibits any punishment of a defendant before a determination of guilt. Part and parcel of this right to liberty is a right to procedural due process before any detention.[53] Although there is constitutional, statutory, and judicial support for a right to presumptive release, it exists currently as an aspirational right given that it has not been effectuated in pretrial practice, even though such language is constitutionally and statutorily common historically and today. Currently, courts conduct something akin to a balancing test to determine who should be released before trial.[54] But historically, this right demanded pretrial release as the bright-line rule for noncapital crimes and detention as the narrow exception.[55] Aside from depriving individuals of their constitutional right to liberty, pretrial detention can also result in increased jail time, inability to consult with counsel, worse plea outcomes, and practical difficulties, such as job loss and instability within families.[56]

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52. LAURA & JOHN ARNOLD FOUND., PRETRIAL CRIMINAL JUSTICE RESEARCH 4 (2013), https://www.ils.ny.gov/files/Pretrial%20Criminal%20Justice%20Research.pdf [https://perma.cc/C9ZC-WEK7] (finding that "when held 2-3 days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours").

53. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

54. *See infra* notes 94–95 and accompanying text.

55. *See* Baradaran, *supra* note 2, at 729; TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., U.S. DOJ, NIC ACCESSION NO. 028360, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 30, 32 (2014), https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf [https://perma.cc/3CUV-LL77].

56. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 533 (1972) ("[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."); Baughman, *supra* note 45, at 5 (articulating the costs to individuals of pretrial detention); MEARES & RIZER, *supra* note 33, at 20–21 (same).

And as far as the concern for dangerousness, detaining most of the accused before trial creates a larger public safety threat because people detained even for a few days before trial are more likely to be incarcerated[57] and commit future crimes than those who are released.[58] If we hope to reduce public danger, the current balancing of interests should be substituted by the right to presumptive release. To properly understand the right to presumptive release requires a deeper dive into the roots of the Due Process Clause—the Magna Carta and the English Bill of Rights.

1. Early Pretrial Release Right

Tradition is a powerful force. Too often, oppressive practices continue due to tradition, and there is a failure to properly evaluate their merits. But sometimes tradition is established through centuries of individual struggle to protect a fundamental right and should be upheld due to its hard-fought status. Such a traditional fundamental right is the constitutional right to presumptive release before trial.[59] Not only does this right carry the weight of vast traditional importance, but its importance would also survive constitutional scrutiny. From the Magna Carta onward, the right of pretrial liberty has been at the heart of early due process protection.

The right to release before trial is long-established. "One of the most celebrated clauses of [the] Magna Carta was that which guaranteed the king's subject immunity from imprisonment, or other punishment, save through the due process of the law . . . ."[60] Indeed, until modern Supreme Court cases, we were reminded that the purpose of bail is solely "assuring the presence" of the defendant in court.[61] This right protected an individual from restriction of liberty without due process

57. *See* Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 201 (2018) (finding that "pretrial detention significantly increases the probability of conviction, primarily through an increase in guilty pleas"); Esmond Harmsworth, *Bail and Detention: An Assessment and Critique of the Federal and Massachusetts Systems*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213, 218–19 (1996) (discussing studies that found a higher proportion of state defendants who were detained pretrial were more likely to be sentenced to prison than bailed defendants).

58. *See* LAURA & JOHN ARNOLD FOUND., *supra* note 52, at 4 (finding that "when held 2-3 days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours"); Heaton et al., *supra* note 28, at 712.

59. Commentators refer to the right to pretrial liberty in multiple ways, some more specific than others, but all relate to the same concept. In this Article, the right to pretrial liberty is treated synonymously with the right to release before trial, freedom from imprisonment, the right to bail, and freedom from bodily restraint. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

60. ALAN LLOYD, KING JOHN 302 (1973); *see also* ROBERT BARTLETT, ENGLAND UNDER THE NORMAN AND ANGEVIN KINGS: 1075–1225, at 186 (J.M. Roberts ed., 2000); BRIT. LIBR.: MAGNA CARTA, *supra* note 7. The right to release existed even before the Magna Carta. *See* Coffin v. United States, 156 U.S. 432, 455 (1895) ("If it suffices to accuse, what will become of the innocent?" (quoting AMMIANUS MARCELLINUS, RERUM GESTARUM LIBRI QUI SUPERSUNT, L. XVIII, cl. 1)).

61. Stack v. Boyle, 342 U.S. 1, 5 (1951).

of law.[62] Historically, the presumption of innocence, grounded in the Due Process Clause, served to prevent judges from adjudicating guilt and was tied closely with a defendant's right to freedom before trial.[63] Although a full bail hearing was standard English practice to determine whether someone should be released on bail, the United States adopted a practice where those accused of non-capital offenses were automatically eligible for release on bail.[64] Indeed, based on this strong due process and liberty language, the default before trial was release. The focus in early American practice was on *how* to release an individual before trial, not *whether* a person should be released.[65] Thus, the foundation of due process protections maintained a strong basis for presumptive release in the pretrial period.[66] Interpretations of due process certainly have changed over time, and in later years presumptive release has not been required.

2. Establishment of Presumptive Release Right

As derived from the Magna Carta, the right of presumptive release is a traditional one with roots in due process, which was later enshrined in the Due Process Clause and adopted by the Supreme Court.[67] This right protects physical

62. *See* CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 104 (1930) ("It is commonly conceded that the purpose of the phrase 'by the law of the land,' which was later transformed into the more popular form 'due process of law,' was intended primarily to insist upon rules of procedure in the administration of criminal justice, namely, that judgment must precede execution, that a judgment must be delivered by the accused man's 'equals,' and that no free man could be punished except in accordance with the law of England . . . .").

63. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES 297 ("Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, . . . there to abide till delivered by due course of law. But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only . . . ." (footnote omitted)); 5 JOHN HENRY WIGMORE, 1 A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2511, at 504 (2d ed. 1923) (explaining the presumption of innocence "hovers over the prisoner as a guardian angel" from the moment of indictment until the verdict is determined (quoting JUDGE WIGLITTLE, TEN YEARS A POLICE COURT JUDGE 207 (1884)); People v. Riley, 33 N.E.2d 872, 875 (Ill. 1941) ("Any person indicted stands before the bar of justice clothed with a presumption of innocence and, as such, is tenderly regarded by the law. Every safeguard is thrown about him. The requirements of proof are many, and all moral, together with many technical, rules stand between him and any possible punishment.").

64. *See* Baradaran, *supra* note 2, at 729 (citing Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91); SCHNACKE, *supra* note 55, at 30, 32.

65. Baradaran, *supra* note 2, at 729 (stating that "English bail law," which carried into American bail law in the early nineteenth century, "presumed that defendants would be released and discussed the 'bail decision' as though it were a decision of *how* to release the defendant, not *if* he would be released").

66. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (noting that "[d]ating back to the Magna Carta," the governing principle has been that "punishment cannot be imposed 'without due process of law'").

67. U.S. CONST. amends. V, XIV; *see Kennedy*, 372 U.S. at 186; Stack v. Boyle, 342 U.S. 1, 8 (1951) (explaining that a defendant is entitled to pretrial release until proven guilty as "the spirit of [bail] is to enable [the defendant] to stay out of jail until a trial has found them guilty"); *see also* Hunt v. Roth, 648 F.2d 1148, 1156 (8th Cir. 1981) ("The protection against excessive bail has a direct nexus to the presumption of innocence, implicitly recognized within the [F]ourteenth [A]mendment.").

bodily liberty before a determination of guilt[68] and prohibits any punishment of a defendant without the due process protections that come with a trial.[69] It is both substantive in providing a default right to liberty and procedural in requiring adequate notice and hearing before allowing punishment or detention.[70]

In the 1950s, the Supreme Court expressly recognized the right to freedom before trial as a due process protection. In *Stack v. Boyle*, the Court recognized that the importance of defendants' traditional right to freedom before trial includes the right to bail.[71] In turn, the right to release on bail was considered critical in preserving the presumption of innocence along with preventing the infliction of punishment before trial.[72] Indeed, the right to "bail" and "freedom" are used interchangeably in *Stack*.[73] An infringement on pretrial liberty dangerously resembles punishment before conviction, an unallowable, unconstitutional result.[74] The Supreme Court has adopted long-standing common law principles that include freedom from bodily restraint as "core of the liberty protected by the Due Process Clause."[75] For this reason, many states expressly recognized that pretrial release was a default right for noncapital crimes in their constitutions.[76]

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68. *See* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

69. *See* Baradaran, *supra* note 2, at 727–38.

70. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

71. 342 U.S. at 4.

72. *Id.* (noting the presumption of innocence "would lose its meaning" without the right to freedom before conviction, including the right to bail before trial); *see* Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); Hudson v. Parker, 156 U.S. 277, 285 (1895) ("The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail . . . .").

73. *See Stack*, 342 U.S. at 4. Notably, in the Bail Reform Act of 1966, the drafters substituted "Release" for "Bail" in the chapter heading "Release in noncapital cases prior to trial," changing the heading to "Jumping Bail," and added sections 3147–3152. Pub. L. No. 89-465, secs. 5(e)(1), 3, 80 Stat. 214, 214–17. Months after *Stack*, the Supreme Court made clear that not all individuals are bailable. Carlson v. Landon, 342 U.S. 524, 542, 546 (1952) (holding that refusal of bail for undocumented immigrants was not unconstitutional under the Eighth Amendment or Fifth Amendment "where there is reasonable apprehension of hurt from aliens charged with a philosophy of violence against this Government").

74. *See Stack*, 342 U.S. at 4; Reno v. Flores, 507 U.S. 292, 301 (1993); United States v. Salerno, 481 U.S. 739, 748 (1987).

75. Foucha v. Louisiana, 504 U.S. 71, 80 (1992); *cf.* Powell v. Alabama, 287 U.S. 45, 52 (1932) (holding that guilty defendants were presumed innocent "until convicted"); Bandy v. United States, 81 S. Ct. 197, 197 (1960) ("The fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt.").

76. *See, e.g.*, PA. CONST. ch. II, § 28 (1776) ("All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great."). Almost every state enacted this provision and forty-two states protected this right to release in at least one of their state constitutions. *See* Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 909 (2013). The Pennsylvania constitution currently reads, "All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will

The presumption of pretrial liberty has a strong constitutional and judicial basis, which changed in the 1980s with the recognition of public safety in the release decision. The next Section discusses these changes brought by *United States v. Salerno*.

3. Clash of Pretrial Liberty and Dangerousness

Although the right to presumptive release has a strong constitutional foundation, its weakness has become a respectively new juxtaposition of that right against the government's prerogative to protect public safety in the 1980s. In practical terms, individual judges believe they are to determine whether a defendant is safe to release without realizing that constitutionally they must release most defendants before trial. A brief exploration of how preventive detention supplanted presumptive release is in order. Federal and state governments administer law enforcement and punishment after due process protections have been satisfied, but the rationale for government interference with liberty pretrial is different.[77] The only justification for denying pretrial liberty is "regulation," not punishment.[78] Still, even assuming that pretrial detentions are regulatory in nature, courts must justify a regulatory infringement on an individual's due process rights. The Supreme Court has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[79] In past cases, the Court has found that a government's interest in detention outweighed an individual's liberty interest when dealing with "times of war or insurrection,"[80] "potentially dangerous resident aliens pending deportation proceedings,"[81] "mentally unstable individuals who present a

reasonably assure the safety of any person and the community when the proof is evident or presumption great . . . ." PA. CONST. art. I, § 14. Another current iteration can be found in Alabama's constitution. ALA. CONST. art. I, § 16 ("That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great . . . .").

77. *See* Trevor George Gardner, *Immigrant Sanctuary as the "Old Normal": A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 12, 14 (2019) (noting that for the states, this power comes from police power granted by the Tenth Amendment, and for the federal government it comes not from a police power but the commerce powers that authorize the federal criminal justice system).

78. Bell v. Wolfish, 441 U.S. 520, 537 (1979) ("This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may."); *Salerno*, 481 U.S. at 748 (concluding "that the pretrial detention contemplated by the Bail Reform Act [of 1984] is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause"); *cf.* Smith v. Doe, 538 U.S. 84, 108 (2003) (Souter, J., concurring in judgment) ("Ensuring public safety is, of course, a fundamental regulatory goal . . . ."); Schall v. Martin, 467 U.S. 253, 268 (1984) (explaining that juvenile pretrial detention "promotes the interests both of society and the juvenile," and thus "the practice serves a legitimate regulatory purpose"); *Foucha*, 504 U.S. at 96 (Kennedy, J., dissenting) ("[I]n the criminal context, the State acts to ensure the public safety."); De Veau v. Braisted, 363 U.S. 144, 155 (1960) (noting that "combatting local crime infesting a particular industry" was a "legitimate and compelling state interest").

79. *Salerno*, 481 U.S. at 748.

80. *Id.* (first citing Ludecke v. Watkins, 335 U.S. 160 (1948); and then citing Moyer v. Peabody, 212 U.S. 78, 84–85 (1909)).

81. *Salerno*, 481 U.S. at 748 (first citing Carlson v. Landon, 342 U.S. 524, 537–42 (1952); and then citing Wong Wing v. United States, 163 U.S. 228 (1896)).

danger to the public,"[82] "dangerous defendants who become incompetent to stand trial,"[83] and juveniles with a serious risk of committing a crime before the return date.[84] This was the case until *United States v. Salerno* shifted the focus to dangerousness in the pretrial determination.

Extending these detention exceptions, the Court held in *Salerno* that with this "well-established authority . . . in special circumstances" to restrain liberty before trial, detention based on dangerousness must be evaluated like in prior cases.[85] *Salerno* set a standard in place that allows detention in limited circumstances when the government demonstrates through a compelling interest in government safety that an individual poses an "articulable threat."[86] This preventive detention, blessed by the Supreme Court in *Salerno*, is arguably what has hampered the accused's right to presumptive release. As articulated by Justice Marshall, *Salerno* constituted a major departure from prior Supreme Court precedent that only allowed flight risk or potential obstruction of justice, such as witness tampering, to justify detaining an individual before trial.[87] It has allowed courts to categorize pretrial detention as permissible regulation and not punishment.[88]

But what is neglected in the modern understanding of *Salerno* is that it dictates that release is the default before trial and detention for the purpose of regulation is allowed in limited circumstances. The two main justifications for detention pretrial are flight risk and public safety.[89] Flight risk is the traditional consideration in a bail hearing, and some argue it is the only allowable consideration.[90] Pretrial detention because of a perceived danger to public safety, known as preventive

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82. *Salerno*, 481 U.S. at 748–49 (citing Addington v. Texas, 441 U.S. 418, (1979)).

83. *Id.* at 749 (first citing Jackson v. Indiana, 406 U.S. 715, 731–39 (1972); and then citing Greenwood v. United States, 350 U.S. 366 (1956)).

84. Schall v. Martin, 467 U.S. 253, 268 (1984).

85. 481 U.S. at 749.

86. *Id.* at 751. Some courts have cited to *Salerno* as establishing that pretrial detention to protect public safety must pass strict scrutiny—the detention must be narrowly tailored to meet a compelling governmental interest. *See infra* notes 101–05 and accompanying text; Foucha v. Louisiana, 504 U.S. 71, 81 (1992) (citing *Salerno* and discussing how pretrial detention requires a compelling governmental interest and narrow tailoring).

87. *See Salerno*, 481 U.S. at 755–56 (Marshall, J., dissenting); *see also id.* at 749 (majority opinion).

88. *See supra* note 78 and accompanying text; *see also, e.g.*, Crane v. Logli, 992 F.2d 136, 139 (7th Cir. 1993) ("[T]he Due Process Clause allows the government to incarcerate pretrial detainees prior to trial. The Court [in *Bell v. Wolfish*] also held, however, that due process does not permit pretrial detainees to be incarcerated in punitive conditions."); United States v. Hare, 873 F.2d 796, 800 (5th Cir. 1989) ("[P]retrial detention under the Bail Reform Act [of 1984] does not on its face violate the due-process clause of the Fifth Amendment. Because pretrial detention under the Act is regulatory, not penal, it does not constitute 'impermissible punishment before trial' that would violate due process." (footnotes omitted) (quoting *Salerno*, 481 U.S. at 746)).

89. Bail Reform Act of 1984, 18 U.S.C. § 3142(e); *see Salerno*, 481 U.S. at 753–54 ("Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight [risk]."); Goldkamp, *supra* note 30, at 65–67 tbl.4 (considering whether state statutes in the second wave of bail reform define dangerousness, and setting forth definitions where applicable).

90. *Cf.* Hudson v. Parker, 156 U.S. 277, 285 (1895) (noting that judges "might take bail for the defendant's appearance in the Circuit Court"); Stack v. Boyle, 342 U.S. 1, 9 (1951) ("The question when application for bail is made relates to each [accused]'s trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance."); Baradaran, *supra* note 2, at 731–34

detention,[91] became codified in the last half-century.[92] Denying liberty pretrial must still satisfy substantive and procedural due process requirements, and release is still nominally the presumption for most defendants. These requirements are discussed in the next Section.

4. Substantive and Procedural Due Process Liberty Requirements

Pretrial preventive detention received the blessing of the Supreme Court in "*carefully limited*" exceptions.[93] This flows from the basic due process principle that "forbids the government to infringe [upon] certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest."[94] The State bears the burden of demonstrating that pretrial detention is necessary, not the defendant.[95] "[W]here the government's interest is sufficiently weighty," the right to liberty may "be subordinated to the greater needs of society."[96] These "greater needs" may include ensuring the presence of the defendant at trial and maintaining security at a pretrial detention facility.[97] In other words, the detention must be tied to a regulatory purpose and must not be excessive to protect that purpose.[98] The government also has to demonstrate in narrow circumstances that an individual's demonstrable danger to their community outweighs the importance of the defendant's liberty interest.[99] Given the grave

("Bail historically served the sole purpose of returning the defendant to court for trial, not preventing her from committing additional crimes.").

91. *E.g.*, Gouldin, *supra* note 30, at 699.

92. *See* Bail Reform Act of 1984, 18 U.S.C. § 3142(e).

93. *Salerno*, 481 U.S. at 755 (emphasis added) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

94. Reno v. Flores, 507 U.S. 292, 302 (1993). Due to the fundamental nature of the right, if there is a finding that pretrial detention is necessary to serve a compelling interest, detention is only allowed when "no condition or combination of conditions" of release will satisfy the government interests. *Salerno*, 481 U.S. at 742 (quoting 18 U.S.C. § 3142(e) (1984)); *see also id.* at 748 ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. . . . [W]e have found that sufficiently compelling governmental interests can justify detention of dangerous persons.").

95. *See Salerno*, 481 U.S. at 751 (explaining that, to detain an arrestee before trial, the government must prove by "clear and convincing evidence that an arrestee presents an identified and articulable threat"). State and federal courts have supported this principle. *See, e.g.*, Valdez-Jimenez v. Eighth Jud. Dist. Ct., 460 P.3d 976, 987 (Nev. 2020) ("[T]he State has the burden of proving by clear and convincing evidence that no less restrictive alternative [to pretrial detention] will satisfy its interests in ensuring the defendant's presence and the community's safety."); Caliste v. Cantrell, 329 F. Supp. 3d 296, 311 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019) (noting the "government burden of [presenting] clear and convincing evidence" in support of pretrial detention); *see also* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-5.10(f), at 23–24 (3d ed. 2007) ("In pretrial detention proceedings, the prosecutor should bear the burden of establishing by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court and protect the safety of the community or any person.").

96. *Salerno*, 481 U.S. at 750–51.

97. *See id.* at 749, 751; Bell v. Wolfish, 441 U.S. 520, 546–47 (1979) (acknowledging that some liberty limits can be imposed to maintain security at a pretrial detention facility).

98. *Bell*, 441 U.S. at 581 (Stevens, J., dissenting).

99. *Salerno*, 481 U.S. at 750–51.

nature of the liberty right, rigorous procedures must be followed.[100] These procedures protect both substantive and procedural due process.

Acknowledging pretrial liberty as a fundamental constitutional right,[101] the judicial system affords it substantive protection. Though not directly, the Supreme Court has all but afforded pretrial liberty the substantive due process protection of heightened scrutiny, meaning that due process demands any infringement on pretrial liberty to be "narrowly tailored to serve a compelling state interest."[102] Though the phrase "strict scrutiny" does not appear in *United States v. Salerno*, the test used in *Salerno* matches strict scrutiny tests applied to other narrowly focused fundamental rights.[103] Indeed, courts require clear and convincing evidence that pretrial incarceration is necessary because there are no alternatives that would reasonably ensure the defendant's future appearance in court and the community's safety.[104] The Supreme Court has never allowed an evidentiary standard below "clear and convincing" in a case involving deprivation of bodily liberty.[105] Substantive due process thus requires a law or policy authorizing pretrial detention to be narrowly tailored to a compelling state interest, with clear and convincing evidence demonstrating that the government may not release a particular defendant safely.

Procedural due process requires that before liberty is infringed, the government must provide procedural safeguards to ensure accuracy of detention.[106] These

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100. *See* Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001) (articulating that the Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections").

101. *See Salerno*, 481 U.S. at 750 (recognizing the "fundamental nature of this right"); *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); United States v. Montalvo-Murillo, 495 U.S. 711, 716 (1990) (confirming that the Court had "recognize[d] that a vital liberty interest [was] at stake" as to the Bail Reform Act of 1984's infringement on pretrial liberty discussed in *Salerno*).

102. Reno v. Flores, 507 U.S. 292, 301–02 (1993) (discussing "fundamental" liberty interests).

103. *See Salerno*, 481 U.S. at 749–52, 755 (explaining that the "fundamental nature" of pretrial liberty meant that pretrial detention was "the carefully limited exception" and pretrial liberty the "norm"); *see also* Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (applying strict scrutiny to hold that the right to marry is a fundamental right); Zablocki v. Redhail, 434 U.S. 374, 386, 388 (1978) (applying strict scrutiny to strike down a state law that impinged upon the fundamental right to marry).

104. *See, e.g.*, *Salerno*, 481 U.S. at 750; *see also* Caliste v. Cantrell, 329 F. Supp. 3d 296, 311–15 (E.D. La. 2018) (applying the clear and convincing evidence standard to bail proceedings), *aff'd*, 937 F.3d 525 (5th Cir. 2019).

105. *Cf.* Addington v. Texas, 441 U.S. 418, 431–33 (1979) (concluding "that the preponderance standard falls short of meeting the demands of due process and that the reasonable-doubt standard is not required," and finding that the "middle level" clear and convincing evidence standard "strikes a fair balance between the rights of the individual and the legitimate concerns of the state").

106. *See Salerno*, 481 U.S. at 746 ("When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process." (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976))); *id.* at 755 (holding that pretrial detention to protect public safety pursuant to the Bail Reform Act of 1984 did not violate procedural due process because the Act required sufficient procedural safeguards).

safeguards include a timely individualized hearing and notice of issues to be addressed in cases of pretrial detention.[107] This hearing must take place within a very short period after arrest.[108] Just as the Constitution requires the government to bear the burden of proving all the elements of a crime, it similarly requires the government to demonstrate that an accused should be detained pretrial because the liberty interest for the accused dictates presumptive release.[109] There is disagreement over which procedural safeguards a preventive detention scheme must have to be constitutionally sufficient; in other words, the requirements for a preventive detention scheme to be "sufficiently tailored."[110] Some interpretations permit pretrial detention based on weighing of evidence of the crime charged, which is improper by a judge before trial;[111] this is therefore a flawed and incorrect reading of *Salerno*. Also, a categorical denial of pretrial release for a noncapital offense conflicts with the foundational right to presumptive release.[112] Post-*Salerno*, the default has not been release before trial,[113] and this in every way contradicts the commands of *Salerno*. A correct reading of Supreme Court precedent on pretrial detention could still very much support a presumption of release for most defendants before trial. The next Section makes a case for a presumptive release right for most accused persons.

5. Effectuating Presumptive Release

The right of presumptive release is positioned to conflict directly with the state interest in protecting the public from danger. However, it is important to recognize them distinctly to determine if there is any real conflict. The Supreme Court has upheld the right to presumptive release consistently through all three waves of bail reform.[114] The Supreme Court has even recognized that due process's core

107. *See, e.g.*, *Mathews*, 424 U.S. at 333; *cf.* Gerstein v. Pugh, 420 U.S. 103, 114, 126 (1975) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.").

108. *See, e.g.*, *Mathews*, 424 at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))).

109. *See Salerno*, 481 U.S. at 751, 755.

110. Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 779 (9th Cir. 2014) (en banc).

111. *See* Baradaran, *supra* note 2, at 759–60, 770.

112. It also is very unlikely to withstand heightened scrutiny. *See* United States v. Scott, 450 F.3d 863, 874 (9th Cir. 2006). The court in *Lopez-Valenzuela v. Arpaio* held that detention based on arrest for a particular crime is not allowed without an individualized finding. 770 F.3d at 791–92.

113. *See* U.S. CTS., TABLE H-14–PRETRIAL SERVICES RELEASE AND DETENTION FOR THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2017 (2017), http://www.uscourts.gov/statistics/table/h-14/judicial-business/2017/09/30 [https://perma.cc/VK8V-9ZN6] (noting that over 72% of defendants in district courts are detained and never released throughout their entire prosecution).

114. *See, e.g.*, *supra* note 49; Stack v. Boyle, 342 U.S. 1, 4 (1951) ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."); Bell v. Wolfish, 441 U.S. 520, 535–36 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. A person lawfully committed to pretrial detention has not been adjudged guilty of any crime." (footnote and citations omitted)); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." (quoting *Salerno*, 481 U.S. at 750)); Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from

protection is freedom from government detention[115] and has held repeatedly that pretrial liberty is the norm, and "detention prior to trial . . . is the carefully limited exception."[116] The reason that presumptive release is not a federal or state norm in practice might be because *Salerno* has been interpreted incorrectly or because the correct statutory presumptions have never been put into place for these rights to be effectuated. The lack of existing statutory presumptions necessary to protect these constitutional rights will be discussed in another forthcoming piece,[117] but at the very least, we know there is no doctrinal barrier to pretrial presumptive release. Judges should be protected from media and public criticism[118] when they comply with *Salerno*'s dictates to treat pretrial detention as a "carefully limited exception"—but because of a lack of understanding of these underlying protections, they are not.

Even though under Supreme Court precedent pretrial detention remains a limited exception,[119] this has not been the reality in state and federal courts across the country. Pretrial detention has become the default, with the majority of defendants detained pretrial across the United States.[120] This, in part, is due to judges' discretion to release or detain defendants and their misunderstanding of how to avoid public danger.[121] Indeed, judges utilize their wide discretion to

government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

115. *See, e.g.*, *Foucha*, 504 U.S. at 80 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . . .").

116. *Salerno*, 481 U.S. at 755.

117. Baughman, *supra* note 16.

118. One example of public backlash against a judge was when it was discovered that Darrell Brooks, the suspect who drove his S.U.V. through a Wisconsin Christmas Parade and killed six people, had been released earlier that month on only $1,000 bail following his arrest for assaulting the mother of his child and running her over with his car, see Glenn Thrush & Shaila Dewan, *Waukesha Suspect's Previous Release Agitates Efforts to Overhaul Bail*, N.Y. TIMES (Nov. 25, 2021), https://www.nytimes.com/2021/11/25/us/waukesha-wisconsin-brooks-bail.html and Marisa Iati & Mark Berman, *The Wisconsin Parade Suspect Was Accused of a Car Attack Weeks Ago. Here's Why He Was Out on Bail.*, WASH. POST (Nov. 24, 2021, 6:30 AM), https://www.washingtonpost.com/nation/2021/11/24/wisconsin-parade-darrell-brooks-bail/.

119. *Salerno*, 481 U.S. at 755.

120. *See supra* notes 25–26 and accompanying text; BAUGHMAN, *supra* note 41; *see also* Press Release, U.S. Comm'n on C.R., U.S. Commission on Civil Rights Releases Report: The Civil Rights Implications of Cash Bail (Jan. 20, 2022), https://www.usccr.gov/news/2022/us-commission-civil-rights-releases-report-civil-rights-implications-cash-bail [https://perma.cc/DH4F-A6KB] ("More than 60% of defendants are detained pre-trial because they can't afford to post bail." (emphasis omitted)).

121. *See* Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 455 (2016) ("[W]hen judges' discretion is more constrained, it appears that more defendants are released without a concomitant increase in crime or flight."); Mitchell P. Pines, *An Answer to the Problem of Bail: A Proposal in Need of Empirical Confirmation*, 9 COLUM. J.L. & SOC. PROBS. 394, 408 (1973) ("Pre-trial release procedures are unusually vulnerable to the subjectivity of the arraignment judge, who alone decides the bail disposition."); Knight v. Sheriff of Leon Cnty., 369 F. Supp. 3d 1214, 1219 (N.D. Fla. 2019) ("When detention serves a compelling interest, a state may accomplish the result through an explicit detention order, or the state may accomplish the same result by setting unaffordable bail. A rose by any other name.").

detain more defendants than necessary to protect public safety.[122] For instance, one federal court held that "[i]n Tennessee, bail is the norm, not the exception. To be released on his own recognizance, a defendant must demonstrate that bond is not necessary to assure his appearance."[123] Without more efforts to ensure preventive detention remains the limited exception, lower courts will continue to utilize their discretion to favor pretrial detention[124] for fear of increasing public danger.

The consequences of depriving the accused of presumptive release are profound for an individual and society.[125] Recent empirical research has confirmed that pretrial detention itself increases the likelihood of conviction and future crime and has an adverse effect on future employment prospects.[126] The torrential effects of pretrial detention impact entire communities.[127] The consequences of pretrial detention include loss of employment, loss of custody of children, loss of housing or property, increased risk for physical and mental illness, limited access to counsel and decreased opportunity to prepare a defense resulting in increased risk of a finding of guilt, all of which contribute to worse plea outcomes and longer sentences.[128] Studies have shown that as little as two days in pretrial detention increases the likelihood that an individual will commit a crime in the future,

122. *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 497 (2012) ("[U]sing our model, judges would be able to release 25% more defendants while decreasing both violent crime and total pretrial crime rates.").

123. Fields v. Henry County, 701 F.3d 180, 187 (6th Cir. 2012).

124. *See* Jennifer E. Copp, William Casey, Thomas G. Blomberg & George Pesta, *Pretrial Risk Assessment Instruments in Practice: The Role of Judicial Discretion in Pretrial Reform*, 21 CRIMINOLOGY & PUB. POL'Y 329, 329 (2022) ("[J]udges frequently departed from the [pretrial risk assessment's] recommendation using alternatives that were more punitive and often included financial conditions . . . .").

125. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 532–33 (1972) ("[T]ime spent in jail awaiting trial . . . often means loss of a job; it disrupts family life; and it enforces idleness."); Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."); SCHNACKE, *supra* note 55, at 15 (explaining pretrial detention has "a variety of social costs").

126. *See* Heaton et al., *supra* note 28, at 712; Jung K. Kim & Yumi Koh, *Pretrial Justice Reform and Black–White Difference in Employment*, 54 APPLIED ECON. 1396, 1396 (2022) (avoiding pretrial detention increased employment probability of Black defendants by 4.2–6.8%).

127. *See, e.g.*, Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 612–15 (2017).

128. *See* BAUGHMAN, *supra* note 41, at 82–89; Baughman, *supra* note 45, at 5; Harmsworth, *supra* note 57, at 218–19 (finding that a higher proportion of state defendants who were detained pretrial were more likely to be sentenced to jail or prison); Heaton et al., *supra* note 28, at 713 ("A person detained for even a few days may lose her job, housing, or custody of her children."); *id.* at 712 ("There is ample documentation that those detained pretrial are convicted more frequently, receive longer sentences, and commit more future crimes than those who are not (on average)."); *see also* Gail Kellough & Scot Wortley, *Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions*, 42 BRIT. J. CRIMINOLOGY 186, 201 (2002) (explaining that Black defendants who are detained are more likely to plead guilty in Canada). *See generally* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021). Additionally, pretrial detention "exerts pressure on [defendants] to plead guilty, and creates a negative impression in the minds of judges and juries." Halsey B. Frank, *Shedding Light on the United States Pretrial Services Agency's Pretrial Risk Assessment Tool*, CRIM. JUST., Fall 2021, at 32, 34.

increasing the future risk level of otherwise low-risk individuals.[129] For this reason, safeguarding the right to presumptive release is critical to protecting the rights of pretrial liberty and public safety. Without release as a default,[130] the balance between public safety and freedom is likely to favor the government.[131] Release becomes the exception rather than the rule, and, without legal protections in place, the state's public safety interest buries the essential rights of liberty at a cost to the accused—and a major cost to public safety.

B. THE RIGHT OF LEGAL DEFENSE

The right of legal defense is defined as a right of an individual to have representation at every critical criminal hearing, including the initial bail determination. The right of legal defense is enshrined in the Sixth Amendment for individuals charged with a crime, yet is not effectuated in practice because many defendants appear for early pretrial hearings without counsel.[132] While a federal statute provides the right to legal defense for federal bail hearings, the majority of states do not guarantee such a right.[133] It is no secret that most states cannot afford to provide legal representation to defendants in their pretrial hearings, but there is hope to allow nonlawyers to fill the gap of representation,

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129. SCHNACKE, *supra* note 55, at 15–16; LAURA & JOHN ARNOLD FOUND., *supra* note 52, at 4; Heaton et al., *supra* note 28, at 728, 768 (finding that in a representative group of 10,000 misdemeanor offenders, pretrial detention would cause an additional 600 misdemeanors and 400 felonies compared to if the same group had been released pretrial and showing that 2016 studies of those detained in Philadelphia, Pennsylvania and Harris County, Texas were more likely to be convicted and serve longer sentences of incarceration simply due to pretrial detention).

130. To safeguard this right, states could enact statutes that require a rebuttable presumption of release with a strict scrutiny or clear and convincing evidence standard. The right to presumptive release could only be interrupted in exceptional cases where the government requests a hearing and demonstrates that the defendant poses a specific and short-term substantial threat. For an example of such a bill, see C.R. CORPS, PRETRIAL RELEASE AND DETENTION ACT § 4(b)–(c), at 2–5, https://cdn.buttercms.com/1ted5IrSx2ynPT8kitB5 [https://perma.cc/9RDG-EZFE] (last visited Oct. 28, 2023).

131. *See supra* notes 25–26 and accompanying text.

132. U.S. CONST. amend. VI; *see* John P. Gross, *The Right to Counsel But Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 841–50 (2017) ("An examination of state criminal procedural codes concerning a defendant's initial appearance . . . reveals that in thirty-two states, counsel for indigent defendants is not physically present at the initial appearance.").

133. *See* 18 U.S.C. § 3142(f) ("At the [detention] hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed."); John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 831 (2017).

This right has been referred to as the right to counsel, but it is referred to here as the right to legal defense to leave open the possibility of nonlegal counsel representing defendants in these early hearings. *See* BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 178 (2017) ("[N]onlawyers can play greater roles in triaging, interviewing, and delivering legal services, and their involvement need not mean watered-down, mediocre help. Some of the best public-defender offices in the country trust trained, specialized paraprofessionals to deliver top-notch care, freeing up lawyers to handle more cases."); Darryl K. Brown, *Reforming Criminal Justice by Reforming Lawyers*, REGUL. REV. (Dec. 4, 2018), https://www.theregreview.org/2018/12/04/brown-reforming-criminal-justice-reforming-lawyers/ [https://perma.cc/Z3ZD-HVM9] (describing the argument that skilled nonlawyers could provide affordable legal services and the probability of reform).

particularly pretrial.[134] While it is preferable that defendants have the right to an attorney pretrial, if found through research to be equivalent in results, a more affordable representative might create a path for many jurisdictions to provide legal representation before trial.[135] Broadly speaking, the right of legal defense is violated when a defendant enters any critical hearing without legal defense—including any determination of pretrial release.[136] Having the right to legal defense may improve a defendant's chances of obtaining release before trial, though in some circumstances, discussed below, it does not. But it is important to understand that even if the right to legal defense has not previously improved release rates, a defendant having legal counsel to make the constitutional arguments articulated here provides a chance that these constitutional rights move from being ritual incantations that continue to be ignored to actionable rights. To state it bluntly, the other three interests of pretrial liberty have no hope to change practice without the right to defense. Alternatively, jurisdictions recognizing these rights as vital might determine that if they cannot provide counsel, a cite-and-release approach might be more appropriate than detention before trial,[137] which further reinforces the presumptive release right.

1. Underlying Constitutional Rights

The right to legal defense is protected by the Sixth Amendment and procedural due process rights during police questioning, plea negotiations, and some pretrial hearings. The Sixth Amendment provides a criminal defendant the right "to have the Assistance of Counsel for his defence."[138] Procedural due process also buttresses the right to legal defense in early criminal proceedings.[139] The right to legal defense is required for some early aspects of the criminal process. Defendants have the right to legal defense upon request when questioned by

134. Though no states are currently allowing nonlawyers to represent pretrial defendants in practice, Arizona has just instituted this innovation which could prove helpful in providing broader access to representation for the accused. *See In re* Amending Arizona Code of Judicial Administration § 7-210: Legal Paraprofessional, No. 2021-177 (Ariz. Dec. 8, 2021) (adopting amendments to allow legal paraprofessionals to render authorized services "(1) At any initial appearance; (2) At criminal proceedings subsequent to an initial appearance, when the defendant is not represented by counsel, for the limited purpose of advocating for release of a defendant from pretrial defendant; and (3) In criminal misdemeanor matters").

135. *See id.*

136. *See, e.g.*, Rothgery v. Gillespie County, 554 U.S. 191, 194 (2008).

137. *See* 725 ILL. COMP. STAT. 5/110-2(a), (c) (2023) ("It is presumed that a defendant is entitled to release on personal recognizance . . . [and i]f the court deems that the defendant is to be released on personal recognizance, the court may require that a written admonishment be signed by the defendant . . . .").

138. U.S. CONST. amend. VI.

139. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

police while in custody,[140] at preliminary hearings where charges are read to them (or initial appearance),[141] during plea negotiations,[142] and at trial.[143] Procedural due process safeguards require representation by counsel and findings on the record explaining the basis for any condition of release imposed and the evidence relied on.[144] A determination of release is often based on evidence that the defendant poses a threat to public safety and implicates due process safeguards. The Sixth Amendment analysis is most critical to determining whether a defendant obtains legal defense.

A person facing criminal prosecution must be provided counsel at all "critical stages" of their case according to the Sixth Amendment.[145] A critical stage is one that holds "significant consequences"[146] and includes proceedings "where certain rights may be sacrificed or lost."[147] A critical stage is one where counsel can help the accused in "coping with legal problems or . . . meeting his adversary."[148] There is a lack of legal certainty as to whether a pretrial release hearing is a "'critical stage' of the prosecution."[149] In *Rothgery v. Gillespie County*, the Supreme Court ruled that attachment of the Sixth Amendment right to counsel occurs at a minimum at a defendant's initial appearance before a judge because this is the time he "learns the charge against him *and his liberty is subject to restriction*."[150] Specifically, the Court held with some circular reasoning that "[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during

140. Miranda v. Arizona, 384 U.S. 436, 479 (1966) (holding that a person interrogated must be informed by the government "that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires").

141. *Rothgery*, 554 U.S. at 198.

142. Missouri v. Frye, 566 U.S. 134, 144 (2012) ("[C]riminal defendants require effective counsel during plea negotiations. 'Anything less . . . might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him."'" (omission in original) (quoting Massiah v. United States, 377 U.S. 201, 204 (1964))).

143. *Gideon*, 372 U.S. at 342, 344.

144. *See* Turner v. Rogers, 564 U.S. 431, 448 (2011) (holding that procedural due process safeguards in civil contempt proceedings include "an express finding by the court that the defendant has the ability to pay"); United States v. Cronic, 466 U.S. 648, 659 (1984) (finding that "a trial is unfair if the accused is denied counsel at a critical stage of his trial"); Coleman v. Alabama, 399 U.S. 1, 7 (1970) (finding that "critical stages" include pretrial proceedings "where certain rights may be sacrificed or lost").

145. *E.g.*, Bell v. Cone, 535 U.S. 685, 695–96 (2002) (identifying three situations implicating the right to counsel).

146. *Id.* at 696.

147. *Coleman*, 399 U.S. at 7.

148. United States v. Ash, 413 U.S. 300, 313 (1973).

149. *Compare* Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, CRIM JUST., Spring 2016, at 23, 23–24 ("Unanswered by the United States Supreme Court is whether the Sixth Amendment to the United States Constitution mandates a right to an appointed lawyer at bail hearings."), *with* Ditch v. Grace, 479 F.3d 249, 253 (3d Cir. 2007) (holding that a "preliminary hearing is a critical stage of a criminal prosecution"), Hurrell-Harring v. State, 930 N.E.2d 217, 223 (N.Y. 2010) (holding that arraignment and bail hearings are both "critical stages"), Gonzalez v. Comm'r of Corr., 68 A.3d 624, 635–36 (Conn. 2013) (concluding that arraignment is a critical stage), *and* Booth v. Galveston County, 352 F. Supp. 3d. 718, 738 (S.D. Tex. 2019) ("There can really be no question that an initial bail hearing should be considered a critical stage of trial.").

150. 554 U.S. 191, 213 (2008) (emphasis added).

any 'critical stage' of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence."[151] *Rothgery* is confusing and the right to counsel is not well-defined, and this has led to a division in lower courts over when the Sixth Amendment begins to apply to the accused.[152] Previous constitutional support—and the Court's holding in *Rothgery*—bolster the conclusion that bail is an adversarial proceeding and should thus include the right to counsel.[153] This lower court confusion over the right to legal defense in pretrial hearings is discussed below.

2. Is a Pretrial Hearing "Critical"?

There is some current debate about what a "critical stage" is and when a lawyer's representation of a defendant must begin to satisfy the demands of the Sixth Amendment.[154] In other words, whether the right to counsel requires an individual to have legal representation at the first interaction with the criminal justice system after an arrest is somewhat unclear. In a footnote, the Court in *Rothgery*

151. *See id.* at 212 (footnote omitted) (finding that "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself").

152. *See, e.g.*, Barnes v. Duffey, No. 09 CV 909, 2010 WL 6787417, at *7 (N.D. Ohio Nov. 12, 2010) (stating that "[r]eliance on state law is untenable, and was never the Supreme Court's intent" when determining when adversarial judicial processes properly commenced because the result would be too vague and raise Sixth Amendment and right to counsel concerns).

This is exacerbated because the timing and relationship between bail hearings and probable cause determinations differ in jurisdictions throughout the country. *See, e.g.*, Walker v. City of Calhoun, 901 F.3d 1245, 1266 (11th Cir. 2018) (holding that the City of Calhoun "can presumptively hold a person for 48 hours before even establishing probable cause . . . . It stands to reason that . . . the City can take the same 48 hours to set bail for somebody held *with* probable cause," thus establishing that bail and probable cause hearings may, but not must, occur at the same time).

153. *See* Escobedo v. Illinois, 378 U.S. 478, 486, 490–91 (1964) (holding that when police begin interrogating a suspect in a circumstance "that lends itself to eliciting incriminating statements," the Sixth Amendment right to counsel has been violated, because "no meaningful distinction can be drawn between interrogation of an accused before and after formal indictment"); Massiah v. United States, 377 U.S. 201, 205 (1964) ("[F]rom the time of their arraignment until the beginning of their trial . . . defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself." (second omission and second and third alteration in original) (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932))).

154. *Compare* Turner v. United States, 885 F.3d 949, 953–54 (6th Cir. 2018) (holding defendant's Sixth Amendment right to counsel had not yet attached during his attorney's preindictment plea negotiations with federal prosecutors, despite his indictment in state court based on the same underlying conduct), United States v. Boskic, 545 F.3d 69, 83–84 (1st Cir. 2008) (recognizing that "access to counsel may be helpful before the Sixth Amendment right attaches, particularly when suspects confront the custodial interrogations that are the hallmark of the investigative process," but declining to extend Sixth Amendment protections to those settings), *and* McFarland v. Lumpkin, 26 F.4th 314, 322 (5th Cir. 2022) (per curiam) (noting that "[a]lthough prior precedent has not distinctly identified the point at which formal adversarial proceedings have begun," defendants have no right to counsel under the Sixth Amendment when arrested on a warrant, taken before a magistrate judge, and put in a line-up while in jail, but do have a right to counsel after a formal complaint and information are filed (alteration in original) (quoting McFarland v. State, 928 S.W.2d 482, 507 (Tex. Crim. App. 1996) (en banc) (per curiam))), *with* United States v. Fernandez, No. 98 CR. 961, 2000 WL 534449, at *2–4 (S.D.N.Y. May 3, 2000) (holding that an attorney's failure to advise a defendant of the importance of seeking a cooperation agreement at an early stage was a lapse of representation constituting a violation of the Sixth Amendment right to counsel).

noted the definition of critical stages from prior cases as "proceedings between an individual and agents of the State (whether 'formal or informal, in court or out') that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary.'"[155] However, no clear holding was made in *Rothgery* that addressed whether a bail determination is considered a critical stage that requires the presence of appointed counsel.[156]

In this gap left by *Rothgery* on what constitutes a critical stage, some lower courts have held that the bail hearing does not require counsel because it is not a critical stage.[157] In *Farrow v. Lipetzky*, the Ninth Circuit reasoned that an initial hearing that included a preliminary bail determination was not a critical stage where the right to counsel attached because the hearing did not "'test[] the merits of the accused's case'; 'skilled counsel' was not necessary to 'help[] the accused understand' the proceedings; and there was no risk that an uncounseled defendant would permanently forfeit 'significant rights.'"[158] In *Bronner v. Marsh*, the Eastern District of Pennsylvania held that a preliminary arraignment that included a bail determination did not implicate the right to counsel because the arraignment was merely the first stage of the criminal proceeding only after which the right to counsel applied.[159] Accordingly, the right to legal defense at bail hearings has been rejected by some lower courts.[160]

This lack of representation in bail hearings leaves uncertainty for defendants who are guaranteed counsel for police questioning and plea negotiations but not at the pretrial hearing.[161] Certainly, legal representation—if demanded by the accused—must be respected after arrest but before initial appearance to avoid

155. 554 U.S. at 212 n.16 (omission in original) (first quoting United States v. Wade, 388 U.S. 218, 226 (1967); and then quoting United States v. Ash, 413 U.S. 300, 312–13 (1973)); *see also Ash*, 413 U.S. at 313 (explaining that the "traditional test" for whether the accused has a right to counsel determines "whether the accused required aid in coping with legal problems or assistance in meeting his adversary").

156. *Cf.* Transcript of Oral Argument at 7, *Rothgery*, 554 U.S. 191 (2008) (No. 07-440) (showing that Rothgery's attorney did not contend that there was a right to counsel at a preliminary hearing).

157. *See, e.g.*, Farrow v. Lipetzky, 637 F. App'x 986, 988 (9th Cir. 2016) (holding that the preliminary bail determination is not a critical stage and thus counsel was not required); Roeder v. State, No. 119,503, 2019 WL 3242198, at *4 (Kan. Ct. App. July 19, 2019) (per curiam) ("Roeder's first appearance and initial bail hearing was not a critical stage of his criminal proceeding.").

158. 637 F. App'x at 988 (alterations in original) (quoting United States v. Benford, 574 F.3d 1228, 1232 (9th Cir. 2009)).

159. No. 20-cv-2656, 2021 WL 2366949, at *8 (E.D. Pa. Mar. 19, 2021).

160. *See supra* note 157 and accompanying text; *cf.* Missouri v. Frye, 566 U.S. 134, 141 (2012) ("[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." (quoting Padilla v. Kentucky, 559 U.S. 356, 373 (2010))); Lafler v. Cooper, 566 U.S. 156, 162 (2012) (holding that during plea negotiation defendants are "entitled to the effective assistance of competent counsel" (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970))).

161. *See, e.g.*, United States v. Wilson, 719 F. Supp. 2d 1260, 1267 (D. Or. 2010) (explaining that the "adversarial nature" of a plea period, "combined with the possibility that [the defendant's] right to trial might be sacrificed or lost, makes clear that it was a critical stage of the criminal process" entitling the defendant to effective assistance of counsel).

violating a defendant's *Miranda* rights.[162] A defendant must have counsel at police questioning before arrest (if requested),[163] but immediately after arrest (or within 48 hours after this point in many jurisdictions) when they appear before a judge, they do not maintain the right to legal defense in many jurisdictions.[164] In short, the right to legal defense attaches to defendants in custodial interrogations and remains if a defendant decides to negotiate with a prosecutor in a plea, yet it somehow skips the bail determination until the initial hearing in many instances. The logic behind this gap of legal defense at the bail determination is not supportable as evidence demonstrates that counsel is vital to helping the accused understand the proceedings and that significant rights are lost when a defendant is denied release pretrial. These gaps in legal defense, particularly among states and with misdemeanor crimes, is discussed more fully in the next Section.

3. Gaps in Legal Defense

While federal courts require counsel at every hearing,[165] there is confusion among the state courts as to when counsel must represent a defendant in the early pretrial period.[166] Federal courts of appeals have treated pretrial detention decisions as critical for the purposes of the Sixth Amendment.[167] Federal district courts have also held that the initial bail hearings are a "critical stage."[168] Similarly, some state courts, such as New York,[169] Nevada,[170] New

162. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

163. *Id.*

164. *See supra* note 152.

165. 18 U.S.C. § 3142(f) ("At the [detention] hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed.").

166. *See* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 334 (2011) ("In light of the lack of a definitive holding by the Court, a checkered pattern exists across the nation where states conduct bail hearings without a defense counsel's presence and indigent defendants often do not gain the benefit of a lawyer's representation for many days, weeks, and even months thereafter.").

167. *See, e.g.*, Mitchell v. Mason, 325 F.3d 732, 743 (6th Cir. 2003) ("The pre-trial period constitutes a 'critical period' because it encompasses counsel's constitutionally imposed duty to investigate the case."); Higazy v. Templeton, 505 F.3d 161, 172 (2d Cir. 2007) ("[A] bail hearing is a 'critical stage of the State's criminal process at which the accused is as much entitled to such aid (of counsel) . . . as at the trial itself.'" (omission in original) (quoting Coleman v. Alabama, 399 U.S. 1, 9–10 (1970))); Smith v. Lockhart, 923 F.2d 1314, 1319–20 (8th Cir. 1991) (holding that a hearing that included bail reduction motions was a critical stage necessitating the assistance of counsel); Caliste v. Cantrell, 329 F. Supp. 3d 296, 314 (E.D. La. 2018) ("The Supreme Court has held that 'critical stages' are those that 'h[o]ld significant consequences for the accused.' . . . Considering the already established vital importance of pretrial liberty [as an issue of significant consequence for the accused], assistance of counsel is of the utmost value at a bail hearing." (first alteration in original) (quoting Bell v. Cone, 535 U.S. 685, 696 (2002))), *aff'd*, 937 F.3d 525 (5th Cir. 2019).

168. *See, e.g.*, Remick v. Utah, No. 16-cv-00789, 2018 WL 1472484, at *10 (D. Utah Mar. 23, 2018) ("[The defendant] had no counsel at his arraignment and bail hearing. These are critical stages in a criminal proceeding . . . ." (footnote omitted)). *But see* Bronner v. Marsh, No. 20-cv-2656, 2021 WL 2366949, at *8 (E.D. Pa. Mar. 19, 2021) (holding that the right to counsel did not attach to a preliminary arraignment because there had been no adversarial proceeding against the defendant).

169. Hurrell-Harring v. State, 930 N.E.2d 217, 223 (N.Y. 2010) ("There is no question that 'a bail hearing is a critical stage of the State's criminal process.'" (quoting *Higazy*, 505 F.3d at 172)).

170. Valdez-Jimenez v. Eighth Jud. Dist. Ct., 460 P.3d 976, 987 (Nev. 2020) (holding that defendant is entitled to a hearing, counsel, and to present evidence when the state requests bail); McCarty v. State,

Jersey,[171] Massachusetts,[172] and Connecticut,[173] have deemed a bail hearing a critical stage of the criminal proceeding that requires presence of appointed counsel for indigent defendants. But despite this clear recognition, the majority of states do not provide the right to legal defense for indigent defendants at the bail hearing.[174] As of the last national assessment, only ten states guarantee the presence of counsel at defendants' first bail determination,[175] and of those who do, few provide this right uniformly across the state to each defendant.[176] Very few provide representation for misdemeanor defendants at all.[177] In some lower courts, pretrial defendants have even been prohibited from speaking on their own behalf in pretrial hearings.[178] Courts are in a difficult situation with an unrepresented defendant who both needs to advocate for their release but also needs to avoid making potentially incriminating

371 P.3d 1002, 1005–06 (2016) (en banc) (discussing defendant's right to counsel at an initial appearance and during critical stages).

171. State v. Fann, 571 A.2d 1023, 1024 (N.J. Super. Ct. Law Div. 1990) ("[F]ixing of bail is a 'critical stage' in a criminal prosecution which requires courts to honor defendants' constitutional rights to counsel . . . .").

172. Walsh v. Commonwealth, 151 N.E.3d 840, 860 (Mass. 2020) ("The defendant has the right to be represented by counsel at a bail hearing . . . .").

173. Gonzalez v. Comm'r of Corr., 68 A.3d 624, 631–37 (Conn. 2013) ("[T]he [defendant] had a sixth amendment right to effective assistance of counsel at the arraignment stage in which proceedings pertaining to the setting of bond and credit for presentence confinement occurred . . . .").

174. Colbert, *supra* note 32, at 1. And even in model legislation proposed to states, representation at early bail hearings is not mandated. NAT'L CONF. OF COMM'RS ON UNIF. STATE L., UNIF. L. COMM'N, UNIFORM PRETRIAL RELEASE AND DETENTION ACT § 302, at 19–20 (2020), https://www.uniformlaws.org/viewdocument/as-approved-act-2020-july [https://perma.cc/C2AM-P8KT]. If adopted by a state, Section 302 would give "[a]n arrested individual . . . [the] right to counsel at a release hearing" and provide that counsel be appointed by an authorized agency "[i]f the individual is unable to obtain counsel for the hearing." *Id.* at 19. However, the Uniform Law Commission (ULC) recognizes that "many jurisdictions do not currently provide counsel at initial appearances where release and detention determinations are made." *Id.* § 302 cmt at 20; *see* UNIF. L. COMM'N, PRETRIAL RELEASE AND DETENTION ACT: GUIDE FOR ADVOCATES & POLICYMAKERS 10 (2020) (on file with author). It seems unlikely that states will choose to incorporate a right to counsel for all early pretrial hearings based on the ULC Act. The ULC acknowledges this foreseeable outcome and the undesirable consequences. *Id.* at 2, 4 ("[T]he Act leaves many crucial points to state discretion—points that, from an equity and liberty perspective, could represent the distinction between a good bill and a bill worth opposing.").

175. Colbert, *supra* note 166, app. at 428–53.

176. *Id.* at 401–08 (noting that twelve states are "majority hybrid states," which provide counsel in most counties, and that eighteen states are "minority hybrid states," which guarantee counsel only in one to two counties).

177. It is noteworthy that, even in jurisdictions that guarantee the right to counsel at bail hearings, misdemeanor defendants do not receive representation even though they are often incarcerated after arrest because they cannot afford bail. *See, e.g.*, Paul Heaton, *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities*, 96 IND. L.J. 701, 711–13 (2021) ("[T]he initial bail determination is made at a preliminary arraignment where the bail commissioner, defense counsel representative, and prosecutor representative need not be trained attorneys; there is very limited information available about the defendant or circumstances of the alleged crime; defendants participate little; and decisions are usually made within the space of two or three minutes.").

178. *See* ODonnell v. Harris County, 892 F.3d 147, 153–54 (5th Cir. 2018) ("Arrestees are instructed not to speak, and are not offered any opportunity to submit evidence of relative ability to post bond at the scheduled amount."); JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION 53 (2023).

statements.[179] Not allowing a defendant to speak when their liberty is on the line does not seem like a proper compromise when a defendant lacks any legal defense and a judge is weighing evidence against them.

Despite the lack of uniform guarantees of this right, constitutionally, each defendant maintains the right to legal defense at some point between arrest and commencement of prosecution. Implicit in this right is the right to defense at every critical hearing and the right to prepare a vigorous legal defense. A person behind bars lacks an appropriate ability to meet with witnesses, gather evidence, and meet with counsel to prepare their defense.[180] Empirical studies demonstrate the importance of legal counsel at pretrial hearings,[181] including the bail hearing,[182] focusing on the negative repercussions of not having legal counsel in such important pretrial hearings.[183] Substantial evidence demonstrates that pretrial counsel improves outcomes for defendants,[184] including improved likelihood of

179. *See* United States v. Portillo, 969 F.3d 144, 161 (5th Cir. 2020) (finding that Portillo's initial appearance, in which the magistrate judge recited the indictment facts, maximum penalties, and the "government's intent to detain him without bond pending trial" bore "none of the markings of a critical stage" that would require the Sixth Amendment's right to counsel to attach, because "Portillo was not forced to make any potentially incriminating statements that could jeopardize his defense," was asked not to discuss the facts of the case nor make strategic decisions about his case, and indicated that he would hire his own attorney).

180. Barker v. Wingo, 407 U.S. 514, 533 (1972).

181. *See* NAT'L RIGHT TO COUNS. COMM., THE CONST. PROJECT, DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 4 (2015), https://www.prisonpolicy.org/scans/theconstitutionproject/rtc_dinal_3.18.15.pdf [https://perma.cc/LVB6-ZV4U] ("Denying poor and low-income defendants the advocacy of a qualified lawyer at their first appearance before a judicial officer – whether a judge, magistrate, or other official charged with determining conditions of pretrial release – significantly impairs the likelihood of an accused obtaining liberty before trial and substantially increases the likelihood of a harsher outcome." (footnote omitted)); Alissa Pollitz Worden, Reveka V. Shteynberg, Kirstin A. Morgan & Andrew L. B. Davies, *The Impact of Counsel at First Appearance on Pretrial Release in Felony Arraignments: The Case of Rural Jurisdictions*, CRIM. JUST. POL'Y REV., July 2020, at 2 ("In a recent investigation of the impact of *counsel at first appearance* (*CAFA*) programs on bail decisions and outcomes in misdemeanor cases in these counties, . . . there was some evidence that defendants who had attorneys present at arraignment were more likely to be released on recognizance, less likely to have high bail set, and therefore less likely to be jailed pending disposition."). *See generally* ROSS HATTON, UNC SCH. OF GOV'T, CRIM. JUST. INNOVATION LAB, RESEARCH ON THE IMPACT OF EARLY INVOLVEMENT OF COUNSEL IN CRIMINAL CASES (2020), https://cjil.sog.unc.edu/wp-content/uploads/sites/19452/2020/07/Early-Access-to-Counsel-Brief-7.22.2020.pdf [https://perma.cc/R7GQ-WBMG].

182. *See, e.g.*, Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002) ("[The Baltimore City Lawyers at Bail Project] showed that more than two and one half times as many represented defendants were released on recognizance from pretrial custody as were unrepresented defendants. Additionally, two and one half times as many represented defendants had their bail reduced to an affordable amount.").

183. *See* Gerstein, *supra* note 35, at 1516 ("[A]ccording to a study in Baltimore, defendants with counsel are more than twice as likely to be released on their own recognizance. And, when represented defendants are granted bail, it is on average around six hundred dollars less than what is set for unrepresented defendants. Appointing counsel at bail hearings, then, will substantially reduce the amount of time a substantial number of indigent defendants spend in jail awaiting their trials. And that will cut down on the number of plea deals those defendants have to take just to get out of jail—regardless of their guilt or innocence." (footnotes omitted)).

184. *See infra* notes 194–96, 198.

release and lower bail amounts imposed, and more favorable plea negotiations.[185] There are negative repercussions for defendants with regard to whether they obtain a trial if they are unrepresented, as the incentives to plea are even more significant without counsel. Part of this legal defense is simply having information about the system, so even having a nonlawyer advocate to guide defendants through the process is better than no representative.[186] The right to counsel has historically been an important one at criminal trials; however, with the disappearance of criminal trials, the protection of this right now commands greater importance earlier in the criminal process. Within the practical reality that less than 3% of criminal cases go to trial, the importance of the right to legal defense grows in the earlier pretrial stages.[187]

Obviously, there is constitutional uncertainty about *Rothgery* and what it means, but there is no constitutional authority that would contradict a right to counsel at this important early point in a case. Given the massive implications on both defendants and public safety, it is difficult to argue that bail is not a critical hearing.[188] This decision affects a defendant's ability to exercise their right to counsel at a later trial. But it also meaningfully reduces access to counsel when the accused is incarcerated. However, this right is neglected, most likely due to the impracticalities of providing counsel at the initial hearing. With the volume of cases and limitations of counsel, it is no wonder that most local jurisdictions do not have the resources to provide counsel for each individual appearing for a bail determination.[189] States that recognize this right do not often enforce it. In a state that does not provide the right to counsel in early pretrial hearings, the default should be presumptive release. One possibility is a cite-and-release system where individuals are simply released before trial when charged with less serious crimes.[190] The federal courts demand the right to counsel at every pretrial

185. BAUGHMAN, *supra* note 41, at 124; *see also* Douglas L. Colbert, *"With a Little Help from My Friends:" Counsel at Bail and Enhanced Pretrial Justice Becomes the New Reality*, 55 WAKE FOREST L. REV. 795, 803 (2020) ("With representation, data shows that an incarcerated defendant charged with a nonviolent crime stands five times as likely to be released on recognizance or affordable bail than an unrepresented defendant.").

186. *See* Heaton, *supra* note 177, at 738.

187. FOUND. FOR CRIM. JUST., NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct [https://perma.cc/6HZ4-2XX2] ("[O]ver the last fifty years, trial by jury has declined at an ever-increasing rate to the point that this institution now occurs in less than 3% of state and federal criminal cases.").

188. *See* Booth v. Galveston County, No. 18-CV-00104, 2019 WL 3714455, at *14 (S.D. Tex. Aug. 7, 2019); ("Not only is a bail hearing *a* 'critical stage' in the criminal process, but it is arguably the *most* 'critical stage.'"). *But see* Schmidt v. State, 481 A.2d 241, 249 (Md. Ct. Spec. App. 1984) ("A bail hearing is not such a proceeding as would constitutionally entitle the accused to the assistance of counsel.").

189. *See* Cara H. Drinan, *Getting Real about* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1312–13 (2013) ("Without adequate financial support, public defenders cannot hire adequate staff, they cannot train or retain lawyers, and they cannot sufficiently represent their clients.").

190. *See generally* Henry F. Fradella & James A. Purdon, *Citations in Lieu of Arrests*, *in* HANDBOOK ON PRETRIAL JUSTICE 113 (Christine S. Scott-Hayward et al. eds., 2022) (discussing the possibility of

hearing and provide each defendant with counsel, including at every bail determination.[191] However, in state courts—where most bail decisions are made—this right is muddled. Recognition of the importance of counsel as a critical interest underlying the pretrial liberty right is lost in the morass of early pretrial rights and confusion over what is expected at each hearing. At bottom, the right to legal defense requires release before trial if there is no access to counsel at every early hearing.

There is no way to overstate the importance of the bail determination to pretrial liberty. The first interaction with a magistrate or judge is when an individual's holding place is determined and once a defendant is in custody, their plea bargaining position is reduced, and they are more likely to be incarcerated and suffer the abuse and harms from incarceration.[192] If incarcerated, the individual obtains a criminal record and collateral consequences that are difficult to shake in the future.[193] Every defendant should receive legal defense in early criminal hearings. If no counsel is possible due to a lack of resources, defendants should be released as a default. Although it is not sufficient that each defendant receives counsel, it provides one piece of the puzzle of pretrial liberty.

C. PROHIBITION ON PRETRIAL FACTUAL DETERMINATIONS

Another historic interest underlying pretrial liberty is what is referred to here as the prohibition of pretrial factual determinations. This Section asserts that as an extension of the *Apprendi* line of cases (discussed below), judicial fact-finding in pretrial determinations should be prohibited as the critical facts in a case must be determined by a jury, not a judge. The right to a jury includes a protection of an accused's interest to a jury's determination of facts and avoids judicial finding of facts before trial.[194] It is an aspirational right found in the intersection of other constitutional rights and has not yet been recognized by courts.[195] The underlying

citations in lieu of formal arrest which reduces criminogenic influences and reduces burdens on the accused).

191. *See Booth*, 2019 WL 3714455, at *16 n.10 ("[I]n the federal system, counsel is appointed to indigent defendants at their initial appearance before a magistrate judge, and the lawyers represent the defendants at all bail and detention hearings." (citing 18 U.S.C. § 3006A(c), (d)(4)(B)(ii)(II))); United States v. Hadden, No. 20 Cr. 468, 2020 WL 7640672, at *4 (S.D.N.Y. Dec. 23, 2020) ("According to the [Criminal Justice Act] Plan: 'A person financially eligible for representation should be provided with counsel as soon as feasible after being taken into custody, when first appearing before the court or U.S. magistrate judge, . . . whichever occurs earliest.'" (citing United States v. Hilsen, No. 03 Cr. 919, 2004 WL 2284388, at *1, n.3 (S.D.N.Y. Oct. 12, 2004))).

192. *See, e.g.*, Dobbie et al., *supra* note 57, at 213–14 (finding that pretrial detention of more than three days increased the likelihood of being rearrested "compared to defendants released within three days"); MARY T. PHILLIPS, N.Y.C. CRIM. JUST. AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY: FINAL REPORT 116 (2012) (finding that pretrial detention increased the likelihood for conviction in both nonfelony and felony cases, and for felony cases, spending more time in pretrial detention lessened the chance of the conviction being reduced to a misdemeanor).

193. *See* DIGARD & SWAVOLA, *supra* note 6, at 12 n.42.

194. Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 858–59 (2008).

195. *See* Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 14–21 (1989).

constitutional rights are the right to a jury trial in a criminal case and the duty of judges to leave all fact-finding to juries, particularly when it comes to criminal cases.[196] While the import of jury fact-finding has been established at sentencing and with fines, the logic extends to early constitutional hearings as well, even though this area of the law has not yet developed. The logical path by which the accused should have the right to a jury finding of the facts in their case is traceable.

The right to a jury is one of the most fundamental rights for an accused, but is rarely effectuated in practice.[197] Rarely does a criminal case go to a jury trial, but the principles that undergird this jury right are nonetheless important. A jury must make all determinations of fact and a judge must only make determinations of law.[198] This was by design so that each defendant could have a jury of his peers to safeguard them against a potentially "less sympathetic" or "biased" judge and prosecutor.[199] This is established in early common law and U.S. constitutional law that has been restored in the last twenty years by the United States Supreme Court.[200] Historic precedent and current constitutional law dictate that juries, not judges, must determine facts, yet in courtrooms across the country, judges make determinations of facts pretrial. In federal and most state statutes, due to bail "reform" changes across the country over the last three waves of bail reform, judges now consider the "seriousness" of an offense and "weigh the evidence" in a case in determining whether to release a defendant pretrial.[201] This pretrial weighing of evidence displaces the role of the jury in fact-finding, and it is especially violative given that defendants seldom receive a jury trial. Removing any

196. *Id.* at 21–27.

197. *See* Thomas Jefferson, *Query XIV: Laws*, *in* THE PORTABLE THOMAS JEFFERSON 177, 177 (Merrill D. Peterson ed., 1977) ("[T]he common sense of twelve honest men gives still a better chance of just decision, than the hazard of cross and pile."). *See generally* LAURA I APPLEMAN, DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION (2015).

198. Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.").

199. Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." (footnote omitted)).

200. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (striking down a state sentencing statute that relied on judicial fact-finding for violation of the Sixth Amendment right to a jury trial).

201. BAUGHMAN, *supra* note 41, at 14, 26–27 ("Currently, judges decide facts before trial in the bail decision and 'weigh evidence' against defendants. In recent years, the Supreme Court has reinvigorated the importance of the jury in the sentencing phase, stopping judges from making important factual determinations related to punishment, and instead reserving these decisions for the jury. . . . [B]ecause the role of judges is limited[,] they should not be deciding facts about a defendant's guilt before trial, and this should be left to the jury after trial.").

judicial fact-finding from a pretrial determination could help restore the pretrial liberty of the accused.

1. Historic Fact-Finding Role of Jury

The right to a jury trial has a long history tracing from English common law.[202] Established early in American public law was the continued value for the fundamental right to a jury trial along with an abiding resentment for royal interference with the right.[203] The Constitution and the Bill of Rights included the right to an impartial jury to protect those charged with a crime from "oppression by the Government."[204] The jury trial protections showed a deep reluctance to "entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges" because the unchecked power of a judge's ability to make decisions of fact was deeply distrusted.[205] According to Blackstone, a jury trial was put in place to confirm the "truth of every accusation."[206] The roles of judge and jury were established early and clearly—judges are arbiters of the law and juries are arbiters of the facts. Congress enshrined the fundamental right to a jury trial into the Sixth, Fifth, and Fourteenth Amendments.[207] The Sixth Amendment actively provided those charged with a crime with "the right to a speedy and public trial, by an impartial jury."[208] The jury trial historically began as an essential protection of the accused, as guaranteeing a jury trial circumvented the possibility of the government usurping the role of the jury.[209]

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202. *See, e.g.*, 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 541 (4th ed. 1873) (explaining that juries are used "to guard against a spirit of oppression and tyranny on the part of rulers"); *Duncan*, 391 U.S. at 151 ("The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689." (footnotes omitted)); United States v. Booker, 543 U.S. 220, 244 (2005) ("[T]he interest in fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.").

203. *Duncan*, 391 U.S. at 152.

204. *Id.* at 155–56; *see* 6 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 22.1(a) (4th ed. 2022).

205. *See Duncan*, 391 U.S. at 156 ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

206. Blakely v. Washington, 542 U.S. 296, 301 (2004) ("[T]he 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours . . . .'" (quoting BLACKSTONE, *supra* note 63, at 343)).

207. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); *id.* amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

208. *Id.* amend. VI.

209. *See Blakely*, 542 U.S. at 308.

The established right to a jury determination of facts could apply in the pretrial period to prohibit judges from such pretrial fact-finding in the release determination. As Judge (then-Professor) Stephanos Bibas has pointed out, the sense that the community, rather than the government, imposes the verdict upon a defendant assures the fairness and equity that the Constitution set out to preserve.[210] Juries are tasked with deciding whether the facts of the case support determination of guilt beyond a reasonable doubt, which in turn allows for the loss of liberty rights or punishment after the finding of guilt.[211] In *Apprendi v. New Jersey*, the U.S. Supreme Court affirmed that juries are the fact finders in a criminal case rather than a judge, as stated in the following rule: "[A]ny fact that increases the penalty for a crime . . . must be submitted to a jury, and proved beyond a reasonable doubt."[212] This reasoning can apply pretrial to prohibit judges from weighing facts in a bail determination, as bail creates a penalty for defendants. The next Section supports this novel jury argument based on Supreme Court precedent in the sentencing arena.

2. Applying *Apprendi* Progeny to Pretrial Fact-Weighing

In a line of cases following *Apprendi*, the Supreme Court restored the importance of a distinct role for juries compared to judges, with juries remaining the sole triers of fact when penalties or fines are at issue.[213] For example, in *Blakely v. Washington*, the Court permitted a judge to impose a statutory maximum only if the sentence was supported *without any additional findings of fact not already determined by the jury*.[214] "For a judge to impose an increased sentence based upon a 'sentencing factor,' [they] must be able to do so without any additional findings of fact."[215] This limitation of judicial fact-finding is only a limitation insofar as the Sixth Amendment protects and reserves specific powers to the

210. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1151 (2001); *see also Blakely*, 542 U.S. at 345 (Breyer, J., dissenting) (discussing principles of fairness to support an interpretation of the Sixth Amendment); Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Scalia, J., concurring) (providing a textual analysis of the right to a jury trial); Laura I Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 402 (2009) ("[H]istorically, the community's punishment decisions prevented the state or government from arbitrarily imposing punishment that did not meet with the community's approval.").

211. *In re* Winship, 397 U.S. 358, 364 (1970).

212. 530 U.S. at 490. The Supreme Court has consistently reaffirmed this rule. *See, e.g.*, S. Union Co. v. United States, 567 U.S. 343, 348–49 (2012) (holding that the facts needed to impose a criminal fine must be submitted to a jury and proved beyond a reasonable doubt); Cunningham v. California, 549 U.S. 270, 281 (2007) (holding that facts necessary to support imposing the upper term of imprisonment in California's determinate sentencing scheme must be submitted to a jury and proved beyond a reasonable doubt); United States v. Booker, 543 U.S. 220, 244 (2005) (requiring all facts that increase the defendant's punishment to be proved to a jury beyond a reasonable doubt); *Blakely*, 542 U.S. at 313–14 (holding that Washington's criminal sentencing system violated the Sixth Amendment right to a jury trial because it gave judges the ability to increase sentences based on their own determination of facts).

213. *See* Shima Baradaran, *The Presumption of Punishment*, 8 CRIM. L. & PHIL. 391, 400 (2014).

214. *Blakely*, 542 U.S. at 303–04.

215. Baradaran, *supra* note 213, at 399; *accord Blakely*, 542 U.S. at 305.

jury[216]—through a "strict division of authority between judge and jury."[217] Thus, the Court held that a judge cannot increase a sentence by an amount that a jury would not have found.[218]

The Court in *United States v. Booker* relied on similar reasoning as in *Blakely* to overrule a sentencing guideline that gave the judge, as opposed to the jury, the ability to decide the relevant facts to sentence a defendant.[219] The Court in *Southern Union Co. v. United States* expanded the rationale in *Blakely* to strike down a decision that imposed a criminal fine on a defendant when the prosecution did not prove every element of the offense to the jury.[220] Specifically, the Court noted that the jury's role as a fact finder "pervades *the entire system* of the adjudged law of criminal procedure," and the fact that a criminal fine rather than incarceration was threatened did not affect this principle.[221] The Court made a similar point in *Alleyne v. United States* by noting that the fact-finding role of the jury is crucial when the facts increase the penalty for a crime.[222] In that case, the Court held that the jury is responsible for determining facts beyond a reasonable doubt that increase the mandatory minimum sentences and again determined that judicial finding of such facts is unconstitutional under the Sixth Amendment.[223] The Court has made similar, strict limitations on the judge's ability to fact find in capital punishment cases following the same reasoning.[224] Thus, the Due Process Clause, taken together with the Sixth Amendment right to a jury, mandates that a jury assess each element of the crime with which the defendant is charged.[225]

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216. *See id.* at 308–09 ("[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power.").

217. *Id.* at 313. "[T]he Framers' paradigm for criminal justice" is "the common-law ideal of limited state power accomplished by strict division of authority between judge and jury." *Id.* Also note that the Court in *Apprendi* determined that a judge exceeds her authority when she prescribes a punishment that the jury's verdict does not allow on its own. *See* 530 U.S. at 482–83; *see also* Baradaran, *supra* note 213, at 399. Furthermore, the right to a jury trial and the jury as the finder of fact is not a "procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306. The jury trial reserves the means for the separation of power in government and provides a mode of control for "the people[]" in the judiciary branch. *Id.*

218. *Apprendi*, 530 U.S. at 482–83; *see also* Baradaran, *supra* note 213, at 399.

219. 543 U.S. 220, 244 (2005).

220. 567 U.S. 343, 347–48 (2012).

221. *Id.* at 356 (emphasis added) (citation omitted) (determining that fines are no different than incarceration as they are still punishments inflicted for the commission of offenses and still require jury fact-finding); *see also* United States v. Pfaff, 619 F.3d 172, 175 (2d Cir. 2010); United States v. LaGrou Distrib. Sys., Inc., 466 F.3d 585, 594 (7th Cir. 2006); United States v. Yang, 144 F. App'x 521, 524 (6th Cir. 2005).

222. 570 U.S. 99, 103 (2013).

223. *Id.*

224. *See* Hurst v. Florida, 577 U.S. 92, 94 (2016) (striking down a statutory scheme that "required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty" based on the Sixth Amendment requirement that "a jury, not a judge . . . find each fact necessary to impose a sentence of death").

225. United States v. Gaudin, 515 U.S. 506, 510 (1995); Apprendi v. New Jersey, 530 U.S. 466, 477 (2000); *see In re* Winship, 397 U.S. 358, 364 (1970).

Taken together, the *Apprendi* progeny are immensely instructive on the role that due process plays in ensuring a full and fair jury trial, as well as limiting judges to their traditional role as interpreters of law rather than fact finders. These cases demonstrate not only the important role of a jury to make the decisions of fact in a criminal trial but also demonstrate that a judge generally may not make decisions of fact during a criminal proceeding. Despite this fundamental importance of the jury to weigh facts, judges are nonetheless given vast power to determine facts at bail determinations. Under the Bail Reform Act of 1984, for example, judges are permitted to weigh the following when determining whether to deny bail to an arrestee: "the nature and circumstances of the offense charged," "the weight of the evidence against the person," "the history and characteristics of the person," and "the nature and seriousness of the danger to any person or the community that would be posed by the person's release."[226] Despite the jury being expected to make these determinations during trial to evaluate appropriate sentencing, judges are given the right to make decisions of fact that greatly affect arrestees' liberty interests. Determining the "nature and seriousness of the danger" if the defendant is released and weighing the evidence are both clearly factual determinations. Judges therefore make these factual determinations before trial without the presence of the jury. Judges are also able to make determinations of "criminal fees" (i.e., set bail amounts) before trial[227] based on the facts of the case—without a jury or counsel and sometimes where the defendant is not even allowed to speak.[228] The fundamental right to a jury trial has long persisted in American jurisprudence, but somehow pretrial detainees are missing a critical piece of this right during bail proceedings.

3. The Role of a Judge Pretrial

The right to a jury determination of the facts in a case is one that protects the accused from a judicial weighing of the facts before trial. It is found in the intersection of other constitutional rights and has not yet been applied in the bail arena. The constitutional rights it aims to protect are the right to a jury trial in a criminal case and the duty of judges to leave all fact-finding to juries.[229] The Supreme Court has repeatedly recognized a strict prohibition against judicial fact-finding when it comes to increased sentences or even imposing criminal

226. 18 U.S.C. § 3142(g); *see also* United States v. Salerno, 481 U.S. 739, 742–43 (1987).

227. *See, e.g.*, Daves v. Dallas County, 22 F.4th 522, 553 (5th Cir. 2022) ("The Magistrate Judges are responsible for determining the conditions of release for arrestees . . . , including the setting of bail."); Wilson v. Green, No. 20-CV-05139, 2020 WL 5750001, at *2 (W.D. Ark. Sept. 25, 2020) ("It is the judge who determines bail. A judge's decision in setting bail is entitled to 'great deference.'" (quoting Harris v. United States, 404 U.S. 1232, 1232 (1971))).

228. *See supra* notes 175–78 and accompanying text.

229. This jury right even implicates the presumption of innocence. *See Apprendi*, 530 U.S. at 477 ("Taken together, [the rights to due process and trial by jury] indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" (second alteration in original) (quoting *Gaudin*, 515 U.S. at 510)).

fines.[230] An accused person has the right to a jury to determine all relevant facts. However, only a small fraction of criminal cases go to trial.[231] With the reality that hardly any cases move to a jury trial, it seems that judges are finding facts pretrial, and there is no finder of facts later in a case. Practically speaking, the role of a jury as finder of facts remains in name only. Certainly, there are disputes over facts and some acknowledgment of facts during plea negotiations. However, the most critical facts found in a criminal case are arguably those found pretrial by a judge. One of the most important decisions in the early stages of a criminal case is whether the individual is detained before trial or released, as this determines whether they obtain release or a carceral sentence or whether they maintain leverage in plea negotiations.[232] Judges determining whether a defendant is dangerous without the benefit of defense counsel, testimony, or experts is also troubling. Given *Apprendi* and its progeny, there should at least be a question as to whether judges can determine these critical facts that result in detention in the absence of a jury.

Putting aside the constitutional right a defendant maintains to be released as a default, a judge is not simply examining a charge and determining release. A judge is instructed to "weigh" evidence[233] and consider the seriousness of the danger posed if the defendant is released,[234] both of which can often be disputed by defendants. The judge can determine facts in favor of either prosecution or defense at this initial bail hearing. The lower court judge in these situations will act as the fact finder at pretrial hearings to "weigh the evidence" and the "seriousness" of the danger and determine facts in favor of the prosecution or

230. *Id.* at 490; Blakely v. Washington, 542 U.S. 296, 303–04 (2004) ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority." (citation omitted)); S. Union Co. v. United States, 567 U.S. 343, 349 (2012) (holding that there was "no principled basis under *Apprendi* for treating criminal fines differently" than the treatment of physical deprivations of liberty).

231. Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, JUDICATURE, Winter 2017, at 26, 28, 32 (noting that "[t]oday, trials only occur in approximately 2 percent of federal criminal cases" and some large state cases).

232. BAUGHMAN, *supra* note 41, at 82–84.

233. 18 U.S.C. § 3142(g)(2) (2018) (stating that judges shall take into account when determining pretrial release the "weight of evidence against the person"); *see also, e.g.*, FLA. R. CRIM. PRO. 3.131(b)(3) (2021) ("In determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the court may consider . . . the weight of the evidence against the defendant . . . ."); D.C. CODE § 23-1322(e)(2) (2021) ("The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account information available concerning . . . [t]he weight of the evidence against the person . . . .").

234. 18 U.S.C. § 3142(g)(4) (2018) (stating that judges shall consider "the nature and seriousness of the danger to any person or the community that would be posed by the person's release"); *see also* FLA. R. CRIM. PRO. 3.131(b)(3) (stating that judges shall consider "the nature and probability of danger that the defendant's release poses to the community"); D.C. CODE § 23-1322(e)(4) (stating that judges shall consider "[t]he nature and seriousness of the danger to any person or the community that would be posed by the person's release").

defense.[235] These decisions can seriously impact the constitutional rights of defendants. For example, in *United States v. Taylor*, the Tenth Circuit held that the lower court properly detained the defendant pretrial because, in part, "the magistrate judge found that the government ha[d] a strong case."[236] In *State v. Bryant*, a New Jersey judge in a pretrial proceeding determined the dangerous nature and circumstances of the alleged crime—that the defendant drove in an "extremely reckless" manner—and that the state had a "very strong" case against the defendant.[237] Judicial fact-finding before trial can create irreparable harm to defendants—as any period of detention causes lasting harm.[238] Yet judges are the default fact finders in the overwhelming majority of criminal cases. The jury should be the only institution to determine criminal facts—a critical right enshrined in the Constitution.[239] A judge should not make any preliminary determinations of facts before trial—yet this happens in courtrooms throughout the country in short hearings, most often without counsel or any defense by the accused.[240] This causes individual harm to defendants who are denied their right to release with no counsel presenting their version of the facts, sometimes without an opportunity to even plead their case,[241] and no proper evidentiary determination that ends with most defendants in jail. Judges should not be able to make determinations of danger against defendants without more due process protections, like those provided in a civil confinement hearing;[242] otherwise, these factual determinations must be left to a jury at trial. This judicial fact-finding has gone unnoticed by most legal scholars and public policy advocates.[243] It has resulted in a lost right of jury protection for the vast majority of defendants because of the lack of understanding of the jury as a critical body in preserving the rights of the accused. This rule against judicial fact-finding ought to be extended to the pretrial context as this preserves the same prohibitions that allow punishment of defendants without a jury determination.

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235. *See* BAUGHMAN, *supra* note 41, at 25–26; *see also supra* notes 180–83 and accompanying text.

236. 602 F. App'x 713, 714 (10th Cir. 2015).

237. No. A-4898-18T6, 2019 WL 5824685, at *2 (N.J. Super. Ct. App. Div. Nov. 7, 2019) (affirming a pretrial detention order where motion judge weighed dangerous nature and circumstances of alleged crime, concluding at a pretrial hearing that defendant drove in an "extremely reckless" manner and that the state had a "very strong" case against defendant).

238. *See supra* notes 192–93 and accompanying text; *see also* United States v. Omar, 157 F. Supp. 3d 707, 710 (M.D. Tenn. 2016) (granting the defendant's motion to reconsider his detention and releasing him, stating that "the Court finds that the continued imprisonment of Defendant for any appreciable length of time will violate the due process clause").

239. *See, e.g.*, Jones v. United States, 526 U.S. 227, 232 (1999) ("[A] fact is an element of an offense . . . [and] must be . . . submitted to a jury . . . .").

240. *See* Worden et al., *supra* note 181.

241. *See* Simonson, *supra* note 127, at 612–15; *supra* notes 175–78 and accompanying text.

242. *See* Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001) (holding that civil detention to protect the community is only upheld "when limited to specially dangerous individuals and subject to strong procedural protections").

243. *See* Baradaran, *supra* note 213, at 403 (noting that a historical view of due process, including the cases holding that juries must find facts, may allow scholars and practioners to more properly understand the presumption of innocence).

D. THE RIGHT TO FINANCIAL PARITY

An interest in financial parity is the final piece of the right to pretrial liberty. As articulated here, pretrial financial parity requires all defendants to be treated similarly in their access to release, regardless of their income or ability to afford bail. It implicitly recognizes that judges cannot set excessive bail to prohibit a defendant from obtaining release before trial.[244] Financial parity requires that a person not be harmed legally—or have liberty deprived—due to their inability to pay a fee, fine, or bail amount. Currently, the majority of the accused are detained simply because they cannot afford the bail amount set for them and are therefore harmed due to simple penury. While "financial parity" has not been recognized as a constitutional right by the Supreme Court, there is substantial lower court support for the fact that each individual has the right to due process, equal protection of law, and protection from excessive bail, regardless of their financial status—and that these rights apply pretrial.[245] These three constitutional rights constitute what this Article refers to as "financial parity." The Supreme Court has not yet blessed these rights, and even current federal law that provides for financial parity in federal cases has been unsuccessful in providing pretrial liberty.[246] Therefore, the remainder of this Section discusses the growing support under federal and state case law for the right of financial parity to be recognized in all cases—adjoining the protections of the Eighth Amendment's Excessive Bail and Fines Clauses, the Fourteenth Amendment's Equal Protection Clause, and the Fifth and Fourteenth Amendments' Due Process Clause.[247]

The right to financial parity emanates from three important constitutional rights established by the Magna Carta, including due process and a prohibition against excessive bail and fines.[248] Both rights were forged to stop judges from abusing their power. For centuries, authorities abused their power to impose

244. *Cf.* CAL. CONST. art. I, § 28(f)(3) ("Excessive bail may not be required.").

245. *See* Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc); Valdez-Jimenez v. Eighth Jud. Dist. Ct., 460 P.3d 976, 987 (Nev. 2020) (holding that "additional procedural safeguards are necessary before bail may be set in an amount that results in continued detention"); United States v. Arzberger, 592 F. Supp. 2d 590, 605–06 (S.D.N.Y. 2008) ("[I]f the Excessive Bail Clause has any meaning, it must preclude bail conditions that . . . result in deprivation of the defendant's liberty."); Williams v. Farrior, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("For purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements.").

246. 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person."); *see infra* Section II.A.

247. U.S. CONST. amends. V, VIII, XIV.

248. BRIT. LIBR.: MAGNA CARTA, *supra* note 7 (translating clause 20 of the Magna Carta (1215): "For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood."); Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (noting that the Magna Carta guaranteed that the accused "shall not be [fined] for a small fault, but after the manner of the fault"). Indeed, in England in the early seventeenth century, the Court of Star Chamber levied "heavy fines on the king's enemies." LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 91 (1981). The English Bill of Rights also prohibits excessive bail. Bill of Rights 1688, 1 W. & M. Sess. 2, c. 2 (Eng.) ("That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.").

fines.[249] Judges were not to impose excessive fines that were "arbitrary."[250] In fact, under the common law, when fines were levied, it was sometimes done based on the income and property of the accused to achieve a sort of parity.[251] The U.S. Supreme Court has noted that indigent defendants are protected by the Due Process and Equal Protection Clauses from invidious discrimination "at all stages of [criminal] proceedings."[252] One type of discrimination that the Founders were sensitive to was discrimination based on ability to pay. In fact, the Founders not only provided Due Process and Equal Protection Clauses against such discrimination but also an Excessive Fines Clause to ensure financial parity in constitutional rights.[253] The purpose of both the Excessive Bail and Fines Clauses was to stop the practice of setting unaffordable bail amounts for the purpose of detaining defendants before trial.[254]

The Supreme Court has clearly stated that a bail set higher than what is reasonably calculated to assure the presence of a defendant is unconstitutional.[255] A judge must make an inquiry about a person's ability to pay a financial condition of release and consider whether alternative conditions of release would be

249. *See Timbs*, 139 S. Ct. at 688 (explaining that the Excessive Fines Clause was created to "limit[] the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense'" (quoting United States v. Bajakajian, 524 U.S. 321, 327–28 (1998))); *see also id.* at 696 (Thomas, J., concurring in judgment) (noting that the Eighth Amendment is "an admonition" against "arbitrary reigns" by the government).

250. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 287 (2d ed., Burt Franklin 1914) (1905) (discussing the Crown's abuse of power in levying fines on certain individuals and not others); *see also* BLACKSTONE, *supra* note 63, at 373 ("[A certain term of] imprisonment . . . [must be] better than an excessive fine, for [an excessive fine] amounts to imprisonment for life."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 750–51 (1833) (explaining that the Eighth Amendment was "adopted, as an admonition to all departments of the national government, to warn them against such violent proceedings, as had taken place in England in the arbitrary reigns of some of the Stuarts," when "[e]normous fines and amercements were . . . sometimes imposed").

251. *See, e.g.*, Jones v. Commonwealth, 5 Va. (1 Call) 555, 557 (1799) ("[F]ine or amercement ought to be according to the degree of the fault and the estate of the defendant."); COOLEY, *supra* note 17, at 327–28 (noting that the Excessive Fines Clause requires a consideration and "reference to the party's ability to pay it").

252. Griffin v. Illinois, 351 U.S. 12, 18 (1956); *see* Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) ("Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting[] its requirements. The incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." (footnote omitted)); *see also* Williams v. Farrior, 626 F. Supp. 983, 985 (S.D. Miss. 1986) ("For purposes of the Fourteenth Amendment's Equal Protection Clause, it is clear that a bail system which allows only monetary bail and does not provide for any meaningful consideration of other possible alternatives for indigent pretrial detainees infringes on both equal protection and due process requirements."); Jennings v. Rodriguez, 138 S. Ct. 830, 862 (2018) (Breyer, J., dissenting) ("The Due Process Clause foresees eligibility for bail as part of 'due process.'"). *But see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 22 (1973) ("Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate.").

253. The Excessive Fines Clause applies to the states and federal government. *See* Bearden v. Georgia, 461 U.S. 660, 663 (1983); *Timbs*, 139 S. Ct. at 688.

254. *See* United States v. Brawner, 7 F. 86, 89 (W.D. Tenn. 1881).

255. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951).

suitable.[256] This right makes it difficult for financial parity to coexist with a system that relies on money bail. These constitutional provisions—Equal Protection, Due Process, and the Excessive Bail and Fines Clauses—all intersect to provide financial parity for the accused pretrial.

1. Excessive Bail and Fines Arguments

The Eighth Amendment's Excessive Bail and Fines Clauses protect financial parity of defendants, preventing high bail amounts set to prevent a defendant from obtaining release.[257] The Supreme Court has affirmed this important protection in *Stack v. Boyle*, relying on the Excessive Bail Clause.[258] In *Stack*, the Supreme Court vacated a bail amount set higher than what was "reasonably calculated" to give "adequate assurance" that the individual "will stand trial and submit to sentence if found guilty."[259] It made clear that an *unattainable bail amount* set that prevents release constitutes punishment prior to conviction, violating the Eighth Amendment's Excessive Bail Clause.[260] In outlining the parameters of the meaning of "excessive" bail, the Supreme Court created a balancing test: the determination of whether conditions of release are excessive requires weighing the state's stated risks of release and the process due to the defendant before deprivation of liberty.[261] Thus, the Supreme Court has clearly held that courts evaluating excessive bail claims are required to balance a particular defendant's interest in pretrial liberty with the state's interests.[262]

Almost forty years later, the Court in *United States v. Salerno* again revisited the Excessive Bail Clause.[263] In that case, the Court focused on an intertwined analysis with the Due Process Clause and held that the government must prove "by clear and convincing evidence that an arrestee presents an identified and articulable threat" when considering pretrial release conditions.[264] Because the Supreme Court failed to provide a meaningful definition of "excessive" in the Excessive Bail Clause, the provision has led to little practical use among the lower courts.[265] However, multiple circuit courts have interpreted *Salerno* to confirm the historic value of the Excessive Bail Clause in prohibiting unreasonably

256. *See* Turner v. Rogers, 564 U.S. 431, 448 (2011) (holding that procedural due process safeguards include "an express finding by the court that the defendant has the ability to pay").

257. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .").

258. *Stack*, 342 U.S. at 5.

259. *Id.* at 4–5.

260. *See id.* at 5.

261. *Id.*

262. *See id.*; *see also, e.g.*, Sergie v. State, No. A-13863, 2021 WL 3277199, at *2 (Alaska Ct. App. July 30, 2021) ("Excessive bail is that which goes beyond the amount actually necessary to fulfill the purposes of bail — *i.e.*, to reasonably ensure the person's appearance and protect the victim, other persons, and the community.").

263. 481 U.S. 739 (1987).

264. *Id.* at 751.

265. *See* Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984*, *supra* note 31, at 122–23.

high bail amounts.[266] And while courts in recent challenges to bail practices have primarily centered their analysis on due process and equal protection claims,[267] some courts have relied on the Eighth Amendment to prohibit bail practices that lack individualized determinations.[268] Others have made historical arguments that support the use of Eighth Amendment claims to require individualized determinations before setting unattainable bail amounts.[269] The Eighth Amendment's Excessive Bail and Fines Clauses have been helpful in supporting financial parity arguments. Still, the bulk of financial parity arguments made and accepted have come under the Due Process Clause and Equal Protection Clauses, as discussed in the next Section.

2. Due Process and Equal Protection Arguments

The Fifth and Fourteenth Amendments' Due Process Clause and the Fourteenth Amendment's Equal Protection Clause require that before detaining an individual before trial, there must be a "meaningful consideration of . . . alternatives" to incarceration for those who cannot afford to pay for their freedom.[270] Thus, a court may not punish or incarcerate a poor defendant due to their inability to pay a fine or fee, because it is considered an unconstitutional deprivation of a person's liberty.[271] A person may not be "subjected to imprisonment solely because of his indigency."[272] In a triad of cases, the Supreme Court established that revoking probation and imprisoning defendants based on indigency alone violates due process as well as equal protection.[273] For example, in *Bearden v. Georgia*, the Court explained that "[d]ue process and equal protection principles converge" in this context.[274] Several circuit courts have held that financial considerations must be made in this early pretrial period to uphold the due process and

266. *See, e.g.*, Fields v. Henry County, 701 F.3d 180, 184 (6th Cir. 2012) ("Rather, the Eighth Amendment mandates that when bail is granted, it may not be unreasonably high in light of the government's purpose for imposing bail."); United States v. Motlow, 10 F.2d 657, 659 (7th Cir. 1926) ("The Eighth Amendment provides that 'excessive bail shall not be required.' This implies, and therefore safeguards, the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given.").

267. *See, e.g.*, Walker v. City of Calhoun, 901 F.3d 1245, 1258 (11th Cir. 2018) ("The district court was correct, however, to evaluate this case under due process and equal protection rubrics rather than the Eighth Amendment.").

268. *See, e.g.*, ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1148 (S.D. Tex. 2017) ("To the extent they apply, the Eighth Amendment cases support the plaintiffs' arguments."); United States v. Torres, 566 F. Supp. 2d 591, 602 (W.D. Tex. 2008) ("The Court finds these conditions are more stringent than what is required to achieve the Government's objectives . . . [and, if applied,] would violate Torres's right to be free from excessive bail under the Eighth Amendment.").

269. *See* Heaton et al., *supra* note 28, at 777–79.

270. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc); *see* Caliste v. Cantrell, 329 F. Supp. 3d 296, 311–12, 315 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019).

271. *See* Tate v. Short, 401 U.S. 395, 397–98 (1971).

272. *Id.* at 398; *see also* Bearden v. Georgia, 461 U.S. 660, 672–73 (1983) (striking down a state practice of revoking probation for failure to pay fine without considering probationer's ability to pay or whether alternative measures meet state's interests).

273. *See Tate*, 401 U.S. at 397–98; Williams v. Illinois, 399 U.S. 235, 242–45 (1970); *Bearden*, 461 U.S. at 672–73.

274. *Bearden*, 461 U.S. at 665.

equal protection rights of the accused.[275] In other words, these clauses act to protect defendants from bail amounts that are set too high for them to obtain release. The mechanism of protection under equal protection prohibits blunt procedures for money bail that detain defendants purely because of their inability to pay, where a more wealthy defendant might obtain release.[276] Similarly, the Due Process Clause requires the consideration of the individual financial position of defendants when setting bail as well as that judges explain why particular financial requirements are necessary for conditioning the release of defendants.[277] None of these courts discussed "financial parity" expressly, but their finding that the Constitution prohibits detention based on an inability to pay bail implicitly recognizes this right.

There is momentum in lower courts and a rejuvenation of the Fourteenth Amendment's application to bail as several courts have found that wealth-based pretrial detention is unconstitutional.[278] For example, the California Supreme Court overturned a trial court's decision to set a $350,000 bail for a defendant who could not afford a bail anywhere near that amount and for the trial court's failure to consider any alternative nonfinancial conditions.[279] Many lower courts

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275. *See* Daves v. Dallas County, 984 F.3d 381, 412 (5th Cir. 2020) ("Under the Equal Protection Clause as applied in the Fifth Circuit, pretrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if a court finds, based on evidence and in a reasoned opinion, either that the defendant is not indigent and is refusing to pay in bad faith, or that no less restrictive alternative can reasonably meet the government's compelling interest." (quoting ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1140 (S.D. Tex. 2017))); Hernandez v. Sessions, 872 F.3d 976, 992–93 (9th Cir. 2017) ("[T]hese cases 'stand for the general proposition that when a person's freedom from governmental detention is conditioned on payment of a monetary sum, courts must consider the person's financial situation and alternative conditions of release when calculating what the person must pay to satisfy a particular state interest.'" (citation omitted)); Vasquez v. Cooper, 862 F.2d 250, 255 (10th Cir. 1988) (determining an indigent defendant's bail claim and applying due process and equal protection principles); Walker v. City of Calhoun, 901 F.3d 1245, 1260 (11th Cir. 2018) (applying a "hybrid analysis of equal protection and due process principles" in a bail case).

276. *See* ODonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018) ("[T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.").

277. *See id*. at 158–60.

278. *See, e.g*., Caliste v. Cantrell, 329 F. Supp. 3d 296, 311 n.5, 320 (E.D. La. 2018); *In re* Humphrey, 228 Cal. Rptr. 3d 513, 540 n.22 (Cal. Ct. App. 2018); *ODonnell*, 892 F.3d at 158 ("Notably, state courts have recognized that 'the power to . . . *require* bail,' not simply the denial of bail, can be an 'instrument of [such] oppression.'" (omission and alteration in original) (quoting Taylor v. State, 667 S.W.2d 149, 151 (Tex. Crim. App. 1984) (en banc))); Schultz v. State, 330 F. Supp. 3d 1344, 1358 (N.D. Ala. 2018) ("Pretrial 'imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.'" (quoting Pugh v. Rainwater, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc))).

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

have also recognized that an accused should be afforded the right to release under equal protection and due process regardless of their ability to afford bail and have struck down even short periods of pretrial detention as unconstitutional.[280] Several other states have found that detaining indigent arrestees without consideration of what bail or fines they can pay is fundamentally unfair and in conflict with constitutional principles of equal protection and due process.[281] Other courts have struck down, on equal protection and due process grounds, secured bail schedules and master bond systems because the financial conditions were predetermined and indigent defendants were automatically detained solely due to their inability to pay.[282] Courts commonly require a "meaningful consideration of other possible alternatives" when setting bail to avoid simply detaining defendants based on their indigent status or due to their inability to make bail.[283] Bail practices in Florida,[284]

280. *See, e.g.*, State v. Blake, 642 So. 2d 959, 966–68 (Ala. 1994) (holding that requiring a 72-hour minimum notice to prosecutors before a judicial public bail hearing was unconstitutional because it deprived defendant's liberty without due process of law through incarceration and violated an indigent defendant's equal protection rights through an additional period of incarceration before a hearing due to an inability to post bail); Rodriguez v. Providence Cmty. Corr., Inc., 191 F. Supp. 3d 758, 775–76 (M.D. Tenn. 2016) (holding that a county's outsourcing of misdemeanor probation services to a for-profit corporation plausibly alleged an unconstitutional violation of indigent probationers' equal protection and due process rights based on their inability to immediately pay fines).

281. *See* 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 . . . the government risks detention that accomplishes 'little more than punishing a person for his poverty.'" (quoting Bearden v. Georgia, 461 U.S. 660, 671 (1983))); Walker v. City of Calhoun, No. 15-CV-0170, 2016 WL 361612, at *10 (N.D. Ga. Jan. 28, 2016) (ruling that "[a]ny bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause"), *vacated on other grounds*, 682 F. App'x 721 (11th Cir. 2017); *see also* Valdez-Jimenez v. Eighth Jud. Dist. Ct., 460 P.3d 976, 984 (Nev. 2020) ("[B]ail must not be in an amount greater than necessary to serve the State's interests.").

282. *See Rainwater*, 572 F.2d at 1057 (holding that a master bond system where some cannot obtain release infringes on due process and equal protection requirements); *see also* Pierce v. City of Velda City, No. 15-cv-570, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) ("The use of a secured bail schedule to set the conditions for release of a[n] [indigent] person in custody after arrest . . . implicates the protections of the Equal Protection Clause . . . ."); *Blake*, 642 So. 2d at 968 (recognizing the unconstitutionality of a bail scheme that allows "a defendant with financial means who is charged with a noncapital violent felony, and who may potentially pose a great threat to community safety," to "obtain immediate release simply by posting bail," while forcing an "indigent defendant charged with a relatively minor misdemeanor" to "remain incarcerated for a minimum of three days, and perhaps longer, before being able to obtain judicial public bail").

283. *Rainwater*, 572 F.2d at 1057; *see also* Cooper v. City of Dothan, No. 15-CV-425, 2015 WL 10013003, at *1–2 (M.D. Ala. June 18, 2015) (striking down a preset and undifferentiated bond amount system that left the defendant "behind bars for as long as a week, while allowing those who can afford the scheduled bond to walk free" when the County had alternative measures to secure the defendant's future appearance); State v. Huckins, 426 P.3d 797, 804 (Wash. Ct. App. 2018) ("[T]he court abused its discretion by requiring monetary bail without considering less restrictive conditions as required by the law.").

284. *See, e.g.*, Knight v. Sheriff of Leon Cnty., 369 F. Supp. 3d 1214, 1219 (N.D. Fla. 2019) ("A system that unnecessarily detains defendants pending trial based on inability to make bail—that detains defendants on this basis without regard to the state's compelling interests in detention—is unconstitutional at several levels.").

Tennessee,[285] Nevada,[286] Oregon,[287] and many other states have been challenged on similar grounds in recent years.

Financial parity entitles all accused to equivalent freedom before trial, including when fines are imposed. Every circuit applying *United States v. Salerno* has found that an order requiring an unaffordable financial condition of release is a de facto order of pretrial detention and requires a finding that it is absolutely necessary because there is no alternative.[288] A recent California decision determined that even where a financial condition is deemed necessary, courts may not detain the accused "solely because" she "lacked the resources" to post bail.[289] This means that if bail is set, it must specifically consider the financial status of the defendant. If the defendant cannot afford bail and it amounts to a de facto detention order, it is unconstitutional. As a matter of established law, unaffordable bail is unconstitutional pretrial detention.[290] Therefore, setting money bail for indigent defendants is typically unconstitutional,[291] and financial parity requires a more careful consideration before imposing any financial conditions. The next Section discusses how the Equal Protection, Due Process, and Excessive Bail and Fine Clauses converge into a broader right of financial parity before trial.

3. Articulating a Right to Financial Parity

Financial parity protects the accused from discrimination based on wealth and avoids detention based simply on unaffordable bail and fees. This includes that all accused receive an opportunity to obtain release pretrial, without regard to their financial means.[292] Financial parity also includes freedom from excessive

285. *See, e.g.*, Hill v. Hall, No. 19-cv-00452, 2019 WL 4928915, at *21 (M.D. Tenn. Oct. 7, 2019) (determining that defendant demonstrated "a substantial showing of the denial of a constitutional right" in asserting that "his rights to due process and equal protection have been violated by his pretrial detention at an insurmountable bail amount" without particularized findings that other conditions could protect state interests (quoting 28 U.S.C. § 2253(c)(2))).

286. *See, e.g.*, *Valdez-Jimenez*, 460 P.3d at 980 ("[T]he judge must consider the defendant's financial resources as well as the other factors . . . in setting the amount of bail, and the judge must state his or her reasons for the bail amount on the record.").

287. *See, e.g.*, Rasmussen v. Garrett, 489 F. Supp. 3d 1131, 1137 (D. Or. 2020) (denying petitioner's claim that Due Process and Equal Protection Clauses were violated "because the state trial court set bail in an amount they cannot afford without properly finding that they present a flight risk or pose a danger to the community").

288. *See, e.g.*, United States v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam); United States v. Mantecon-Zayas, 949 F.2d 548, 551 (1st Cir. 1991) (per curiam); United States v. Leisure, 710 F.2d 422, 425 (8th Cir. 1983).

289. *In re* Humphrey, 482 P.3d 1008, 1013 (Cal. 2021) (quoting Bearden v. Georgia, 461 U.S. 660, 667–68 (1983)).

290. *See* ODonnell v. Harris County, 892 F.3d 147, 154, 158 (5th Cir. 2018); *Leathers*, 412 F.2d at 171; *see also* Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1645 (2020) ("Courts and legislatures should recognize that an order imposing unaffordable bail is an order of pretrial detention. It has precisely the same effect: the accused person sits in jail.").

291. *In re Humphrey*, 482 P.3d at 1012 ("The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional" under the Equal Protection and Due Process Clauses).

292. Stack v. Boyle, 342 U.S. 1, 8 (1951) (explaining that the Eighth Amendment prohibition of excessive bail requires courts to consider defendant's ability to pay when setting bail to secure appearance at trial).

fines that punish a defendant.[293] Accused persons should have financial parity when it comes to release before trial, and their income should not dictate whether they are released before trial. While financial status should not be a consideration, financial parity must not be confused with financial equality. Certainly, a defendant with greater means will always have a more favorable position in criminal justice, and while this is unjust, it currently violates no constitutional principles. However, financial parity requires that no defendant is imprisoned simply due to an inability to pay when, if they had the means, they would obtain release. An Alabama court distinguished the principle of financial parity recently: "While relative wealth and poverty will inevitably have some effect on the administration of justice, any sentence that subjects a criminal defendant 'to imprisonment *solely because of* . . . indigency' is constitutionally infirm and cannot stand."[294] In other words, it is the discrimination based on financial means for defendants who would be able to obtain release but for their lack of money that is constitutionally troubling.[295]

Currently, most people accused of a crime are detained before trial due to a problem of financial parity rather than dangerousness or flight risk.[296] While there is growing movement among lower courts for the necessity of financial parity, the majority of jurisdictions fail to consider a defendant's financial status when setting bail, leaving pretrial defendants in jail solely for their inability to pay.[297] Currently, very few defendants are ordered detained before trial; still, the vast

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293. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .").

294. United States v. Flowers, 946 F. Supp. 2d 1295, 1300 (M.D. Ala. 2013) (omission in original) (emphasis added) (quoting Tate v. Short, 401 U.S. 395, 398 (1971)) ("It is unconstitutional to keep a defendant in prison longer than the maximum time for her crime merely because she is unable to pay a court-ordered fine, and, similarly, it violates the Constitution's guarantee of equal protection under the laws to convert a fine-only sentence into a prison term based on inability to pay." (citation omitted)).

295. WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 11 (1976) ("The American system of bail allows a person arrested for a criminal offense the right to purchase his release pending trial. Those who can afford the price are released; those who cannot remain in jail."); *id.* at 19 ("The requirement that virtually every defendant must post bail causes discrimination against defendants who are poor . . . .").

296. *See* Press Release, U.S. Comm'n on C.R., *supra* note 120 ("More than 60% of defendants are detained pre-trial because they can't afford to post bail." (emphasis omitted)); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1401 (2017) ("[T]he majority of defendants are detained before trial because they cannot afford to pay relatively small amounts of bail.").

297. *See* PRETRIAL JUST. INST., PRETRIAL JUSTICE IN AMERICA: A SURVEY OF COUNTY PRETRIAL RELEASE POLICIES, PRACTICES AND OUTCOMES 2, 7–8, https://biblioteca.cejamericas.org/bitstream/handle/2015/3094/PJI_Pretrial_Justice_in_America_Survey_2010.pdf?sequence=1&isAllowed=y [https://perma.cc/4UUZ-BQ8V] (last visited Oct. 29, 2023) (noting that in its study of 112 of the 150 most populous counties in America, "[s]ixty-four percent of the counties participating in the survey stated that a bail schedule is used in their jurisdiction," and of those counties that use bail schedules, "in 51 percent of the jurisdictions the bail schedule is used both before and at the initial appearance, and seven percent more use the schedule only at initial appearance"); CYNTHIA A. MAMALIAN, PRETRIAL JUST. INST., STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT 17 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PJI_PretrialRiskAssessment.pdf [https://perma.cc/343K-CTB3] ("Recent research also indicates that judges are still dependent on the use of bond schedules in making pretrial release decisions.").

majority are not released because they are unable to pay money bail.[298] And indeed the problem of detention due to lack of affordability of bail is getting worse. Since the 1990s, courts throughout the United States have increased the reliance on money bail from 37% to 61% of cases.[299] Detention due to indigency is common as estimates suggest that 60% of those who cannot pay bail are in "the poorest third of society," and 80% are in "the bottom half" of society.[300] It is unclear whether traditional money bail can continue as more courts recognize the underlying constitutional rights intersecting on behalf of pretrial liberty. One way to achieve financial parity is to prohibit money bail completely in pretrial release.[301] Another option is to require an individualized determination so defendants are on equal footing in their ability to obtain release. With understanding and implementation of the constitutional protections underlying financial parity, pretrial liberty—the ultimate objective of these underlying rights—will certainly increase.

In all, the right of pretrial liberty requires protection of four interests for a defendant, including: a presumption of release, a right to legal defense, a right to a jury finding of facts, and the right to financial parity pretrial. These interests intersect to dictate that a defendant must be represented at their first hearing where bail is determined and ideally be able to meet with counsel outside of jail with the presumption in most cases that they are released. The accused also maintains the right that a judge not "weigh" any evidence against them or determine the "seriousness" of the danger they pose in determining pretrial release. A defendant is also not to be disadvantaged when it comes to their constitutional right to release if they cannot afford bail or fines. These rights, albeit simple and for the most part supported by significant constitutional and judicial backing, are not currently maintained in the morass of state and federal bail jurisprudence. The next Part

298. *See* Press Release, U.S. Comm'n on C.R., *supra* note 120; Yang, *supra* note 296, at 1401; *cf.* Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (referring to a class action brought by defendants regarding payment of pretrial bail); Pierce v. City of Velda City, No. 15–cv–570, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) ("No person may, consistent with the Equal Protection Clause . . . be held in custody after an arrest because the person is too poor to post a monetary bond."); Cooper v. City of Dothan, No. 15-CV-425, 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015) (establishing "the unconstitutionality of a pretrial detention scheme whereby indigent detainees are confined for periods of time solely due to their inability to tender monetary amounts in accordance with a master bond schedule").

299. BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DOJ, NCJ 243777, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 1 (2013), https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/CP7R-YX6Y] (finding in a study of the 75 largest counties that from 1990 to 2009, the proportion of felony pretrial releases with financial conditions grew from 37% to 61%).

300. BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR 14 n.11 (2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf [https://perma.cc/Q8D6-2C82]; *see also* Press Release, N.Y. C.L. Union, New York City Takes Important Step Toward Ending Destructive Cash Bail System (July 8, 2015), http://www.nyclu.org/news/new-york-city-takes-important-step-toward-ending-destructive-cash-bail-system [https://perma.cc/42T2-HJHR].

301. *See* C.R. CORPS, *supra* note 130, at § 2. Los Angeles has recently implemented a zero bail policy that eliminates cash bail except for the most serious crimes. KCAL News Staff, *Controversial Zero Bail Policy Goes into Effect for Los Angeles County*, CBS L.A. (Oct. 1, 2023, 10:31 PM), https://www.cbsnews.com/losangeles/news/controversial-zero-bail-policy-goes-into-effect-for-los-angeles-county/ [https://perma.cc/BAF9-JWTT].

dives into how these four interests combine into a constitutional right of pretrial liberty and how all must be considered together to improve release rates.

II. NEGLECTING A CONSTITUTIONAL RIGHT TO PRETRIAL LIBERTY

This Article thus far has demonstrated a careful consideration of the four interests encompassing a stand-alone right to pretrial liberty. It has shown that by neglecting a rigorous understanding of the constitutional backing to pretrial liberty, dangerousness considerations have dominated early criminal determinations. The goal of this final Part is twofold. First, this Part briefly points out that the applicable judicial and statutory frameworks in state and federal fronts do not meet the constitutional requirements of pretrial liberty and are failing. The first step is for judges to understand the commands of pretrial liberty, including presumptive release for most defendants, the importance of counsel, prohibitions against fact-finding, and financial parity. With a failure to respect these four interests, pretrial liberty has suffered and become the exception rather than the rule, with fears of public danger prevailing in pretrial considerations. Faithful application of existing law and historical precedent in this area is the critical first step. The other vital piece of this puzzle that is left for a forthcoming piece is firm legislative presumptions established by federal and state statute.[302] Second, the bulk of this Part attempts to justify the importance of each of the intersecting pretrial liberty interests by demonstrating how liberty suffers when any one of the interests articulated here is not effectuated. Without a change in understanding of the interlocking rights of pretrial liberty, courts will never provide the substantive protections required in early constitutional hearings.

A. A FAILURE TO RECOGNIZE THE RIGHT TO PRETRIAL LIBERTY

First, there is not adequate judicial protection of pretrial liberty in either state or federal arenas. As demonstrated, lower courts applying judicial precedent have not been able to protect pretrial liberty, or improved pretrial detention, and thus the underlying rights are lost in judicial balancing tests.[303] As a result, the underlying rights have lacked distinct recognition leading to increased detention. All states have enacted new pretrial policies, with five hundred policy changes from 2012 to 2017[304]

302. I will address the statutory aspects of reform in a forthcoming piece, Baughman, *supra* note 16.

303. *See supra* Sections I.A–D.

304. Garrett & Monahan, *supra* note 40, at 452; *see* NAT'L CONF. OF STATE LEGISLATURES, TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION UPDATE 1–2 (2018), https://docs.legis.wisconsin.gov/misc/lc/study/2018/1783/010_august_16_2018_meeting_10_00_a_m_lc_conference_room/aug16_enactments [https://perma.cc/8MSW-8XAP]; *cf.* AMBER WIDGERY, NAT'L CONF. OF STATE LEGISLATURES, TRENDS IN PRETRIAL RELEASE: STATE LEGISLATION 1 (2015) ("From 2012 to 2014, 261 new laws in 47 states addressed pretrial policy."); PRETRIAL JUST. INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA 4, 6, 8, 13, 14 (2017), https://www.prisonpolicy.org/scans/pji/the_state_of_pretrial_in_america_pji_2017.pdf [https://perma.cc/MC8D-VCC5] (discussing reforms in New York, New Jersey, New Mexico, California, and Texas); PRETRIAL JUST. INST., WHAT'S HAPPENING IN PRETRIAL JUSTICE? 21 (2019) [https://perma.cc/RT7RY69Z] (surveying reforms in thirty-six states).

and over 200 bills pending since.[305] These reform efforts have failed to effectuate the constitutional rights underlying pretrial liberty.[306] While several periods of reform and various states have attempted to reform pretrial practices, they have all been missing a focus on the underlying pretrial liberty rights at stake. Arguably, the existing bail reforms—both federal and state—have overwhelmingly led to increased detention, not increased liberty. Between 1983 and 2013, the annual admissions to jail nearly doubled, from 6 million to 11.7 million.[307] On the state side, several divergent and overlapping bail reform schemes have attempted to improve pretrial release practices without success.[308] All have increased detention, despite constitutional case law and statutes dictating that detention should remain the exception.[309] On the federal front, the situation is even worse for statutory protection of pretrial liberty.

The federal statutory bail approach fails to achieve pretrial liberty, even though it provides defendants with several of the important pretrial liberty rights discussed here—legal defense and financial parity. The federal government provides every defendant with counsel for their bail determination. They provide defendants with talented defense attorneys and exceptional pretrial release supervision.[310] Money bail bonds—though permitted—are rarely used under the federal system and the default as articulated is statutorily release.[311] In other words, two of the rights of pretrial liberty are mostly met. Additionally, detention only occurs after a hearing where government establishes risk of flight or danger. However, having legal counsel alone is not enough.[312] And prohibiting money bail alone, or even with provision of legal counsel, is not enough. Although two important rights of liberty are protected, detention rates are high and getting worse because the federal model fails to effectuate the presumption of release set out in federal

305. *See* NAT'L CONF. OF STATE LEGISLATURES, *supra* note 304, at 1–2.

306. *See* Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1323–29 (2021) (highlighting that risk assessment has failed to provide equal protection for minority populations in detention decisions).

307. VERA INST. OF JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA (2015), https://www.vera.org/downloads/publications/incarcerations-front-door-summary.pdf [https://perma.cc/8UBW-E2LP] (explaining that this "number [is] equivalent to the combined populations of Los Angeles and New York City and nearly 20 times the annual admissions to state and federal prisons. Not only are more people ending up in jail today compared to three decades ago, those who get there are spending more time behind bars, with the average length of stay increasing from 14 days to 23 days.").

308. All of these statutory approaches are discussed in a forthcoming piece. *See* Baughman, *supra* note 16.

309. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 755 (1987).

310. Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, FED. PROB., Sept. 2018, at 13, 18, 20.

311. *See* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person."); § 3142(b) ("The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond . . . subject to [certain] condition[s] . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.").

312. Rowland, *supra* note 310, at 16, 18. Providing legal counsel is not the *sine qua non* of pretrial liberty, as demonstrated by the federal model that requires it and has low pretrial release rates.

case law. Federal courts detain most federal defendants because they fall under "exceptions" to presumptive release. Courts also fail to respect the right to a jury determination of facts by considering the factual circumstances in determining detention at the pretrial hearing. Stated simply, it is difficult to improve pretrial release without judicial understanding of the rights of pretrial liberty and without the right legislative presumptions in place. Thus, without state and federal judicial and statutory protection of the four interests of pretrial liberty, it will be difficult to improve pretrial release rates.

B. THE INTERCONNECTEDNESS OF PRETRIAL LIBERTY RIGHTS

Second, a consideration of how the rights of liberty interplay or combine to enhance pretrial liberty, and how neglecting even one right could fail to enhance pretrial liberty, is in order. The rights of pretrial liberty are overlapping constitutional rights. They are not all protected on a single constitutional provision; instead, they create a web of constitutional provisions and judicially recognized rights on top of a historically rich foundation of presumptive pretrial release. The combination of pretrial liberty rights could be said to create a cumulative constitutional harm beyond what has been recognized with regard to punishment of the poor. There are certainly times where criminal procedure rights operate in tandem without converging into more protective cumulative tests, but if there was an area of law which could justify a cumulative test, pretrial liberty might be one. The rights of pretrial liberty have substantial constitutional backing: the Sixth Amendment right to counsel and defense at critical hearings, like the bail determination; the Fifth and Fourteenth Amendment due process right that presumes release and demands detention only in limited exceptions; the Excessive Bail, Due Process, and Equal Protection Clauses that require financial parity; and the Sixth Amendment right to a jury trial that should stop judicial fact-finding before trial. A strict focus on one of these rights alone, neglecting the cumulative impact of the other rights, has thus far not provided the pretrial protection that defendants need. Potentially, an all-encompassing right to pretrial liberty could be the first step in a renewed focus on liberty rather than dangerousness.

The right to pretrial liberty must be recognized doctrinally; otherwise, its underlying rights will continue to be mangled by courts. For instance, federal courts in Texas required through constitutional mandates that financial parity must be respected—and that all defendants should not receive money bail unless there was a full and individualized consideration of whether they were able to pay bail.[313] But in this iteration, the court neglected the other rights of pretrial release—including presumptive release—and this was not effectuated. As a result, Texas courts continue to impose money bail without a consideration of the accused's ability to pay,[314] despite clear and historic federal precedent to the

313. ODonnell v. Harris County, 892 F.3d 147, 158 (5th Cir. 2018).

314. Amanda Woog & Nathan Fennell, *Power and Procedure in Texas Bail-Setting*, 74 SMU L. REV. 475, 480–81 (2021) ("[E]vidence from pending court cases reveals no significant changes in bail practices following the Fifth Circuit's *ODonnell* ruling. . . . 'Magistrate Judges still routinely treat the

contrary.[315] Similarly in Georgia, despite federal constitutional case law dictating that judges consider a defendant's ability to pay, less than half of the counties studied considered ability to pay before setting bail in misdemeanor cases.[316] Many of these defendants are unrepresented in these hearings and their jurisdictions do not mandate release as a presumption by statute. These jurisdictions also do not guarantee legal defense at the initial bail determination. Without mandating access to legal defense at the pretrial hearing and respecting a presumption of release for most crimes, even constitutional reforms are likely to fail. Only when the presumption is shifted to release might accused individuals start achieving greater rates of release.[317]

Another example demonstrates the importance of all of the pieces of pretrial liberty and that legal representation or other procedural improvements are not enough to improve bail. Professor Paul Heaton describes a pilot program in Philadelphia in which "bail advocates" (nonlawyer representatives) interviewed accused individuals shortly after arrest to provide them more information about the pretrial process.[318] Heaton studied the effects of this intervention—where the accused did not have a lawyer but did have an advocate. Those accused with bail advocates did not achieve lower detention rates, but they did benefit defendants in important ways.[319] The Heaton study demonstrates that even with enhanced support for the accused, there was no improvement in detention rates. So, improving the right to legal defense without presumptive release or financial parity does not move the needle on bail reform. There is a resource problem in having all defendants represented by counsel at bail hearings, but with pretrial presumptive release for most defendants, the accused would not need to appear at early hearings unrepresented and would have access to counsel to appear at their later hearings. One suggested fix here might be to release most defendants presumptively or provide a nonlawyer representative if a jurisdiction cannot afford legal representation for all bail hearings.[320]

[bail] schedules as binding, and make no adjustment in light of an arrestee's inability to pay.' . . . [I]n other parts of Texas where it is possible to observe bail-setting, we have seen no meaningful consideration of ability to pay or alternatives to cash bail." (first alteration in original) (footnote omitted) (quoting Daves v. Dallas County, 341 F. Supp. 3d 688, 692 (N.D. Tex. 2018), *aff'd in part and remanded*, 984 F.3d 381 (5th Cir. 2020))).

315. *ODonnell*, 892 F.3d at 158.

316. Andrea Woods, Sandra G. Mayson, Lauren Sudeall, Guthrie Armstrong & Anthony Potts, *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia*, 54 GA. L. REV. 1235, 1256 (2020).

317. *See* BAUGHMAN, *supra* note 41, at 43 (noting the benefits of unsecured bail for decreasing incarceration rates).

318. Heaton, *supra* note 177, at 736–37.

319. Bail advocates (who were hired paraprofessionals) remarkably reduced the client's likelihood of bail violation (-64%) and future arrest (-26%). *Id.* at 701. It appears that these advocates helped defendants in tangible ways to feel like they had someone who was interested in their future and they appreciated the information they received.

320. While Heaton's study did not find that a nonlawyer representative cut pretrial detention rates, this could help provide more representation at earlier stages without presenting a resource burden on jurisdictions. *Id.*

Determining how the four interests underlying pretrial liberty impact pretrial release is a consideration in determining whether all four are actually required to improve pretrial liberty. Considering those interests, it is clear that legal defense is constitutionally mandated and important for an initial bail hearing. And as a practical matter, with legal counsel, two-and-a-half times more defendants are able to obtain release before trial.[321] Counsel can also help judges appropriately understand the risk of releasing a particular defendant—in the majority of cases it is extremely low, and this can avoid the overemphasis of dangerousness by judges. The importance of the right to financial parity is also clear: without a focus on reducing detention based on the ability to pay, important constitutional rights cannot be effectuated when more than 60% of defendants are not released simply based on poverty.[322] As such, money bail amounts set too high have had a direct effect on the number of people who can be released before trial.[323] And the right to presumptive release is very closely connected with an increase in release rates—and might be the most important of these four interests.

However, the prohibition against judicial fact-finding might be one that is tempting to ignore. Why does it matter if a judge weighs evidence against the defendant? How does a defendant's right to have a jury determine facts increase release rates? To be honest, this right is arguably least closely linked to release rates but might have the most significant symbolic impact. A judge considering facts before trial might lead to increased detention because the judge is improperly trying the accused based on a one-sided portrayal of the facts obtained by police and prosecutors. But the bigger issue is that judges often make decisions to detain or release based on no evidence presented at all, no counsel, or other immeasureable factors.[324] The more discretion given to judges with a larger number of crimes to consider, the more variability and unpredictability enters into this process. In other words, the main reason to remove judges from fact-finding during the pretrial period is because it can create more justifications for judges to detain. Indeed, in an ideal bail system where release is presumptive, there will always (and should always) be room for prosecutorial and judicial discretion to determine that certain individuals should be detained or should be released with certain conditions. But fact-finding and weighing of evidence before trial—particularly with the absence of legal defense—makes this process even more subjective and introduces a level of discretion that should be saved for juries during

321. Colbert et al., *supra* note 182, at 1720 (finding that "more than two and one half times as many represented defendants were released on recognizance from pretrial custody as were unrepresented defendants").

322. *See* Press Release, U.S. Comm'n on C.R., *supra* note 120; U.S. COMM'N ON C.R., THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 44–45 (2022), https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf [https://perma.cc/RJ9H-M6NB].

323. *See supra* notes 297–99 and accompanying text.

324. For an excellent account of judicial randomness in decision making, see Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PNAS 6889, 6890 (2011), noting the potential for extraneous factors to affect legal decisions, including the drop in favorable rulings following judges' daily food breaks from approximately 65% to nearly zero.

more robust hearings later in the criminal justice process. By removing the fact-finding altogether, it leaves less discretion for judges and more room for juries or legislatures to increase the application of presumptive release. Understood this way, the right to jury trial is as critical as the other rights of pretrial liberty. Overall, considering all four interests of liberty and their underlying constitutional rights will prove to be a more effective means of enhancing freedom for defendants before trial.

CONCLUSION

Until now, the rights of the accused after arrest but before trial have not been a focus of scholarly attention, and as a result have been protected in a piecemeal constitutional manner. Historic protections rooted in the Constitution—due process, equal protection, Sixth Amendment right to counsel, and the Eighth Amendment prohibition on excessive bail—have all maintained important protections for defendants. What has been missing is the clear articulation of these individual rights in early criminal cases and how they might interplay to presume liberty for the accused before trial. In the last two waves of bail reform, without much discussion or realization, the focus has become considerations of danger and public safety. While historic presumptions of liberty have remained on the books, they have been ignored as judges have focused on dangerousness, neglecting key constitutional protections and increasing pretrial detention rates. And in an effort to improve public safety, we have actually increased danger to the public as even a small amount of detention before trial increases the risks posed to society. As it turns out, when it comes to pretrial detention, public safety and pretrial liberty are not the conflicting interests we once imagined, and indeed, public safety and constitutional dictates both demand greater pretrial release. This Article, rather than targeting the prevailing considerations of dangerousness, instead provides a rigorous demarcation of the various individual constitutional liberty interests at play in early criminal cases. Aggregating these interests into a stand-alone right to pretrial liberty, this Article demonstrates that the protections of its overlapping rights provide a powerful presumption against detention before trial. These rights provide meaningful protection for judges to effectuate the presumptive release dictated by judicial precedent, countering their displaced fear about releasing dangerous defendants. These rights together magnify protection of an accused in an early criminal case, with the hope that it might finally tame dangerousness as the prevailing consideration and turn the tide of bail towards pretrial liberty.