

## BAIL REFORM IN COLORADO: A PRESUMPTION OF RELEASE

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*Interest in bail reform has ebbed and flowed in the United States since the 1960s. Recently, a condemning look at bail administration and pretrial detention across various jurisdictions has pushed bail reform to the policy forefront at both the national and state levels. In 2013, Colorado's General Assembly reformed its bail statute to decrease reliance on monetary bail and promote pretrial services programs in an attempt to prevent unnecessary pretrial detention of low-income defendants who present low risks for flight and threat to community safety. This reform was a much-needed step in the right direction. But the new bail statute allows courts, which are too accustomed to equating bail with money under the old statute, to impose monetary bail, even in cases involving low-risk defendants. This problem has led to the initiation of lawsuits, like *Mares v. Denver County Court*, to prevent courts from imposing monetary bail unnecessarily. The Colorado General Assembly should enact further reform that creates a presumption of release on unsecured personal recognizance bonds and imposes monetary bonds only if it is demonstrated that the individual poses a high risk of flight or threat to community safety. Such reform would achieve the General Assembly's 2013 goals by ensuring community safety and preventing unnecessary pretrial detention of low-risk defendants.*

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## INTRODUCTION

“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>1</sup> These words, written by the Supreme Court thirty years ago, are untrue for many criminal defendants, particularly low-income individuals, who cannot afford the price at which their bail is set.<sup>2</sup> This unfortunate fact about bail administration in America is causing quite the stir. Recently, it has been covered in everything from a scathing article in the *New York Times Magazine*<sup>3</sup> to an in-depth comedy/tragedy sketch on *Last Week Tonight with John Oliver*.<sup>4</sup> Some commentators have even begun to refer to this renewed interest in bail reform as the “Third Generation of Bail Reform” in America.<sup>5</sup>

A tragic example of why there is a renewed interest in bail

1. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

2. Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), [http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?\\_r=1](http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=1) [<https://perma.cc/K7EX-QWQ7>].

3. *Id.*

4. LastWeekTonight, *Bail: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (June 7, 2015), <https://www.youtube.com/watch?v=IS5mwymTIJU> [<https://perma.cc/DX6D-6UPX>] (exploring the many injustices that occur as a result of America’s bail system, which disproportionately affects the poor, through the comedic lens of John Oliver).

5. TIMOTHY R. SCHNACKE, BEST PRACTICES IN BOND SETTING: COLORADO’S NEW PRETRIAL BAIL LAW 19 (2013) (noting the third generation of bail reform “is best defined as one that aims primarily to reduce the deleterious effects of money at bail and to focus more on transparent as rational processes, such as assessment and supervision to address a particular defendant’s pretrial risk”).

reform is demonstrated by Sandra Bland's case.<sup>6</sup> In July 2015, Bland was arrested after being pulled over for a traffic infraction and allegedly assaulting a police officer.<sup>7</sup> Bland would have been released after her arraignment if she were able to pay \$500, ten percent of her bond.<sup>8</sup> Instead, while her family was working on a way to find enough money to post her bond, Bland spent three days in jail before she was found dead in her cell from an apparent suicide.<sup>9</sup> Sandra Bland was not detained for three days because she presented a flight risk or a threat to community safety but simply because she could not afford to pay \$500.<sup>10</sup>

This Comment explores bail reform with a focus on current bail administration problems in Colorado. In 2013, the General Assembly reformed Colorado's bail statute to: (1) curb unnecessary pretrial detention for low-income defendants who are low-risk for both flight and threat to public safety; (2) limit reliance on the use of monetary bail; and (3) implement more research-driven practices for determining flight risk and threat to public safety in bail administration.<sup>11</sup> This reform was a step in the right direction and has been lauded by proponents of bail reform, but the mentality of "bail equal[ing] money"<sup>12</sup> under Colorado's old statute has been hard to overcome, as evidenced by the unnecessary pretrial detention of low-risk, low-income defendants.<sup>13</sup> To truly achieve the goals that the General Assembly sought in 2013, further reform of Colorado's bail statute is necessary.

This Comment's argument is simple: to avoid unjust and unnecessary pretrial detention of low-income defendants who pose low to no flight risk or threat to community safety, the Colorado General Assembly should create a strong, express presumption of release on unsecured personal recognizance bonds. Part I explores the history of bail and pretrial detention

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6. See Leon Neyfakh, *Why Was Sandra Bland Still In Jail?*, SLATE (July 23, 2015, 8:17 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/07/sandra\\_bland\\_is\\_the\\_bail\\_system\\_that\\_kept\\_her\\_in\\_prison\\_unconstitutional.html](http://www.slate.com/articles/news_and_politics/crime/2015/07/sandra_bland_is_the_bail_system_that_kept_her_in_prison_unconstitutional.html) [<https://perma.cc/FH5A-CDT8>].

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. SCHNACKE, *supra* note 5, at 15.

12. *Id.* at 30.

13. See Plaintiff's Amended Complaint at 6, *Mares v. Denver Cty. Ct.*, No. 14CV32341 (Colo. Dist. Ct. Feb. 27, 2015).

at the national level and analyzes important Supreme Court cases regarding bail administration and pretrial detention. Part II discusses the problems with bail and pretrial detention, what proponents of meaningful reform have labeled the “bail fail.” Part III addresses Colorado’s 2013 bail reform and argues that further reform, through creating a strong, express presumption of release on unsecured personal recognizance bonds, is necessary to address the issues that have persisted despite recent reform. By enacting further reform, Colorado will achieve what it set out to do in 2013: avoid unnecessary pretrial detention of low-risk defendants, limit reliance on monetary bail, and improve or implement well-funded pretrial services programs in all jurisdictions.

## I. THE HISTORY OF BAIL & PRETRIAL DETENTION

To better understand current problems with bail administration and pretrial detention, this Part explores the history of bail and pretrial detention in the United States. The term “bail” describes a security that courts require be posted by criminal defendants who must appear in court at a later date.<sup>14</sup> This Comment specifically focuses on bail required for criminal defendants to be released prior to trial. In this Part, section A discusses England’s influence on the bail system in the colonies and, eventually, the modern United States. Section B explores early critics of America’s bail system and the first major Supreme Court decisions addressing bail administration. Finally, section C looks at federal bail reform in the 1960s, public criticism of reform in the 1970s, and further reform in the 1980s.

### A. *England’s Influence on Bail in the United States*

While many consider the right to bail a key component of our criminal justice system by protecting the presumption of innocence<sup>15</sup> and affording due process to the accused,<sup>16</sup> it is

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14. *Bail*, BLACK’S LAW DICTIONARY (10th ed. 2014).

15. See MARIE VANNOSTRAND & GENA KEEBLER, PRETRIAL RISK ASSESSMENT IN THE FEDERAL COURT 2 (2009), [https://www.pretrial.org/download/risk-assessment/Pretrial%20Risk%20Assessment%20in%20the%20Federal%20Court%20Final%20Report%20\(2009\).pdf](https://www.pretrial.org/download/risk-assessment/Pretrial%20Risk%20Assessment%20in%20the%20Federal%20Court%20Final%20Report%20(2009).pdf) [<https://perma.cc/L55C-C4ML>].

16. AM. BAR ASS’N, CRIMINAL JUSTICE SECTION STANDARD 10-1.1, [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjus](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjus)

important to understand the history of bail because the U.S. Constitution does not explicitly grant the right to bail or define which crimes are bailable.<sup>17</sup> The Eighth Amendment does, however, provide that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>18</sup> Commentators have disagreed on whether the Constitution’s lack of a right to bail was intentional or simply a mistake.<sup>19</sup> Others have noted that there is little documented history that proves whether the Framers intended to support or exclude the right to bail.<sup>20</sup>

England’s bail system was an early influence upon the development of bail in the United States.<sup>21</sup> The English Bill of Rights of 1689 addressed three main concepts concerning bail.<sup>22</sup> First, it determined which offenses were bailable.<sup>23</sup> Second, it adopted a habeas corpus procedure.<sup>24</sup> Third, it protected against excessive bail.<sup>25</sup> Notably, the Eighth Amendment’s protection against excessive bail is worded very similarly to the protections in the English Bill of Rights.<sup>26</sup>

Though the colonies initially applied and followed the English law closely, they soon began to deviate slightly in their view of how bail should operate. Massachusetts, for example, redefined its list of bailable offenses and provided a right to bail for all non-capital cases.<sup>27</sup> Pennsylvania furthered this right to bail by establishing that “all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great.”<sup>28</sup> Pennsylvania adopted a

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17. TIMOTHY R. SCHNACKE, MICHAEL R. JONES & CLAIRE M. B. BROOKER, *THE HISTORY OF BAIL AND PRETRIAL RELEASE* 5 (2010) [hereinafter SCHNACKE ET AL.].

18. U.S. CONST. amend. VIII.

19. Compare SCHNACKE ET AL., *supra* note 17, at 5 n.19, with Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1326 nn.145–46 (2012).

20. Appleman, *supra* note 19, at 1326.

21. SCHNACKE ET AL., *supra* note 17, at 4.

22. *Id.*

23. *Id.* (noting the right to be released on bail was established in the Petition of Right and bailable offenses were enumerated “by a long line of statutes”).

24. *Id.*

25. *Id.*

26. *Id.*; see also *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952) (“The bail clause was lifted with slight changes from the English Bill of Rights Act.”).

27. SCHNACKE ET AL., *supra* note 17, at 4.

28. *Id.* (quoting June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L.

consideration of evidence for capital cases and greatly extended the right to bail beyond any of its predecessors, something that was very influential in state constitutions adopted after 1776.<sup>29</sup>

Despite the Constitution's lack of an explicit right to bail, Congress adopted the Judiciary Act of 1789, which granted a right to bail in non-capital federal criminal law cases.<sup>30</sup> As a result of the Eighth Amendment and the Judiciary Act of 1789, the principles guiding America's bail system were that: "(1) Bail should not be excessive, (2) A right to bail exists in non-capital cases, and (3) Bail is meant to assure the appearance of the accused at trial."<sup>31</sup>

*B. Early Critics of America's Bail System & Major Supreme Court Decisions*

In practice, American culture led to very different circumstances in its bail system that were not encountered in the English system.<sup>32</sup> Commentators have noted that the desolate American frontier made it both difficult to find friends or neighbors to post bail and much more feasible for defendants to flee to unsettled areas.<sup>33</sup> These factors helped lead to the creation of the monetary bail bond profession in America.<sup>34</sup> The "professional bail bond industry flourished in America," largely unnoticed until 1927, when "The Bail System in Chicago," a study by Arthur Beeley, was published.<sup>35</sup> Beeley criticized the system for rigidly basing bail solely on the alleged offense and found that nearly twenty percent of defendants were unable to post bond.<sup>36</sup> Beeley recommended that bail determinations should be set on an individualized assessment.<sup>37</sup> Specifically, Beeley recommended "the inauguration of fact-finding investigations so that bail determinations could be tailored to the individual,"<sup>38</sup> a practice that pretrial services programs

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REV. 517, 531 (1983)).

29. *Id.* at 5.

30. *Id.*

31. *Id.*

32. *Id.* at 6.

33. *Id.*

34. *Id.* at 6–7.

35. *Id.* at 7.

36. *Id.*

37. *Id.*

38. *Id.*

engage in today.<sup>39</sup> The “fact-finding investigation” for individualized assessment that Beeley advocated for ninety years ago, however, has yet to be achieved in many jurisdictions.<sup>40</sup>

After Beeley’s study on the bail system in Chicago, America’s interest in bail waned until *Stack v. Boyle* in 1951.<sup>41</sup> In *Stack*, the Supreme Court’s first major decision regarding bail administration, a number of defendants were arrested on charges of conspiring to violate the Smith Act.<sup>42</sup> Bail was fixed for each of the defendants at \$50,000, a sum significantly higher than others previously set for defendants with the same charge.<sup>43</sup> The defendants moved to reduce the bail amount, arguing it was excessive under the Eighth Amendment.<sup>44</sup> To support their motion, the defendants offered statements regarding “their financial resources, family relationships, health, prior criminal records, and other information.”<sup>45</sup> The trial court refused to reduce bail after a hearing, despite the government’s only proffered evidence for not reducing bail being that four unrelated defendants had forfeited bail in New

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39. Pretrial services programs provide “three main services: risk assessment, bail recommendations, and supervision.” MELISSA NEAL, JUSTICE POLICY INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 33 (2012). Bail reform proponents argue that pretrial services programs “can minimize unnecessary pretrial detention, reduce jail crowding, increase public safety, ensure that released defendants appear for scheduled court events, and lessen invidious discrimination between rich and poor in the pretrial process.” NAT’L INSTITUTE OF JUSTICE, PRETRIAL SERVICES PROGRAMS: RESPONSIBILITIES AND POTENTIAL 1 (2001), <https://www.ncjrs.gov/pdffiles1/nij/181939.pdf> [<https://perma.cc/Z9LF-FQVT>]; see also HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 55 (Dec. 2010), [https://www.hrw.org/sites/default/files/reports/us1210webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf) [<https://perma.cc/A7VA-57GF>] (describing the benefits associated with pretrial services programs).

40. SCHNACKE, *supra* note 5, at 63 (noting that only half of the judicial districts in Colorado have pretrial service programs to “screen and investigate defendants for pretrial risk”).

41. SCHNACKE ET AL., *supra* note 17, at 8.

42. See *Stack v. Boyle*, 342 U.S. 1, 3 (1951). The Smith Act criminalized advocating for the overthrow of the U.S. government. 18 U.S.C. § 2385 (2012).

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

44. *Id.*

45. *Id.*; see also ARTHUR L. BEELEY, THE BAIL SYSTEM IN CHICAGO 167 (1966) (noting factors for individualized assessment of bail should include: “(1) the nature of the offense, (2) the weight of the evidence, (3) the character of the accused, (4) the seriousness of punishment following conviction, and (5) the quality of the bail-security”).

York on Smith Act violation charges.<sup>46</sup>

The defendants appealed to the Supreme Court, which began its opinion by analyzing the history of bail in America.<sup>47</sup> The Court noted a right to bail for individuals arrested and charged with non-capital offenses, beginning with the Judiciary Act of 1789 and progressing to the modern Federal Rules of Criminal Procedure, Rule 46.<sup>48</sup> In discussing the right to bail, the Court noted:

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.<sup>49</sup>

From this premise, the Court further emphasized that the historical and modern purpose of bail had been to serve as an assurance that defendants would appear at trial.<sup>50</sup> The Court went on to reason, logically, that bail that was set at any amount higher than “reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”<sup>51</sup> The government argued that the Court should depart from that logic because the defendants were members of a conspiracy, thus making them more likely to flee.<sup>52</sup> The Court flatly rejected that argument by reasoning that “[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.”<sup>53</sup>

Commentators have noted that the *Stack* decision is an important case regarding bail and pretrial release for two reasons.<sup>54</sup> First, there is strong language recognizing a historical and modern right to bail.<sup>55</sup> Second, commentators have argued that the Court supported the idea of bail

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46. *Stack*, 342 U.S. at 3–4.

47. *Id.* at 4.

48. *Id.*

49. *Id.* (citation omitted).

50. *Id.* at 5.

51. *Id.*

52. *Id.* at 5–6.

53. *Id.* at 6.

54. SCHNACKE ET AL., *supra* note 17, at 8.

55. *Id.*

administration based on an individual assessment of defendants.<sup>56</sup> They argue that the notion of individualized assessment is further supported by language in Justice Jackson's concurrence.<sup>57</sup> In his concurrence, Justice Jackson echoed the majority's recognition of the historical and modern importance of a right to bail.<sup>58</sup> Justice Jackson also advocated for an individualized assessment for each defendant in bail administration.<sup>59</sup> He reasoned that the "question [of bail] relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance."<sup>60</sup>

Though the Supreme Court's holding in *Stack* was a clear win for bail proponents, shortly thereafter the Court issued a ruling in *Carlson v. Landon*, which demonstrated that the right to bail before trial is not always guaranteed.<sup>61</sup> In *Carlson*, four non-citizens were arrested and charged with violating the Internal Security Act of 1950.<sup>62</sup> The four defendants argued that being held without bail while the government determined their deportability violated the Eighth Amendment.<sup>63</sup> The Court rejected the argument that the Eighth Amendment "compels an allowance of bail in a reasonable amount" by noting that "the very language of the [Eighth] Amendment fails to say all arrests must be bailable."<sup>64</sup> The Court concluded that the Eighth Amendment's protection against excessive bail did not require bail to be allowed in cases like this.<sup>65</sup>

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56. *Id.*

57. *Id.* at 9.

58. *Stack*, 342 U.S. at 7–8 (Jackson, J., concurring) ("The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial.")

59. *Id.* at 9 ("Each accused is entitled to any benefits due to his good record, and misdeeds or bad record should prejudice only those who are guilty of them.")

60. *Id.*

61. 342 U.S. 524, 545 (1952); see also SCHNACKE ET AL., *supra* note 17, at 9 (noting that *Carlson* "clarified that the traditional right to freedom before conviction in the federal system was not, in fact, absolute.")

62. All four defendants were charged with being members of the Communist Party. *Carlson*, 342 U.S. at 528.

63. *Id.* at 529.

64. *Id.* at 544–46.

65. *Id.* at 546. The Court began its analysis by framing the issue as follows: "Here we meet the argument that the Constitution requires by the Eighth Amendment . . . the same reasonable bail for alien Communists under deportation charges as it accords citizens charged with bailable criminal offenses." *Id.* at 544–45.

While *Carlson* somewhat diminished the forceful language about the right to bail and pretrial release found in *Stack*, it is important to note that the Court in *Carlson* was confronted with a very different scenario, one which implicated immigration law and deportation proceedings.<sup>66</sup> There are three main takeaways from the Court's decision in both of these cases. First, though there is no absolute right to bail, the Court believes it is important and well established in history.<sup>67</sup> Second, where the right to bail is provided, the Court has arguably expressed that bail should be determined on individualized assessments.<sup>68</sup> Third, the purpose of monetary bail historically was to secure the presence of the defendant at trial, and the amount must be "reasonably calculated," and no higher than, to serve that purpose.<sup>69</sup>

### C. Federal Bail Reform

After the Supreme Court's decisions in *Stack* and *Carlson*, scholarly interest in bail administration peaked.<sup>70</sup> Many of the studies conducted throughout the 1950s and early 1960s exposed the problems and injustices that defendants faced across many jurisdictions.<sup>71</sup> The studies often highlighted problems like the oppressive role of bondsmen; the overwhelming number of low-income defendants who remained incarcerated pretrial because they were unable to afford bail; and the limited role that courts played in the assessment of bail.<sup>72</sup> The Vera Foundation<sup>73</sup> conducted a study with New York University Law School called the Manhattan Bail Project, which sought alternatives to monetary bail by conducting interviews with defendants and providing courts with that information.<sup>74</sup> Using the interview information, the project members argued that low-risk defendants should be released on their own personal recognizance without having to post

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66. *Id.* at 528.

67. *See id.* at 545; *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

68. *Stack*, 342 U.S. at 5–6, 9.

69. Otherwise, the bail would be "excessive" under the Eighth Amendment. *Id.* at 5.

70. *See* SCHNACKE ET AL., *supra* note 17, at 9–10.

71. *Id.*

72. *See id.* at 10 (citation omitted).

73. The Vera Foundation was the precursor to the Vera Institute of Justice. *Id.*

74. *Id.*

monetary bail.<sup>75</sup> The project was an overwhelming success, with 65 percent of the people interviewed being released without monetary bail and less than one percent of those released not appearing for court by the project's third year of operation.<sup>76</sup>

Studies and programs like the Manhattan Bail Project "laid the foundation for the bail reform movement of the 1960s," which began with the National Conference on Bail and Criminal Justice in 1964.<sup>77</sup> U.S. Attorney General Robert Kennedy brought together over 400 judges, defense attorneys, prosecutors, bondsmen, prison guards, and police officers to discuss and analyze alternatives to the monetary bail system.<sup>78</sup> The conference covered a wide range of alternatives to monetary bail and potential risks from the proposed alternatives.<sup>79</sup> In closing the conference, Attorney General Robert Kennedy remarked:

What has been made clear today, in the last two days, is that our present attitudes toward bail are not only cruel, but really completely illogical. What has been demonstrated here is that usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?<sup>80</sup>

Shortly before the conference, legislators introduced a series of bills in the Senate to reform bail in the federal system.<sup>81</sup> Two years later, Congress passed the Federal Bail Reform Act of 1966, the first federal bail reform since the Judiciary Act of 1789.<sup>82</sup> The Act largely provided that defendants charged with non-capital offenses should be released on their personal recognizance unless the court

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75. *Id.*

76. The Manhattan Bail Project inspired other cities, like Washington, D.C., to launch similar programs. *Id.*

77. *Id.* at 10, 11.

78. *Id.* at 11.

79. Topics included: "release on [personal] recognizance, release on police summons, setting high money bail bonds to prevent pretrial release for public safety purposes . . ." *Id.*

80. *Id.* at 11–12.

81. *Id.* at 12.

82. *Id.*

determined that the defendant's personal recognizance would not ensure that he or she would appear at trial, in which case the judge should choose the least-restrictive measure to assure the defendant's appearance.<sup>83</sup> In cases where the defendant was charged with a capital offense, the defendant's release was conditioned on a finding by the judge that the defendant (1) would appear for future court dates and (2) was not a danger to the community.<sup>84</sup>

Overall, the Bail Reform Act of 1966 was very influential amongst the states and was lauded by bail reform proponents.<sup>85</sup> At the federal level, many jurisdictions began implementing pretrial service programs, which provided courts with information about defendants to help judges make more informed decisions about bail.<sup>86</sup> However, throughout the late 1960s and 1970s, critics of the Bail Reform Act emerged.<sup>87</sup> In the 1970s, the public became concerned about crime and, in turn, crimes committed by people released on bail.<sup>88</sup> Violent crimes committed by defendants released on bail were widely publicized, generating public outrage and criticism of bail administration under the Bail Reform Act of 1966.<sup>89</sup> The 1966 Act allowed judges to consider community safety only in cases where individuals were charged with capital offenses, or awaiting sentencing or appeal, which public opinion considered to be far too narrow grounds for something as important as public safety.<sup>90</sup>

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83. *Id.* (noting the Bail Reform Act also contained the following provisions: "(1) a presumption in favor of releasing non-capital defendants on their own recognizance; (2) conditional pretrial release with conditions imposed to reduce the risk of failure to appear; (3) restrictions on money bail bonds, which the court could impose only if non-financial release options were not enough to assure a defendant's appearance; (4) a deposit money bail option, allowing defendants to post a 10% deposit of the money bail bond amount with the court in lieu of the full monetary amount of a surety bond; and (5) review of bail bonds for defendants detained for 24 hours or more").

84. This standard was also used for defendants who were convicted and waiting for sentencing or appeal. *Id.*

85. *Id.*

86. *Id.* at 17.

87. *Id.* at 13–17. For example, professional organizations like the American Bar Association criticized the Bail Reform Act of 1966 for failing to implement preventive detention (i.e., expressly allowing judges to consider a defendant's future danger to the community), and failing to abolish the compensated surety system (i.e., bondsmen). *Id.* at 14–15.

88. *Id.* at 17.

89. *Id.*

90. *Id.*

Taking into consideration the problem of crimes committed by defendants released on bail, Congress amended the bail laws by passing the Bail Reform Act of 1984 to expand the scope of public safety considerations in bail administration.<sup>91</sup> The Bail Reform Act of 1984 was amended to allow

pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . 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*.<sup>92</sup>

Thus, the 1984 “Act create[d] a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.”<sup>93</sup>

In *United States v. Salerno*, defendants who were denied bail facially challenged the 1984 Act’s presumption of pretrial detention, arguing it violated due process and the Eighth Amendment.<sup>94</sup> In *Salerno*, two alleged conspirators were charged with multiple counts of Racketeer Influenced and Corrupt Organizations Act violations.<sup>95</sup> At the defendants’ arraignment, the Government moved to have the defendants detained pretrial, arguing that “no condition of release would assure the safety of the community or any person.”<sup>96</sup> After a hearing, the district court granted the Government’s pretrial detention motion. The defendants appealed, arguing that the Bail Reform Act of 1984 “permits pretrial detention on the ground that the arrestee is likely to commit future crimes,” which is unconstitutional.<sup>97</sup> The Second Circuit reversed the district court, holding “our criminal law system holds persons accountable for past actions, not anticipated future actions.”<sup>98</sup>

In addressing *Salerno*’s Eighth Amendment challenge to the Bail Reform Act of 1984, the Supreme Court began its

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91. *Id.*

92. 18 U.S.C. § 3142(b) (2008) (emphasis added).

93. SCHNACKE ET AL., *supra* note 17, at 18.

94. 481 U.S. 739 (1987).

95. *Id.* at 743.

96. *Id.*

97. *Id.* at 744.

98. *Id.* at 745.

analysis by noting that while the Eighth Amendment proscribes excessive bail, it “of course, says nothing about whether bail shall be available at all.”<sup>99</sup> The defendants argued that despite the lack of an explicit right to bail, precedent like *Stack* dictated that limitations on bail should be based solely on “considerations of flight” and not possible future crimes.<sup>100</sup> The Court briefly touched on the importance of its precedent granting a right to bail reasonably calculated to assure the defendant’s appearance at trial, but greatly emphasized that, under the Eighth Amendment, the government is not prohibited from regulating other interests, like public safety, through the use of pretrial detention.<sup>101</sup> The Court went on to hold:

Nothing in the text of the Bail Clause limits permissible Government considerations solely to questions of flight. The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be “excessive” in light of the perceived evil . . . . We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.<sup>102</sup>

After *Salerno*, it became clear that the underlying considerations for a right to bail were twofold: to assure the appearance of the accused at trial and to ensure public safety.<sup>103</sup> *Salerno* serves as the authority and intellectual foundation behind preventive detention (i.e., denying bail altogether for defendants charged with certain offenses).<sup>104</sup>

Commentators soon began to note that jail populations

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99. *Id.* at 752.

100. *Id.*

101. *Id.* at 753 (“[W]hile we agree that a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.”).

102. *Id.* at 754–55.

103. SCHNACKE ET AL., *supra* note 17, at 18 (noting that by 1999 “at least 44 states and the District of Columbia [have] statutes that included public safety, as well as risk of failure to appear, as an appropriate consideration in the pretrial release decision”).

104. *See* 481 U.S. at 752.

were rising at an alarming rate as a result of the Bail Reform Act of 1984 and the Supreme Court's decision in *Salerno*.<sup>105</sup> This led many commentators to conduct research and studies about the various problems derived from the bail system and pretrial detention in America.<sup>106</sup> The next Part explores the various problems resulting from reliance on monetary bail, which causes many low-risk, low-income individuals to be unjustly detained pretrial.

## II. PRETRIAL DETENTION & THE "BAIL FAIL"<sup>107</sup>

Though there has not been wide-sweeping bail reform legislation at the federal level since the Bail Reform Act of 1984, its effects have developed over the last thirty years and led to a renewed public interest in bail and pretrial release.<sup>108</sup> Throughout the 1990s and early 2000s, organizations like the National Association of Bail Insurance Companies and the American Legislative Exchange Council focused their lobbying and political power on eliminating pretrial services programs and pretrial release on nonmonetary bail, while organizations like the Pretrial Services Resource Center opposed such efforts.<sup>109</sup> The efforts on both sides of the issue remain mixed—some jurisdictions, like Washington, D.C., have implemented pretrial services programs and rarely use monetary bail, while others rely heavily on monetary bail and do not have pretrial services programs.<sup>110</sup> Regardless, recent studies and scholarly articles on bail administration and its effect on pretrial detention have garnered national attention.<sup>111</sup>

On June 1, 2011, at the National Symposium on Pretrial Justice, then-U.S. Attorney General Eric Holder began his address by noting the progress made since the National Conference on Bail and Criminal Justice convened by Attorney

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105. See SCHNACKE ET AL., *supra* note 17, at 20.

106. See *id.*

107. Name coined by NEAL, *supra* note 39, at 3.

108. See SCHNACKE ET AL., *supra* note 17, at 21.

109. *Id.* (noting the American Legislative Exchange Council is a political organization "consisting of state legislators and conservative policy advocates").

110. SCHNACKE, *supra* note 5, at 63 (discussing D.C.'s pretrial services agency while noting that only half of the judicial districts in Colorado have pretrial service programs to "screen and investigate defendants for pretrial risk").

111. *Id.* at 19 (noting that this is "The Third Generation of Bail Reform" in America).

General Robert Kennedy nearly fifty years earlier.<sup>112</sup> Holder further noted that while pretrial justice reform has made improvements, there are still many problems.<sup>113</sup> He remarked:

Across the country, nearly two thirds of all inmates who crowd our county jails – at an annual cost of roughly nine billion taxpayer dollars – are defendants awaiting trial. That’s right, nearly two thirds of all inmates. Many of these individuals are nonviolent, non-felony offenders, charged with crimes ranging from petty theft to public drug use. And a disproportionate number of them are poor. They are forced to remain in custody – for an average of two weeks, and at a considerable expense to taxpayers – because they simply cannot afford to post the bail required – very often, just a few hundred dollars – to return home until their day in court arrives.<sup>114</sup>

Attorney General Holder addressed some of the most pressing problems resulting from the monetary bail system, but his statement about mass incarceration and low-income defendants is only a glance at the pervasive problems that stem from our monetary bail system.

This Part discusses the problems with monetary bail and its effect on pretrial detention. Section A explores the costs associated with bail and pretrial detention. Section B discusses the burden of pretrial detention on defendants, their families, and the communities in which they live.

#### A. *The Price of Bail*

City and county jails across the country normally admit and process anywhere from eleven million to thirteen million people per year.<sup>115</sup> Annually, there are around 750,000 people in local and county jails, with around 450,000 detained *pretrial* because of either an inability to afford bail or denial of bail

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112. Eric Holder, Att’y Gen., U.S. Dep’t of Justice, Address at the National Symposium on Pretrial Justice (June 1, 2011), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice> [<https://perma.cc/RW73-4BMR>].

113. *Id.*

114. *Id.*

115. See NEAL, *supra* note 39, at 15; see also Pinto, *supra* note 2.

through preventive detention.<sup>116</sup> Six out of every ten people in jail are awaiting trial, while *ninety percent* of defendants who remain in pretrial detention are there because they have not posted bond.<sup>117</sup> Pretrial detention for one defendant is estimated to cost an average of \$60 per day, but, depending on the jurisdiction, can cost as much as \$200 per day.<sup>118</sup> In county jails alone, this amounts to an annual cost of around \$9 billion for taxpayers.<sup>119</sup>

Bail continues to be set at higher amounts, which further increases the number of people who are detained pretrial.<sup>120</sup> One study shows that from 1992 to 2006, average bail amounts drastically rose by over \$30,000—representing an increase of almost 100 percent.<sup>121</sup> For defendants unable to post bail who are detained until their hearings, the average amount of bail rose from \$40,000 in 1992 to \$90,000 in 2006,<sup>122</sup> a 125 percent increase. Overall, the median price of bail for those detained pretrial has increased by \$15,000 since 1992,<sup>123</sup> an increase of 150 percent. This information is particularly troublesome when studies show that the number of pretrial inmates has continued to rise, though crime has gone down, and that the number of pretrial inmates is largely related to the imposition of monetary bail for pretrial release.<sup>124</sup> As a result of the overwhelming amount of people detained pretrial, and sometimes throughout the entire process until their cases are resolved, jails face significant overcrowding problems.<sup>125</sup>

The bail system in America has had a devastating impact on low-income people accused of crimes.<sup>126</sup> According to a Bureau of Justice Statistics survey from 1990 to 2004, there is a “direct relationship between the bail amount and the

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116. SCHNACKE ET AL., *supra* note 17, at 20; Pinto, *supra* note 2.

117. Pretrial Justice Institute, *Bail in America: Unsafe, Unfair, Ineffective* (2014), <http://www.pretrial.org/the-problem/> [<https://perma.cc/NVL8-EQ6W>].

118. *Id.*

119. NEAL, *supra* note 39, at 4.

120. *Id.* at 10.

121. *Id.* (citing a Bureau of Justice Statistics survey of felony cases in the seventy-five most populous U.S. counties).

122. *Id.* (noting “an average bail of \$40,000 in 1992 to \$90,000 in 2006”).

123. *Id.* (“Since 2000, the median bail amount for those detained has been \$25,000, up from \$10,000 in 1992.”).

124. SCHNACKE ET AL., *supra* note 17, at 21.

125. *Id.* at 20 (noting that in 2006 local jails operated at 94% of their capacity).

126. *See* NEAL, *supra* note 39, at 13 (describing the negative impacts monetary bail has on low-income individuals and their families).

probability of release.”<sup>127</sup> The study found that one defendant out of every ten was released when bail was set at more than \$100,000, slightly less than half of defendants were released when bail was set between \$10,000 and \$24,999, and more than fifty percent of defendants were released when bail was set at less than \$10,000.<sup>128</sup> An even more jarring example of the disproportionate impact on low-income individuals is in New York City, where each year around 45,000 people are detained pretrial because they cannot afford to post bail.<sup>129</sup> Even when bail in nonfelony cases is set at \$500 or less, only 15 percent of defendants can afford to post bail and are released prior to trial.<sup>130</sup>

### B. *The Price of Pretrial Detention*

Commentators have studied and written extensively about the burdens of pretrial detention on the individual defendant. Some have argued that defendants subject to pretrial detention suffer the same deprivations of liberty, property, and privacy that the criminal justice system imposes on convicted defendants.<sup>131</sup> When low-income defendants charged with low-level crimes are detained pretrial, they are often detained “with convicted criminals and potentially dangerous defendants who await trial.”<sup>132</sup> Thus, they are exposed to more severe criminal behavior and violence during their detention while awaiting trial.<sup>133</sup>

The influence that pretrial detention has on convictions and the lengths of sentences imposed is an extreme injustice.<sup>134</sup> In 2006, one study found that prosecutors in felony cases achieved a conviction rate of 68 percent; however, 96 percent of those convictions were the result of guilty pleas, and only three

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127. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1360 (2014).

128. *Id.* (“Simply put, defendants without assets cannot obtain bail.”).

129. Pinto, *supra* note 2.

130. *Id.* (stating that bail is set at \$500 or less in only one-third of nonfelony cases).

131. *See* Wiseman, *supra* note 127, at 1353–54 (noting defendants detained pretrial “are taken from their communities and physically barred from the outside world . . . . Their conversations are constantly monitored . . . [and they] are often . . . detained for months”).

132. *Id.* at 1354.

133. *Id.*

134. Pretrial Justice Institute, *supra* note 117.

percent of felony defendants were convicted after having taken their cases to trial.<sup>135</sup> Many defendants are thus pressured to plead guilty instead of taking their cases to trial, simply because they cannot afford bail.<sup>136</sup> Moreover, defendants detained pretrial who have charges that could result in sentences of less than one year in jail have four times the likelihood of being sentenced to jail and, on average, receive three times longer sentences than defendants released pretrial.<sup>137</sup> Defendants kept in pretrial detention who are charged with crimes that could result in sentences of more than one year in prison have three times the likelihood of being sentenced to prison and generally receive twice as long of a sentence, when compared to defendants released prior to trial facing the same charges.<sup>138</sup> The defendant who remains detained pretrial simply because of an inability to pay bail faces much harsher sentencing consequences once convicted.<sup>139</sup>

Pretrial detention creates additional problems that may not seem readily apparent. For example, some have argued that the incentive to plead guilty, though innocent, instead of remaining detained pretrial, creates more dangerous communities because the person who actually committed the offense remains at large.<sup>140</sup> Further, others have argued that,

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135. NEAL, *supra* note 39, at 26.

136. *Id.* (quoting Robin Steinberg, an attorney with the Bronx Defenders, saying, “We see clients at arraignment not wanting to plea, saying they want to fight their case. Then they hear the bail that the prosecutor is going to ask for, and they’ll turn to their defense lawyer and say, ‘I’ll take the plea.’”); HUMAN RIGHTS WATCH, *supra* note 39, at 31 (“Judges, prosecutors, and defense counsel all know that defendants at arraignments who face the prospect of pretrial detention because they cannot post bail are likely to agree to plea bargains.”).

137. Pretrial Justice Institute, *supra* note 117.

138. *Id.*

139. Longer sentencing for those detained pretrial could be explained by defendants with prior criminal convictions who, thus, receive higher bail and harsher sentencing. While this may be true in some cases, studies also show that “first time defendants are convicted and sentenced more harshly than those with previous convictions . . . .” NEAL, *supra* note 39, at 26 (footnote omitted). Accordingly, the relationship between harsher sentences and pretrial detention cannot be explained only by factors such as a defendant’s criminal history. J.C. Oleson et al., *Pretrial Detention Choices and Federal Sentencing*, 78 Fed. Probation 1, 13 (June 2014), [http://www.uscourts.gov/sites/default/files/june2014\\_final\\_proof\\_6\\_11\\_2014.pdf](http://www.uscourts.gov/sites/default/files/june2014_final_proof_6_11_2014.pdf) [<https://perma.cc/RXF7-24DN>] (“There is a consensus . . . that pretrial detention is associated with negative effects on sentencing, but the precise causal mechanisms of these relationships remain unknown.”).

140. NEAL, *supra* note 39, at 26 (“For every person that falsely pleads guilty, the person who truly committed the offense remains unaccounted for in the

at the very least, this is a bad system because it skews data on how we determine who may pose a legitimate risk to communities.<sup>141</sup> Additionally, many defendants who are unable to afford bail, even when set at low amounts, lose their jobs due to their pretrial detention.<sup>142</sup> As a result, the defendant's family loses critical financial support, often resulting in further loss to the defendant and his or her family of housing, transportation, child care, and basic necessities, like food and utilities.<sup>143</sup> One commentator has argued that defendants who lose their jobs due to pretrial detention can even have a negative impact on the economy.<sup>144</sup> To make matters worse, some defendants detained pretrial are charged processing and daily fees for "room and board," which they are expected to pay regardless of whether the charge is dropped or they win at trial.<sup>145</sup> Finally, even if low-income defendants are able to scrape enough money together to post bail, this often imposes a great burden on them and their families.<sup>146</sup>

Monetary bail and its direct effect on pretrial detention have enormous impacts on the entire criminal justice system. While some of the most draconian effects are felt by defendants and their families, pretrial detention also creates excessive tax burdens and skews data and studies that are meant to help prosecutors and judges gauge potential threats to community safety. Such facts seem even more troublesome when considering that a defendant's ability to pay bail is neither an indication of guilt nor of the defendant's threat to the community upon release.<sup>147</sup> These facts and studies illustrating the injustices of imposing monetary bail on low-income defendants have garnered national attention, inspiring academic, legal, and legislative efforts aimed at reforming bail systems across jurisdictions.

On the academic front, one commentator has argued that the administration of monetary bail and its direct effect on

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community and has not been held responsible for his or her actions.").

141. *Id.* (noting "researchers are just getting a good idea of which people are more likely to plead guilty regardless of their guilt or innocence").

142. Pinto, *supra* note 2.

143. Wiseman, *supra* note 127, at 1356–57.

144. *Id.* at 1357.

145. Appleman, *supra* note 19, at 1316–17 (noting Michigan assesses a \$12 processing fee and a \$60 daily fee).

146. Wiseman, *supra* note 127, at 1360 (finding low-income defendants who post bail will be forced to forego paying for basic necessities).

147. See NEAL, *supra* note 39, at 21, 26.

pretrial detention violates the Sixth Amendment right to a jury trial,<sup>148</sup> while another has argued that the Eighth Amendment prohibition of excessive bail includes a right to electronic monitoring, instead of pretrial detention.<sup>149</sup> On the legal front, civil rights lawyers with Equal Justice Under Law have filed numerous class actions challenging monetary bail systems throughout the country, some of which have resulted in settlements that reform bail practices, and even court holdings declaring that certain jurisdictions' reliance on monetary bail violates the Equal Protection Clause.<sup>150</sup> In one of these suits, the Department of Justice filed a statement of interest noting that "any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pre-trial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy."<sup>151</sup> Finally, policymakers across jurisdictions have introduced legislation aimed at reforming monetary bail practices. In 2015, New York City announced plans to increase pretrial supervision funding for low-risk defendants to reduce reliance on monetary bail and pretrial detention.<sup>152</sup> Recently, New Mexico, Illinois, Kentucky, New Jersey, Oregon, and Colorado have undergone legislative efforts to reform monetary bail practices.<sup>153</sup>

Colorado serves as an interesting example because its 2013 reform represented "the first major overhaul [of its] pretrial bail statute since 1972."<sup>154</sup> Furthermore, the Colorado General Assembly's policy goals—to decrease reliance on monetary bail and prevent unnecessary pretrial detention for low-risk

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148. Appleman, *supra* note 19, at 1321.

149. Wiseman, *supra* note 127, at 1350.

150. Equal Justice Under Law, *Ending the American Money Bail System*, <http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/> (last visited Jan. 13, 2017) [<https://perma.cc/T3VH-5ATR>].

151. Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Ala. Feb. 13, 2015), <https://www.justice.gov/file/340461/download> [<https://perma.cc/YKZ9-TG5C>].

152. Eric Levitz, *A Victory in Bail Reform for Criminal Justice Advocates*, MSNBC (July 28, 2015), <http://www.msnbc.com/msnbc/major-victory-bail-reform-criminal-justice-advocates> [<https://perma.cc/N9W5-WZK3>].

153. Nick Wing, *New Mexico Votes to Reform Bail System That Jails People Just Because They're Poor*, HUFFINGTON POST (Nov. 8, 2016), [http://www.huffingtonpost.com/entry/new-mexico-amendment1\\_us\\_5817a3cfe4b0990edc32ed05](http://www.huffingtonpost.com/entry/new-mexico-amendment1_us_5817a3cfe4b0990edc32ed05) [<https://perma.cc/6D9P-84TN>].

154. SCHNACKE, *supra* note 5, at 1.

defendants<sup>155</sup>—epitomize the renewed national interest in bail administration and efforts to reform bail systems that negatively impact low-risk, low-income defendants. Accordingly, the next Part focuses on Colorado’s recent bail reform and argues for implementing further reform to fully achieve the goals the state legislature set in 2013.

### III. BAIL IN COLORADO

Colorado recently reformed its bail statute to prevent unnecessary pretrial detention of low-risk defendants through limiting reliance on monetary bail, but further reform is necessary. Specifically, the Colorado General Assembly should create a strong, express presumption of release on unsecured personal recognizance bonds, unless it has been demonstrated to the court that the defendant poses a risk of flight or a threat to community safety. This Part discusses the substantive changes to Colorado’s bail statute and explains why further reform is necessary. Section A discusses the influences and impetus behind Colorado’s bail reform and the considerations of the legislature in rewriting the bail statute. Section B discusses the substantive changes to the bail statute and highlights its improvements. Section C discusses the problems that persist despite Colorado’s new bail statute. Finally, section D argues for further meaningful reform that rectifies these issues.

#### A. *Influences of Colorado’s 2013 Bail Reform*

On May 11, 2013, Colorado Governor John Hickenlooper signed into law the state’s first major bail reform law since 1972.<sup>156</sup> In addition to the statutory provisions on bail, Colorado also addresses bail in its constitution, which prohibits excessive bail in article II, section 20 and outlines preventive detention in section 19.<sup>157</sup> One commentator noted that while

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155. See *infra* section III.A.

156. SCHNACKE, *supra* note 5, at 1 (discussing H.B. 13-1236).

157. See COLO. CONST. art II, § 20 (stating “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”); *id.* § 19 (1)(a), (b) (denying bail for defendants charged with enumerated offenses after a preliminary hearing finding “proof is evident and presumption great . . . [and that] *the public would be placed in significant peril* if the accused were released on bail”) (emphasis added).

those involved in the criminal justice system knew Colorado's old bail statute needed significant reform, the real push for substantive reform came from a group in Colorado called the Commission on Criminal and Juvenile Justice (CCJJ), created in 2007.<sup>158</sup>

In 2011, CCJJ created a Bail Subcommittee, made up of judges, defense attorneys, prosecutors, law enforcement, bail bondsmen, and victim's rights representatives, to research bail and make recommendations for bail reform to the rest of CCJJ.<sup>159</sup> The Bail Subcommittee made four recommendations, all of which were approved by CCJJ, and three of which were used and implemented into Colorado's new bail statute.<sup>160</sup> The recommendations implemented by the Colorado General Assembly were: (1) "implement evidence based decision making practices and standardized bail release decision making guidelines"; (2) "limit the use of monetary bonds in the bail decision making process, with the presumption that all pretrial detainees are eligible for pretrial release"; and (3) "expand and improve pretrial approaches and opportunities in Colorado."<sup>161</sup>

One commentator has described the bail reform bill's legislative history as having three themes.<sup>162</sup> The first theme was a concern that, under the old bail statute, there was unnecessary pretrial detention of too many low-risk defendants who were detained because they could not afford to pay the amount at which their bail was set.<sup>163</sup> The second theme was that in order to address the problem of unnecessary pretrial detention, the new bail statute must reduce the use of monetary bail.<sup>164</sup> Though the bill did not eliminate the use of monetary bail, bill sponsor Representative Claire Levy said the

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158. See SCHNACKE, *supra* note 5, at 15.

159. *Id.* at 21.

160. *Id.*

161. See *id.* at 22–26 (noting the fourth recommendation to create and implement a data collection instrument "on total jail population, index crime, crime class, type of bond, bond amount, if any, length of stay, assessed risk level, and the proportion of pretrial, sentenced and hold populations" was not drafted into the bail reform bill).

162. *Id.* at 26.

163. *Id.* at 27.

164. *Id.* (noting that bill sponsor Representative Claire Levy said the "main focus of the bill is to limit the use of money bonds in the bail decision-making process with the presumption that *all* pretrial detainees are eligible for pretrial release unless they are ineligible under existing law of the constitution") (emphasis added).

new bail statute “does express a preference for least restrictive conditions that are consistent with public safety.”<sup>165</sup> The third theme was to implement “research driven, best-practices into the administration of bail,” which would further lead to limiting the use of monetary bail.<sup>166</sup>

### B. Colorado’s New Bail Statute

Under the new statute, the definition of “bail” is “a security, which may include a bond with or without monetary conditions, required by a court for the release of a person in custody set to provide reasonable assurance of public safety and court appearance.”<sup>167</sup> This new definition of bail is significant in Colorado because under the old statute “bail equaled money,” and now “it sets the tone for a statute that correctly places money on par with (if not less than, in terms of desirability) other conditions of pretrial release.”<sup>168</sup> In addition to changing the definition of “bail,” the new statute also enacted substantial changes in a section called “Setting and selection of bond type - criteria.”<sup>169</sup> The section has been summarized as mandating:

(1) the court to determine the type of bond and conditions of release; (2) review of any bond and conditions fixed upon return of an indictment or filing of the information or complaint . . . ; (3) a presumption of release under least-restrictive conditions unless the defendant is unbailable pursuant to the Constitutional preventive detention provisions; (4) individualization of conditions of release . . . and *express mandatory consideration of a defendant’s financial condition or situation*; (5) “reasonable” financial conditions, and non-statutory conditions to be “tailored to address a specific concern;” and (6) consideration of ways (including changing bond types) to avoid unnecessary pretrial detention.<sup>170</sup>

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165. *Id.* at 27–28.

166. *Id.* at 28.

167. COLO. REV. STAT. § 16-1-104(3) (2016).

168. SCHNACKE, *supra* note 5, at 30.

169. *See* COLO. REV. STAT. § 16-4-103 (2016).

170. SCHNACKE, *supra* note 5, at 46 (emphasis added).

While this language seems to favor pretrial release without imposing monetary bail for defendants who pose no flight risk or threat to community safety, the statute still provides for, and lacks a presumption against, imposing monetary bail under section 16-4-104: “Types of bond set by the court.”<sup>171</sup> Under this section, there are four types of bond available in Colorado. Subsection (a) provides for unsecured personal recognizance bonds, which does not require the defendant to pay any money to bail out of jail, but sets a monetary amount that the defendant will be liable for should he or she fail to appear.<sup>172</sup> Bonds set under subsection (b) are also unsecured personal recognizance bonds that allow the judge to impose additional non-monetary conditions, like pretrial supervision, to “reasonably ensure the appearance of the person in court and the safety of any person or persons in the community.”<sup>173</sup> The third type of bond was debated more thoroughly.<sup>174</sup> As introduced in the General Assembly, the third type of bond “contained an express presumption for release on [personal] recognizance by allowing secured money conditions only when it is determined that release on an unsecured personal recognizance bond with additional conditions . . . does not reasonably assure the appearance of the person in court or the safety of any person or persons in the community.”<sup>175</sup> After pressure from commercial bail bondsmen,<sup>176</sup> however, the language was changed in the final bill, which provides for release “on a bond with secured monetary conditions when reasonable and necessary to ensure the appearance of the person in court or the safety of any person or persons in the community.”<sup>177</sup> Bonds under subsection (d) went unchanged from the initial introduction, allowing bonds with “secured real estate conditions” only “when it is determined that release on an unsecured personal recognizance bond without monetary

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171. See COLO. REV. STAT. § 16-4-104(c)–(d).

172. SCHNACKE, *supra* note 5, at 47.

173. *Id.* at 48; COLO. REV. STAT. § 16-4-104(b).

174. See SCHNACKE, *supra* note 5, at 48.

175. *Id.* (internal quotations omitted).

176. *Id.* at 49. Defendants pay bail bondsmen a non-refundable fee (usually ten percent of the total bond amount) and pledge property or valuable items as collateral, and the bondsmen posts the defendant’s bail. Shaun Ossei-Owusu, *Poverty’s Punishment: America’s Oppressive Bail Regime*, AM. PROSPECT (Nov. 18, 2016), <http://prospect.org/article/poverty%E2%80%99s-punishment-america%E2%80%99s-oppressive-bail-regime> [<https://perma.cc/6JJ6-LRPZ>].

177. SCHNACKE, *supra* note 5, at 49 (internal quotations omitted).

conditions will not reasonably ensure the appearance of the person in court or the safety of any person or persons in the community.”<sup>178</sup>

Another substantive change to the bail statute is in the “Pretrial services programs” section.<sup>179</sup> This section strongly encourages the chief judge of each judicial district to work with county governments to create and implement effective pretrial services programs.<sup>180</sup> It also encourages pretrial services programs and community advisory boards to implement “an empirically developed pretrial risk assessment tool . . . and a structured decision-making design based upon the person’s charge and the risk assessment score.”<sup>181</sup> Though the statute does not mandate its use, many jurisdictions in Colorado use the Colorado Pretrial Assessment Tool (CPAT) to satisfy the use of an empirically developed pretrial risk assessment tool.<sup>182</sup>

Colorado’s bail statute reforms were enacted to meaningfully change bail administration in the state and to help prevent unnecessary pretrial detention for defendants who simply cannot afford bail.<sup>183</sup> While changes in the new bail statute are significant and encourage the use of individualized assessment and imposition of secured monetary bonds only after risk assessment, there are still problems that will likely allow unnecessary pretrial detention to persist. First, and most importantly, the new law does not provide low-risk defendants with a presumption of release on unsecured personal recognizance bonds.<sup>184</sup> Moreover, the statute does not eliminate the use of bond schedules,<sup>185</sup> which have been known to

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178. *Id.* at 50–51 (noting that this provision was likely unchanged because so few defendants obtain this type of secured bond) (internal quotations omitted); COLO. REV. STAT. § 16-4-104(d).

179. COLO. REV. STAT. § 16-4-106 (2016).

180. *Id.*

181. *Id.* § 16-4-106(4)(c).

182. *See* SCHNACKE, *supra* note 5, at 22.

183. *Id.* at 27–28.

184. *Id.* at 62 (noting that the statute does “place up-front money in its proper perspective—as one of many tools that judges may use, albeit sparingly if ever, to help provide reasonable assurance of court appearance”).

185. “A bond schedule is an established financial amount for specific charges or classes of charges. It is a charge-based system for setting bonds and is not based on the actual characteristics of individual offenses.” Greg Hurley, *The Constitutionality of Bond Schedules*, NAT’L CTR. FOR ST. CTS. (Jan. 2016), <http://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2016/The-Constitutionality-of-Bond-Schedules.aspx> [https://perma.cc/P54V-ZU7P].

“unintentionally foster[] the unnecessary detention of misdemeanants, indigents, and nondangerous defendants because they are unable to afford the sum mandated by the schedule.”<sup>186</sup> Finally, the new pretrial services section strongly encourages the use of pretrial services and tools like CPAT to advise judges on the right type of bond to impose on defendants, but it does not mandate pretrial services or CPAT, which is concerning because only about half of the judicial districts have pretrial service programs.<sup>187</sup>

*C. Problems Persist: Mares v. Denver County Court*

The new bail statute represents progress to help curb the problem of unnecessary pretrial detention, but because of the problems examined in section B, especially the new statute’s failure to create a presumption in favor of release on unsecured personal recognizance bonds, bail administration and unnecessary pretrial detention of low-risk, low-income defendants is likely to persist. This argument is further supported because, as at least one commentator noted, under the old bail statute “bail equaled money” and historically “Colorado law has encouraged judges to use secured money as the primary determinate of which defendants should be released or detained before their trials.”<sup>188</sup> Because Colorado law has historically encouraged judges to use secured monetary bonds as the primary mechanism for bail administration, and the commercial surety industry was successful in lobbying the General Assembly to exclude a presumption of release on unsecured personal recognizance bonds in the new statute, unnecessary pretrial detention of low-risk defendants who simply cannot afford the price of their secured monetary bonds has persisted and will likely continue to do so.<sup>189</sup> One

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186. SCHNACKE, *supra* note 5, at 43 (quoting the CCJJ recommendation, which further remarked that “bail schedules permit dangerous or risky defendants to purchase release without judicial review or other conditions tailored to prevent danger or flight”). The new law attempts to prevent problems resulting from bail schedules by mandating courts that use bond schedules to also incorporate “factors that consider the individualized risk and circumstances of a person in custody and all other relevant criteria and *not solely the level of offense.*” *Id.* at 42 (emphasis added).

187. *Id.* at 63.

188. *Id.* at 30, 62.

189. See Plaintiff’s Amended Complaint, *Mares v. Denver Cty. Ct.*, No. 14CV32341 (Colo. Dist. Ct. Feb. 27, 2015).

commentator echoed similar sentiments, remarking that the new law “will undoubtedly test people’s assumptions about practices that have become routine through habit and custom” and may lead to a “heightened realization” of the need for further reform, particularly if there is “a continuation of objectively high and unattainable bond amounts.”<sup>190</sup>

One example of problems persisting despite Colorado’s bail reform is found in a civil lawsuit brought by Donald Mares against Denver County Court judges and Presiding Judge John M. Marcucci, which was recently settled.<sup>191</sup> In May 2014, Mares was arrested on suspicion of three misdemeanors, the most serious being a Class 1 Misdemeanor.<sup>192</sup> A pretrial services report created for his case noted that Mares had a CPAT score of Category 2 and was eligible for an unsecured personal recognizance bond with additional non-monetary conditions under section 16-4-104(b) of the Colorado Revised Statutes.<sup>193</sup> The amended complaint noted that:

Under the CPAT, pretrial detainees are graded into four categories of CPAT 1 through 4. CPAT 1 are the most likely to appear and CPAT 4 are the least likely to appear. As a result, those with CPAT 1 and 2 scores are most likely able to appear based only on a personal recognizance bond whereas it is only those with CPAT 3 and 4 scores who may need some sort of cash bond to ensure court appearance.<sup>194</sup>

However, at the initial bond hearing, a Denver County magistrate informed Mares that his bond had already been set in chambers at \$1,500 with basic pretrial supervision and refused to allow Mares’s attorney to argue and present

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190. SCHNACKE, *supra* note 5, at 63.

191. Plaintiff’s Amended Complaint, *Mares*, No. 14CV32341. Though this Comment discusses only *Mares v. Denver County Court*, at least three other lawsuits were also filed against Denver County Court for its bond-setting practices under the new bail statute. See Jordan Steffen, *Denver County Judges Accused of Mishandling Bond in Misdemeanor Cases*, DENVER POST (Jan. 24, 2015, 1:00 PM), <http://www.denverpost.com/2015/01/24/denver-county-judges-accused-of-mishandling-bond-in-misdemeanor-cases/> [https://perma.cc/4NRH-X3HK]. One of these other cases, *Castorena-Loera v. Denver Cty. Ct.*, was consolidated with Mares’s cases and also resulted in a favorable settlement. See No. 14CV32342, Notice of Settlement Agreement (Colo. Dist. Ct. Sept. 10, 2015).

192. Plaintiff’s Amended Complaint, at 6, *Mares*, No. 14CV32341.

193. *Id.*

194. *Id.* at 11.

evidence regarding proper bond.<sup>195</sup>

In the civil suit, Mares claimed that the magistrate set his bond in chambers according to the Denver County Court Bond Schedule, which sets bond for all Class 1 Misdemeanors at \$1,500, “without consideration of Mr. Mares’s individual characteristics.”<sup>196</sup> The complaint alleged that because CPAT was being administered but ignored by Denver County Court judges, “[e]ligible arrested individuals [were] not being released immediately after assessment of risk.”<sup>197</sup> The complaint further alleged that because Mares was rated a CPAT 2, which placed him with an average public safety rate of 80 percent and an average appearance rate of 85 percent, he qualified for an unsecured personal recognizance bond, but was instead given a \$1,500 bond.<sup>198</sup> Mares sought, among other things, the following declaratory relief from the court: (1) that the defendants’ practice of setting bond violated Colorado law and the U.S. and Colorado Constitutions; (2) that defendants’ practice of setting bond in chambers, without hearing bail arguments, and prior to the detainee’s first appearance violated Colorado law; and (3) that the defendants’ reliance on bond schedules and ignorance of CPAT and individualized standards violated Colorado law.<sup>199</sup>

Though this case resulted in a favorable settlement with the Denver County Court,<sup>200</sup> *Mares* serves as an example for why the 2013 bail reform did not go far enough to prevent

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195. *Id.* at 7. It should also be noted that part of the dispute over how bond was set in this case regarded the implication of Colorado’s Victim Rights Act (VRA), which requires alleged victims in cases involving domestic violence be notified of and heard at any hearing where there is bond reduction or modification, but explicitly notes that an initial bond setting is not considered a bond reduction or modification hearing. *Id.* at 6. In the settlement agreement, the parties agreed that the VRA is not implicated when the hearing is an initial setting of bond by the Denver County Court. Notice of Settlement Agreement, *Mares v. Denver Cty. Ct.*, No. 14CV32341, (Colo. Dist. Ct. Sept. 10, 2015).

196. Plaintiff’s Amended Complaint, at 7, *Mares*, No. 14CV32341.

197. *Id.* at 10.

198. *Id.* at 6, 11. Mares also argued that the defendants’ failure to consider individualized standards put him at risk of losing his job and causing him further financial hardship. *Id.* at 9. The defendants acknowledged that Mares remained in jail for around ten days. Defendants’ Answer to Amended Complaint, at 15, *Mares*, No. 14CV32341.

199. Plaintiff’s Amended Complaint, at 12–13, *Mares*, No. 14CV32341. Mares also sought declaratory relief that the VRA was inapplicable at a detainee’s first setting of bond. *Id.* at 13.

200. Notice of Settlement Agreement, *Mares*, No. 14CV32341 (Colo. Dist. Ct. Sept. 10, 2015).

unnecessary pretrial detention. The Denver County Court explicitly ignored the pretrial services report, which detailed Mares's low risk of flight and threat to community safety, and instead chose to impose a monetary bond that he could not afford.<sup>201</sup> Under Colorado's old statute bail equaled money; Denver County Court echoed this notion by utilizing the bond schedule rather than considering CPAT information and argument from Mr. Mares's counsel.<sup>202</sup> The General Assembly sought to end unnecessary pretrial detention for low-risk defendants in the bail statute by, among other things, creating a presumption that all defendants are "eligible for release on bond with the appropriate and least-restrictive conditions . . . ."<sup>203</sup> But by removing the express presumption for release on unsecured personal recognizance bonds under section 16-4-104(c),<sup>204</sup> the statute allows courts to impose monetary bonds—even for defendants who pose low risks for flight and threat to community safety. Thus, for Mr. Mares bail still equaled money more than a year after the General Assembly had passed bail reform, because of the failure to establish a presumption for release on unsecured personal recognizance bonds for low-risk defendants.<sup>205</sup>

Colorado's new bail statute is a step in the right direction for both curbing unnecessary pretrial detention and working toward implementing better pretrial services and risk assessment tools, like CPAT. The new bail statute even seems like a useful tool for bringing civil suits to force judges, magistrates, and courts to consider defendants individually when determining bond type, as demonstrated by the *Mares* suit's favorable settlement.<sup>206</sup> However, like Mares lamented in the first few pages of his amended complaint, "[i]t is regrettable that it has come to filing legal action to get one court of law in this State to follow Colorado and federal statutes and constitutions . . . ."<sup>207</sup> Though it is certainly regrettable, this is exactly the type of situation that at least one commentator

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201. Plaintiff's Amended Complaint, at 6–7, *Mares*, No. 14CV32341.

202. *Id.* at 7.

203. *See supra* section III.B; COLO. REV. STAT. § 16-4-103(4)(a).

204. *See supra* section III.B; COLO. REV. STAT. § 16-4-104(c).

205. Plaintiff's Amended Complaint, *Mares*, No. 14CV32341, at 7 (noting Mares's bond was set on May 20, 2014).

206. Notice of Settlement Agreement, *Mares*, No. 14CV32341 (Colo. Dist. Ct. Sept. 10, 2015).

207. Plaintiff's Amended Complaint, *Mares*, No. 14CV32341, at 3.

envisioned “may lead to a heightened realization that other provisions of law may be in need of examination and reform.”<sup>208</sup> The next section discusses the need for further reform of Colorado’s bail statute that would help prevent the need for individuals to bring civil suits like *Mares* as a result of unjust, unnecessary pretrial detention.

#### *D. Further Reform in Colorado*

Many proponents of bail reform concerned with decreasing unnecessary pretrial detention, including the CCJJ, have advocated for a “bail/no bail (release/no release) dichotomy,” which the District of Columbia (D.C.) and federal system have incorporated statutorily.<sup>209</sup> Colorado also incorporated this into its new bail statute, which requires courts to presume every defendant is “eligible for bond with the appropriate and least-restrictive conditions . . . unless a person is otherwise ineligible for release pursuant to the provisions of section 16-4-101 and section 19 of article II of the Colorado constitution.”<sup>210</sup> But because of the problem with courts arbitrarily imposing monetary bond, like the court in *Mares*, the “release” side of the dichotomy (the presumption of release with least-restrictive conditions) does not go far enough to ensure that courts will not unnecessarily impose monetary bond on low-risk defendants. Colorado’s General Assembly should strengthen the release side of the dichotomy by creating a strong, express presumption for release on unsecured personal recognizance bonds unless it has been demonstrated that the individual poses a risk of flight or a threat to community safety.

Though some may be skeptical of enacting this reform, it is useful to explore, by way of comparison, how the release/no release dichotomy works in a jurisdiction like D.C., which has largely eliminated imposing monetary bonds altogether. D.C. has an extremely successful pretrial services agency that advises courts of various defendants’ risk for failure to appear and threat to community safety, and monitors defendants released pretrial with conditions of supervision.<sup>211</sup> In 1992, D.C. fundamentally reformed its bond code, which struck a

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208. SCHNACKE, *supra* note 5, at 63.

209. *Id.* at 23, 31.

210. COLO. REV. STAT. § 16-4-103(4)(a) (2016).

211. NEAL, *supra* note 39, at 40.

balance: it expanded the scope of offenses that were subject to preventive pretrial detention, and it prohibited the courts from imposing a financial condition that would result in pretrial detention unless the defendant committed an offense falling under the preventive detention section of the code.<sup>212</sup> Around 80 percent of people charged with offenses in D.C. are released without monetary bond, 15 percent are detained pretrial without bail, and only five percent are given a monetary bond<sup>213</sup>—but even this imposition of a monetary bond cannot result in preventive detention under D.C. Code section 23-1321(c)(3).<sup>214</sup> The most recent D.C. Pretrial Services Agency data illustrates its success with court appearance and public safety for released defendants—90 percent appeared for court, 91 percent did not incur any new arrests during the pretrial period, and 98 percent did not incur any new arrests for crimes of violence during the pretrial period.<sup>215</sup>

While establishing a D.C.-like bail system in Colorado would likely address many of the problems this Comment seeks to resolve, a more practical solution would be to improve the recently reformed bail statute. To effectively prevent the practice of imposing monetary bonds on low-risk defendants in Colorado, the General Assembly should again reform its bail statute to create a strong, express presumption in favor of release with unsecured personal recognizance bonds under sections 16-4-104(a) and (b). As noted above, the new bail statute's section on "Types of bond set by the court" was introduced with a presumption of release on personal recognizance, which, after pressure from the commercial surety industry, was removed as a source of compromise.<sup>216</sup>

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212. Bruce Beaudin, *The D.C. Pretrial Services Agency: Lessons from Five Decades of Innovation and Growth*, PRETRIAL JUST. INST.: CASE STUDIES 5 (2009), <https://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf> [<https://perma.cc/J9Y8-46E9>]. See also D.C. CODE § 23-1322 (2015); *id.* § 23-1321 (2015).

213. Beaudin, *supra* note 212, at 2.

214. D.C. CODE § 23-1321(c)(3) ("A judicial officer may . . . impose such a financial condition to reasonably assure the defendant's presence at all court proceedings *that does not result in the preventive detention of the person, except as provided in § 23-1322(b).*") (emphasis added).

215. *Performance Measures*, Pretrial Services Agency for the District of Columbia, [https://www.psa.gov/?q=data/performance\\_measures](https://www.psa.gov/?q=data/performance_measures) (last visited Feb. 12, 2017) [<https://perma.cc/Q34B-L5JR>] (noting the most recent statistics were from October 1, 2014 to June 30, 2015).

216. See *supra* section III.B; SCHNACKE, *supra* note 5, at 49.

Specifically, section 16-4-104(c) as introduced provided:

*A bond with secured monetary conditions when it is determined that release on an unsecured personal recognizance bond with additional conditions but without monetary conditions does not reasonably ensure the appearance of the person in court or the safety of any person or persons in the community.*<sup>217</sup>

As enacted, the presumption was removed and subsection (c) now merely provides: “A bond with secured monetary conditions when reasonable and necessary to ensure the appearance of the person in court or the safety of any person or persons or the community.”<sup>218</sup> Notably, bonds with secured real estate conditions under section 16-4-104(d) still provide for the presumption of release on unsecured personal recognizance bonds.<sup>219</sup>

One commentator has noted that even though the presumption for release on unsecured personal recognizance bonds was ultimately removed from section 16-4-104(c), the bail statute’s “structuring bond type alternatives in [section 16-4-104] from least to most restrictive . . . suggest[s] legislative intent to use Subsection (c) only as a last resort.”<sup>220</sup> The commentator further reasoned that the provision “requiring judges to presume pretrial release with ‘least restrictive conditions’ [means that] the General Assembly has clearly indicated its continued desire for judges to impose secured financial conditions only when release through a [sic] less-restrictive methods—typically nonfinancial conditions or unsecured monetary conditions—will not suffice.”<sup>221</sup> While these observations are true, cases like *Mares* demonstrate that, in practice, courts may simply ignore the statute’s implicit preference for unsecured personal recognizance bonds, even

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217. H.B. 13-1236, 69th Gen. Assemb., Reg. Sess. (Colo. 2013), [http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/6E02E86379A7876487257AF0007C1217?open&file=1236\\_01.pdf](http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/6E02E86379A7876487257AF0007C1217?open&file=1236_01.pdf) [https://perma.cc/9USN-7E22] (emphasis added).

218. COLO. REV. STAT. § 16-4-104(c).

219. *Id.* § 16-4-104(d) (“A bond with secured real estate conditions when it is determined that release on an unsecured personal recognizance bond without monetary conditions will not reasonably ensure the appearance of the person in court or the safety of any person or persons or the community.”).

220. SCHNACKE, *supra* note 5, at 49.

221. *Id.*

when setting bond for low-risk defendants. Therefore, reforming the section on “Types of bond set by the court” to explicitly create a strong presumption of release on unsecured personal recognizance bonds would better achieve the three legislative themes present during the legislative history of the new bail statute.<sup>222</sup>

Because of the risk that Colorado courts may continue to equate bail with money under the statute, like the court in *Mares*, the General Assembly should reform the “Types of bond set by the court” section to create a strong, express presumption of release on unsecured personal recognizance bonds unless the defendant presents a risk of flight or a threat to community safety. The following is a recommendation of what the new section would look like, with the substantive changes in bold:

§ 16-4-104. Types of bond set by the court.

(1) The court shall determine, after consideration of all relevant criteria, which of the following types of bond is appropriate for the pretrial release of a person in custody, subject to the relevant statutory conditions of release listed in section 16-4-105. The person may be released upon execution of:

(a) An unsecured personal recognizance bond in an amount specified by the court. The court may require additional obligors on the bond as a condition of the bond.

(b) An unsecured personal recognizance bond with additional nonmonetary conditions of release designed specifically to reasonably ensure the appearance of the person in court and the safety of any person or persons or the community;

(c) A bond with secured monetary conditions, **which the**

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222. See *supra* section III.A (noting the themes were: (1) unnecessary pretrial detention of low-risk defendants who could not afford the price at which their bail was set; (2) to prevent unnecessary pretrial detention of low-risk defendants, the new statute should reduce the use of monetary bail; and (3) limiting the use of monetary bail by implementing “research driven, best-practices into the administration of bail”).

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**court shall presume to be improper unless it has been demonstrated that release on an unsecured personal recognizance bond under paragraphs (a) or (b) but without monetary conditions will not reasonably ensure the appearance of the person in court or the safety of any person or persons or the community.**

...

**(d) A bond with secured real estate conditions, which the court shall presume to be improper unless it has been demonstrated that release on an unsecured personal recognizance bond under paragraphs (a) or (b) but without monetary conditions will not reasonably ensure the appearance of the person in court or the safety of any person or persons or the community.**

...

**(e) A court may rely on information provided from a pretrial services program established under section 16-4-106 as evidence demonstrating that release on an unsecured personal recognizance bond under paragraphs (a) or (b) but without monetary conditions will not reasonably ensure the appearance of the person in court or the safety of any person or persons or the community.<sup>223</sup>**

This statutory reform would achieve several positive outcomes. First, this new statute would help accomplish the legislative goal of preventing unnecessary pretrial detention. Creating a strong, express presumption in favor of release on unsecured personal recognizance bonds furthers the goal of a release/no release dichotomy by ensuring that defendants will be released unless it has been demonstrated to the court that they present a flight risk or a threat to community safety. Moreover, the presumption language in the suggested reform is much clearer and stronger than the language originally proposed (but removed) for subsection (c) and the presumption

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223. The additional statutory language under subsections (c) and (d) where the ellipses appear would be left unchanged.

language that currently exists in subsection (d).<sup>224</sup> This strong presumption would undoubtedly cause a fight from the commercial surety industry in Colorado, which was a predominant reason for removing the presumption under subsection (c) in 2013.<sup>225</sup> Regardless, the suggested reform would strike a proper balance by creating a presumption of release without monetary conditions, while still allowing the court to impose monetary bond in circumstances where the defendant presents a high risk of flight or threat to community safety.

Second, the suggested reform would act like a roadmap for judges and attorneys at bail hearings, thus improving judicial economy. Because of the strong presumption in favor of release on unsecured personal recognizance bonds under subsections (a) and (b), this suggested reform would avoid unnecessary pretrial detention of low-risk defendants, unlike in *Mares*, because it requires demonstrating that the individual presents a flight risk or threat to community safety before a monetary bond or a bond secured with real estate conditions may be imposed. Accordingly, judges setting bail must start from the premise that the defendant will be released on an unsecured personal recognizance bond, and then the district attorney must demonstrate that such a bond will not ensure the defendant's appearance or that the defendant poses a threat to the community. Subsection (e) recognizes reports from pretrial services programs as preferred and sufficient evidence to rebut the presumptions in sections (c) and (d), further aiding in the suggested reform's roadmap. That provision would encourage district attorneys to present information, like CPAT reports from pretrial services programs, to demonstrate to the court why it should impose monetary or real estate bonds for defendants who present a high risk of flight or threat to community safety. Even in jurisdictions that have not established pretrial services programs, low-risk defendants will be far less likely to be unnecessarily detained pretrial, because district attorneys would need to demonstrate why individual defendants present such a risk of flight or threat to community safety that it merits the court imposing a monetary bond as a condition of release. Therefore, such a reform to bail

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224. See *supra* section III.B; see also COLO. REV. STAT. § 16-4-104(d).

225. See *supra* text accompanying note 176.

administration would relieve courts of any confusion regarding whether bail should automatically be equated with money, like it had been under the old statute.

Finally, this presumption could lead to more jurisdictions in Colorado establishing pretrial services programs. Because a new presumption in the statute would prevent unnecessary pretrial detention for low-risk defendants, counties could use money from saved jail resources to create a pretrial services program like the 2013 bail reform encouraged all jurisdictions to do.<sup>226</sup> Subsection (e)'s explicit recognition of information from pretrial services programs as sufficient rebuttal evidence may also encourage district attorneys across jurisdictions to pressure counties to allocate resources that either implement or improve pretrial services. Because there would be a strong presumption in favor of release on unsecured personal recognizance bonds under subsections (a) or (b) that could be overcome by information provided by pretrial services programs, district attorneys and other elected officials would have a strong incentive to ensure pretrial services programs are established and adequately funded. At the same time, the suggested reform strikes a balance: it would not mandate that jurisdictions create pretrial services programs, which may be expensive for rural communities with smaller local government budgets, but it would place political pressure on elected officials and encourage them to work with county governments and the state government to allocate resources for such programs.

Importantly, this reform would achieve the goals that Colorado's General Assembly sought in its 2013 bail reform by: (1) preventing unnecessary pretrial detention for low-risk, low-income defendants; (2) limiting reliance on the use of monetary bail through a strong presumption in favor of release on unsecured personal recognizance bonds; and (3) implementing more research-driven practices for determining flight risk and threat to community safety in bail administration by encouraging jurisdictions to implement pretrial services programs and to ensure that existing pretrial services programs are well-funded.

To be clear, the opponents of bail reform make compelling arguments against non-monetary pretrial release to ensure

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226. See COLO. REV. STAT. § 16-4-106.

community safety and to prevent flight. These arguments pushed Congress to make community safety a prominent consideration for pretrial release in the Bail Reform Act of 1984.<sup>227</sup> A monetary bail system without a presumption of release on personal recognizance bonds would likely result in more pretrial detention for defendants, which, if taken to its logical extreme, may inevitably increase community safety and court appearance rates. But, as discussed above, pretrial detention results in high costs to taxpayers and has detrimental effects on defendants and their families.<sup>228</sup> The proposed statutory reform would address both community safety and flight risk concerns. Indeed, the suggested statutory reform would likely further the goals of ensuring community safety and the defendant's appearance for trial by forcing the attorneys to demonstrate to the court an individualized assessment of whether the defendant presents a risk of flight or threat to the community. Moreover, as previously discussed, this statute could lead to the creation of more pretrial services programs, which use tools like CPAT to assess defendants' flight risk and threat to the community. As pretrial services programs expand and improve under the suggested statutory reform, the information and statistics gathered through pretrial screenings could be used to predict more accurately who poses a true risk of flight and threat to community safety. Thus, the suggested statutory reforms could serve as a solution to concerns that bail reform opponents have regarding community safety and risk of flight.

A recent study analyzing pretrial outcomes in Colorado found that unsecured personal recognizance bonds achieved the most ideal pretrial outcomes.<sup>229</sup> The study compared public safety, court appearance, and jail bed use for defendants receiving unsecured bonds and secured bonds in Colorado's ten most populous counties.<sup>230</sup> It found that unsecured bonds were as effective as secured bonds at achieving both public safety and court appearance, and were more effective at freeing up jail beds and having faster release from detention than secured

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227. SCHNACKE ET AL., *supra* note 17, at 17–18.

228. See *supra* sections II.A, II.B.

229. See MICHAEL R. JONES, THE PRETRIAL JUSTICE INSTITUTE, UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 3 (2013).

230. *Id.*

bonds.<sup>231</sup> The study also found that pricier secured bonds resulted in more pretrial jail bed use, but did not increase the rate of appearance at trial.<sup>232</sup> Accordingly, reforming Colorado's bail statute to provide for an express presumption of release on unsecured personal recognizance bonds would likely achieve public safety, court appearance, and less jail bed use.

Proponents of bail reform may argue that the suggested statutory reform does not go far enough because it still allows courts to impose monetary bonds. For example, bail reform proponents could argue that Colorado should create a system like D.C.'s. Though this would likely resolve many of Colorado's bail issues, as mentioned above, such a reform could prove difficult to enact. To begin, it should be noted that Colorado has a form of the bail/no bail, release/no release dichotomy that renders certain individuals ineligible for bail if they have committed enumerated offenses in section 16-4-101 or section 19 of article II of Colorado's Constitution, which makes it similar to D.C.'s bail/no bail dichotomy.<sup>233</sup> Unlike in D.C. and the federal system, however, Colorado's preventive detention provisions apply only when serious alleged offenses have occurred "coupled with certain conditions precedent, such as the defendant being on probation, parole, or bail for" other serious crimes.<sup>234</sup> As such, one commentator has noted that "these provisions inevitably preclude the [preventive] detention option for high risk defendants who have committed extremely serious offenses but who do not meet the conditions precedent."<sup>235</sup>

The General Assembly added new categories for preventive detention to the bail statute in 2000 and 2013, but did so without also amending the Colorado Constitution, rendering the new preventive detention provisions "almost certainly unconstitutional."<sup>236</sup> Thus, while Colorado may be a jurisdiction where bail reform proponents could argue for largely eliminating monetary bail and including more preventive detention offenses, in the form of a statute similar

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231. *Id.*

232. *Id.*

233. *See* SCHNACKE, *supra* note 5, at 31.

234. *Id.* at 31–32.

235. *Id.* at 32.

236. *Id.* at 33 (noting in 2000 the General Assembly added a preventive detention category for "persons charged with possession of a weapon by a previous offender," and in 2013 for "persons charged with certain sex offenses").

to D.C.'s Bail Code, such reforms would also necessitate amending the Colorado Constitution's provision on preventive detention.<sup>237</sup>

It is important to note, however, that "a continuation of objectively high and unattainable bond amounts may indicate the need to reevaluate the Colorado preventive detention provisions to allow judges to detain dangerous and high-risk defendants th[r]ough a lawful and transparent mechanism."<sup>238</sup> This Comment's proposed statutory reform would likely ensure that courts make the necessary findings regarding flight and community safety risks before imposing monetary bail, but even this reform could lead to a realization that monetary bail achieves little, and judges should have the option to deny bail altogether for high-risk defendants through statutory and constitutional preventive detention provisions. Regardless, creating a presumption of release on unsecured personal recognizance bonds would represent a significant, incremental improvement, without the risk of reforming Colorado's bail statute in a way that raises constitutionality concerns.

The facts and statistics are clear. Colorado's bail reform in 2013 laid the foundation for implementing a system that prevents unnecessary pretrial detention. But bail administration under the new statute in places like Denver County Court proves that old habits, like equating bail with money, die hard. To rectify this problem, without undertaking expensive litigation against jurisdictions that refuse to consider defendants' individualized characteristics when setting bail, Colorado must take the reform one step further: create a strong, express presumption of release on unsecured personal recognizance bonds that can be overcome only by demonstrating to the court that the individual presents a risk of flight or a threat to community safety. This reform would achieve the original goals of the 2013 Colorado General Assembly by preventing unnecessary pretrial incarceration of defendants who are simply too poor to afford bail, while promoting courts' abilities to successfully assess risk and detain only those who truly present a high risk of flight or threat to community safety.

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237. *See id.* ("Perhaps because changes to the preventive detention statute would also require changes to the Constitution, the CCJJ chose not to recommend altering any of the bail eligibility provisions.").

238. *Id.* at 63.

## CONCLUSION

Bail administration in America too often results in the unjust pretrial detainment of low-income defendants who pose neither a flight risk nor a threat to community safety simply because they cannot afford bail. While Colorado's bail statute has been reformed in an attempt to end this practice, the changes to how courts administer bail have been much slower. Further reform is imperative to successfully combat unjust and unnecessary pretrial detention of low-income defendants. For decades in Colorado, bail equaled money. To end this outdated, unjust mentality, the General Assembly should create a strong, express presumption of release on unsecured personal recognizance bonds. "It is evident that [bail] is hostile to the poor and favorable only to the rich. The poor man has not always a security to produce . . ." <sup>239</sup> Unfortunately, nearly two centuries later, this observation still rings true. We can improve bail administration and pretrial detention in Colorado, however, by building on the recent statutory reforms to ensure that courts no longer impose monetary bail for low-risk defendants. While enacting this reform may not solve all of Colorado's bail administration problems, it would represent significant progress toward realizing the goal in our society—that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."<sup>240</sup>

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239. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 28 (Francis Bowen ed., Barnes & Noble Publishing, Inc. 2003) (1835).

240. *United States v. Salerno*, 481 U.S. 739, 755 (1987).