Pretrial Justice in Out-of-the-Way Places – Including Rural Communities in the Bail Reform Conversation

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PRETRIAL JUSTICE IN OUT-OF-THE-WAY PLACES – INCLUDING RURAL COMMUNITIES IN THE BAIL REFORM CONVERSATION

Jordan Gross*

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INTRODUCTION

In the United States, a marked preference for carceral responses to social ills has fueled incarceration rates that vastly exceed those of almost every other nation. The U.S. justice system is a collection of multiple law enforcement, judicial, and corrections systems independently run by states, tribes, and the federal government, under each jurisdiction’s laws. In addition, many local municipal governments in the U.S., such as cities and counties, operate their own justice systems. Other entities in the U.S., like the branches of the armed services, also maintain independent justice systems. What these various governmental units and entities have in common is that they all have the power to incarcerate two categories of people: defendants awaiting trial (pretrial detainees—the focus of this Article), and defendants convicted of offenses. These two populations—pretrial detainees and convicted offenders—are distinct in the eyes of the law. Pretrial detainees cannot be incarcerated as punishment. Rather, the detaining authority must have a regulatory, non-punitive justification for their detention. In the U.S., pretrial detainees may be incarcerated in stationhouses, jails, or detention centers. If a detention facility also houses convicted offenders (as many jails do), pretrial detainees are supposed to be housed separately from convicted offenders. In contrast, convicted offenders have been adjudicated guilty of a crime and can be incarcerated as punishment for that crime, or for violating a condition related to a sentence for an underlying offense. In the U.S., convicted offenders are housed either in jails or prisons, depending on the seriousness of their offenses. Defendants who receive a felony-length sentence are typically placed in the custody of a department of corrections and sent to a facility designed for long-term in-

1. See Emily Widra & Tiana Herring, States of Incarceration: The Global Context 2021, PRISON POL’Y INITIATIVE (Sept. 2021), https://perma.cc/CT7S-VMQG (stating that “[n]ot only does the U.S. have the highest incarceration rate in the world, every single U.S. state incarcerates more people per capita than virtually any independent democracy on earth”).

2. “Criminal justice system” is used throughout this Article in its technical sense to denote the formal processes and institutions created to “apprehend, try, punish, and treat law violators” such as “law enforcement, courts, and correctional agencies.” See Larry J. Siegel, Overview of the Criminal Justice System, U.S. DEP’T OF JUST.: OFF. OF JUST. PROGRAMS (2000), https://perma.cc/PGJ2-UMSL. This use is not meant to assert that these institutions are systematized to achieve justice. See Erica Bryant, Why We Say “Criminal Legal System,” Not “Criminal Justice System”, VERA INST. OF JUST. (Dec. 1, 2021), https://perma.cc/Z5Y8-E9TR (“‘Criminal justice system’ is a misnomer. Throughout history and across the world, false language has facilitated the systemic, inhumane treatment of groups of people. This is certainly the case for people impacted by the U.S. criminal legal system. Words shape how people think, and our speech should recognize that our system of racially biased policing and draconian punishment is not just.”).


4. See, e.g., 28 C.F.R. § 551.100 (2023) (“Procedures and practices required for the care, custody, and control of [pretrial] . . . inmates may differ from those established for convicted inmates. Pretrial inmates will be separated, to the extent practicable, from convicted inmates.”).
carceration. Offenders convicted of misdemeanor-length sentences are typically incarcerated in a state or local jail, or other short-term detention facility.

States and local governments, not the federal government or tribes, incarcerate most of the people behind bars in the U.S.5 Within states, local and county jails hold about a third of the people incarcerated in the U.S.6 Of individuals held in local and county jails or detention facilities, the vast majority—approximately two-thirds—are pretrial detainees.7 The jurisdictionally-specific and multi-layered nature of criminal law enforcement in the U.S. is critical to appreciating what fuels its high rates of incarceration. It is also key to understanding a central premise of this Article—that bail administration and reform is a bottom-up, not a top-down proposition, and that meaningful reductions in the rate of pretrial detention in the U.S. can only be achieved by centering bail reform initiatives on the concerns, expertise, and experiences of local communities and stakeholders.

Pretrial release and detention8 decisions can have catastrophic impacts on individual defendants with ripple effects on their families and their communities.9 As a result, a trial court’s initial decision to detain a defendant pretrial or release them into the community is one of the most consequential junctures in a person’s involvement with the criminal justice system.10 Pre-

6. Id. This reflects the fact that most criminal law is created, enforced, and administered at the state and local level in the U.S. federal system. In contrast, other federal systems legislate much of their criminal law and procedure at the national level under uniform codes applicable throughout the country.
7. Id. ("In 2021, about 421,000 people entered prison gates, but people went to jail almost 7 million times. Some have just been arrested and will make bail within hours or days, while many others are too poor to make bail and remain behind bars until their trial. Only a small number (about 87,500 on any given day) have been convicted."). See also Nazish Dholakia, U.S. Jails and Prisons, Explained, Vera Inst. of Just., Feb. 21, 2023, https://perma.cc/CM9F-F488 ("[J]ails may hold people who have been convicted of low-level offenses and face sentences to incarceration that are typically less than a year, the vast majority of people in jail—approximately two-thirds—have not been convicted of a crime.").
8. Terms like "pretrial release and detention" and "pretrial detainee" are misnomers given that most defendants never go to trial in the U.S. because our trial system has been displaced by a plea-bargaining system. Thus, "pre-plea release and detention" and "pre-plea detainee" are much more accurate descriptors.
10. This Article uses the term “trial court” broadly to refer to all tribunals authorized to make pretrial release and detention decisions. In most jurisdictions, this includes not just trial courts of general jurisdiction, but also courts of limited jurisdiction, like justice courts staffed by justices of the peace, special masters, or magistrates. This Article uses the term “bail administration” broadly to cover all
trial release and detention decisions can also have far-reaching, cumulative impacts on community wellbeing. It is not just justice-involved individuals, their families, and their communities who experience the negative consequences of pretrial detention. Local governments and taxpayers bear most of the fiscal burden of pretrial incarceration. This is because the jails and detention centers that house pretrial detainees are typically operated and financed primarily at the city and county levels in the U.S.\textsuperscript{11} Every dollar spent on pretrial detention at the local level is a dollar unavailable for other public amenities and services that are also typically operated and funded primarily at the local level in the U.S., like libraries, public schools, and parks.

Bail reform has generated a sprawling discourse in the media and in academia, accompanied by a correspondingly voluminous body of research and literature.\textsuperscript{12} Pretrial detention’s contribution to high incarceration rates in the U.S. and its disproportionate impacts on defendants from marginalized and racialized communities is well-documented and it has inspired bail reform conversations in probably every jurisdiction in the U.S. Most bail reform initiatives are aimed at “right-sizing” the pretrial detainee population—that is, calibrating bail administration so that only the “right defendants” (usually identified as those charged with felonies or offenses involving force or violence) are detained,\textsuperscript{13} or removing money (or, more accurately, aspects of a trial court’s pretrial release and detention authority under that jurisdiction’s laws and court rules. This authority typically includes ordering a defendant detained, ordering their release without conditions, or ordering their release subject to conditions. Thus, the term, as used here, encompasses a trial court’s authority to impose financial conditions of release, like posting security, and to impose nonfinancial conditions or release, like submitting to pretrial supervision.

\textsuperscript{11} See Bernadette Rabuy, \textit{Pretrial Detention Costs $13.6 Billion Each Year}, PRISON POL’Y INITIATIVE (Feb. 7, 2017), https://perma.cc/2EVU-3Q6A; Correctional Institutions, U.S. BUREAU OF JUST. STAT., https://perma.cc/6KQ7-BB6 (last visited Mar. 11, 2023) (“Jails confine persons before or after adjudication and are usually operated by local law enforcement authorities such as a sheriff, a police chief, or a county or city administrator. A small number of jails are privately operated. Regional jails include two or more jail jurisdictions with a formal agreement to operate a jail facility.”).

\textsuperscript{12} See Russell M. Gold & Ronald F. Wright, \textit{The Political Patterns of Bail Reform}, 55 WAKE FOREST L. REV. 743, 756 (2020); Samuel R. Wiseman, \textit{Fixing Bail}, 84 GEO. WASH. L. REV. 417, 425 (2016) (discussing judicial discretion in bail administration and proposing judicial discretion be replaced with “bail guidelines” to determine whether defendants should be released); Crystal S. Yang, \textit{Toward an Optimal Bail System}, 92 N.Y.U. L. REV. 1399, 1416 (2017) (providing a broad conceptual framework for how policymakers can design a better bail system by weighing both the costs and benefits of pretrial detention); Sandra G. Mayson, \textit{Dangerous Defendants}, 127 YALE L.J. 490, 507 (2018).

\textsuperscript{13} For a discussion of the overall tendency of contemporary criminal justice reform to categorize defendants as either worthy of reform-based leniency or, alternatively, deserving of harsh punishment, \textit{see} Katherine Beckett, Anna Reosti & Emily Knaphus, \textit{The End of an Era? Understanding the Contradictions of Criminal Justice Reform}, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238, 254 (2016) (“Policy-makers have . . . left the punitive approach to violent, property and public order crimes intact, and in some cases have even adopted legislation intended to make penalties for such offenses more severe—even as they embrace drug and/or parole reforms. These findings indicate that contemporary discourse about punishment reflects a new way of thinking and talking about incarceration in which the ‘punish-
rately, poverty) from the pretrial detention equation. Two dominant narratives inform contemporary bail reform in the U.S.: first, saving money for the state and local governments that bear the costs of pretrial supervision and detention; and second, reducing harm to individuals and communities impacted by pretrial supervision and detention.14

Contemporary initiatives and scholarly analysis in this field often resemble a quest for the holy grail of bail reform; a search for a universally-applicable fix to bail administration that will halt and reverse the high rates of detention and end the racial and ethnic disproportionality that characterize bail administration in many jurisdictions in the U.S.15 Ironically, the U.S. did discover a decarceration “holy grail” in the COVID-19 pandemic. Decisive actions taken by courts in collaboration with prosecutors, defender offices, and jail administrators to quickly reduce jail admissions and expedite releases as a public health measure is the only intervention that has led to widespread reductions in pretrial detention rates in modern U.S. history. This decrease proved to be temporary.16 But it amply demonstrated that if the political will is there, jail populations in most jurisdictions can be significant imperatives’ is simultaneously questioned for some groups, but broadly accepted and even intensified for others.”).

14. Isabella Jorgensen & Sandra Smith, The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States, HARVARD KENNEDY SCH. 6 (HKS Faculty Research Working Paper Series RWP21-033, Dec. 2021), https://perma.cc/WV6J-SRY5 (stating that “[t]he pretrial systems in many places generate significant racial disparities, including in bail amounts, rates of pretrial release, and length of pretrial detention. Despite this, decision-makers who lead the adoption of bail reforms often do not center the goal of reducing racial disparities, instead choosing to focus on reducing the local jail population and/or saving money.”). Jorgensen and Smith further note that bail reform initiatives do not always decrease racial disparities.

15. In July 2020, for example, the Uniform Law Commission released its Uniform Pretrial Release and Detention Act (UPRDA). The UPRDA is “intended to replace a state’s existing statutory law regulating determinations to release or detain individuals pretrial.” UNIF. PRETRIAL RELEASE AND DETENTION ACT, art. I § 101 (2020); see also Katie Robinson, ULC Approves Three New Acts, UNIF. L. COMM’N (July 15, 2020), https://perma.cc/HC2U-7QX6.

16. See Sawyer & Wager, supra note 5 (“In the first year of the pandemic, we saw significant reductions in prison and jail populations: the number of people in prisons dropped by 15% during 2020, and jail populations fell . . . 25% by the summer of 2020 . . . . [T]he changes that led to such dramatic population drops were largely the result of pandemic-related slowdowns in the criminal legal system [such as pandemic-related court delays and suspending jail transfers to prisons]—not permanent policy changes. And as the criminal legal system has returned to ‘business as usual,’ prison and jail populations have already begun to rebound to pre-pandemic levels.”); Todd D. Minton & Zhen Zeng, Jail Inmates in 2020 - Statistical Tables, U.S. DEP’T OF JUST. 1 (Dec. 2021), https://perma.cc/Y6YM-YBKS (“The number of inmates in local jails across the United States decreased 25% from midyear 2019 (734,500) to midyear 2020 (549,100), after a 10-year period of relative stability . . . . About 167 inmates per 100,000 U.S. residents were incarcerated in local jails at midyear 2020, down from 224 per 100,000 in 2019. The number of persons admitted to local jails also decreased from 2019 to 2020, from 10.3 million to 8.7 million. This 16% decline was more than six times the 2.5% decrease in jail admissions each year from 2010 to 2019. The large declines in jail admissions and midyear populations from 2019 to 2020 can be attributed mainly to the COVID-19 pandemic.”).
icantly lowered and managed administratively by courts under a state’s ex-
isting bail administration laws.

As explained in this Article, the structure of the criminal justice system
and the jurisprudence governing pretrial detention in the U.S. are such that,
apart from a worldwide public health emergency or a sudden universal
brace of decarceration principles, there is no single bail administration re-
form that will simultaneously reduce pretrial detention rates nationally,
eliminate disproportionate impacts of pretrial detention policies on racial-
ized and minoritized defendants, and save taxpayer dollars. By way of ex-
ample, eliminating or reducing reliance on “cash bail”\(^\text{17}\) and adopting pre-
trial risk assessment tools (which some jurisdictions have done with mixed
success) are often identified as the key to reforming bail in the U.S.\(^\text{18}\) Some
uncomfortable truths may get lost when eliminating cash bail becomes the
\textit{sine qua non} of successful bail reform. First among them is the reality that
eliminating cash bail actually translates to authorizing pretrial detention
with no possibility of release of more accused defendants than would have
been permitted historically. This is because eliminating cash bail takes
away one tool available to trial courts in cash bail jurisdictions who seek to
incapacitate dangerous defendants pretrial—namely setting bail at an
amount the defendant cannot meet (so-called “unpayable bail”).\(^\text{19}\) Jurisdic-
tions moving away from cash bail instead authorize trial courts to hold any
defendant considered dangerous with no possibility of release.\(^\text{20}\) As a prac-
tical matter, until state legislatures and policymakers pursue decarceration
as a systemic goal, eliminating cash bail may mean accepting that more
defendants who are accused of a crime, a subset of whom are factually
innocent, will be detained pretrial with no possibility of release.\(^\text{21}\) Moving

\(^{17}\) As discussed \textit{infra}, the term “cash bail” is often misused and misunderstood in popular (and
sometimes academic) discourse. I put the terms in quotation marks here to flag this issue.

\(^{18}\) \textit{Pretrial Release: Risk Assessment Tools}, NAT’L CONF. OF STATE LEGISLATURES (June 30,
2022), https://perma.cc/3NAH-9MG8; Christopher Slobogin, \textit{Preventive Justice: How Algorithms,
Parole Boards, and Limiting Retributivism Could End Mass Incarceration}, 56 WAKE FOREST L. REV. 97,
102–05 (2021).

\(^{19}\) There is an ongoing debate around whether bail reform is driving an increase in violent crime in the
U.S. See Holmes Lybrand & Tara Subramaniam, \textit{Fact-Checking Claims Bail Reform Is Driving
Increase in Violent Crime}, CNN POL. (July 7, 2021), https://perma.cc/VN2W-3CSS (reporting that
“[s]tudies on certain jurisdictions, such as Cook County, disagree on whether cash bail can be linked to
any increase in crime” and that “[t]wo studies from the University of Utah and Loyola University Chi-
cago came to opposite conclusions on whether the bail reform in Cook County led to an increase in
crime in the county, which provides . . . a clear example of how researchers disagree on methodology
in studying the effects of bail reform and increases in crime.”). This topic is well outside the scope of
this Article, except to the extent that the debate is not fine-tuned around urban and rural distinctions in
criminal activity and bail administration.

\(^{20}\) \textit{Preventive Detention}, PRETRIAL JUST. CTR. FOR CTS., https://perma.cc/R9VD-CZN7 (last vis-
ited Mar. 11, 2023).

\(^{21}\) To be clear, the Author’s point is not to champion the virtues of cash bail, but rather to point
out that moving cash bail out of bail administration in favor of preventive detention can be framed as a
to risk-based preventive detention may also require accepting that the pre-trial detainee pool will likely contain disproportionate numbers of marginalized, poor, mentally ill, minoritized, and racialized individuals. Further, the algorithmic risk assessment tools that invariably accompany cash bail reform have not always delivered the fairer and race-neutral outcomes they were once thought to promote.

From a legislative perspective, eliminating or severely restricting cash bail is not a politically viable or practical option in states with constitutions that guarantee the accused a right to bail. Trial courts in states with a constitutional right to bail are required to set bail for all accused defendants except in a very narrow category of cases. The category of non-bailable offenses in most states was originally limited to capital offenses, such as intentional murder and treason. As discussed below, a number of states amended their original constitutions to create broader categories of non-bailable offenses, typically by including non-capital violent felonies. These states are still constitutional right to bail states, albeit with a wider net of offenses for which pretrial detention without release is authorized. In either case, trial courts in constitutional right to bail states are not authorized to detain defendants without bail except for those offenses enumerated in their state constitutions. And in constitutional right to bail states, state legislatures cannot expand the list of non-bailable offenses by statute beyond that authorized by their state’s constitution. Expanding or modifying the list of non-bailable offenses in a state constitution requires undertaking the trade-off between two bad policy options. The deeper issue, which neither of these policy choices addresses, is the ingrained use of the U.S. criminal justice system as a vehicle to control and detain poor and marginalized people under the guise of public safety. In bail administration, the control impulse is manifested in the expansion of the legitimate purpose of bail beyond its original common law justification. As discussed infra, at common law the only recognized basis for imposing bail was to prevent (or at least de-incentivize) an accused from fleeing pending future court proceedings. Modern jurisprudence recognizes a second justification for bail: protecting the public from a perceived risk of future harm from an accused. A risk-based bail system privileges this second justification by authorizing pretrial detention and incapacitation of some accused persons based on a prediction of future dangerousness.

22. This is because pretrial detention amplifies the disproportionate representation by the processes that bring defendants into the criminal justice system in the first instance. See Jenny E. Carroll, Beyond Bail, 73 Fla. L. Rev. 143, 148 (2021) (“[T]he reduction or eradication of monetary bail alone has not, and will not, ensure a fair and unbiased system of pretrial detention . . . .”). See also id. at 193–94.


25. See generally Timothy R. Schnacke, Determining the Meaning of a State’s Constitutional Right to Bail Clause for Purposes of the Uniform Pretrial Release and Detention Act, CTR. FOR LEGAL & EVIDENCE-BASED PRACS. (Apr. 28, 2021), https://perma.cc/4EHL-GQN2. This point is discussed further infra.
politically difficult and time-consuming work of amending the state constitution.

This Article advocates abandoning the “silver bullet” approach to bail reform. There is no model of bail administration with universal applicability and benefits across state and local jurisdictions in the U.S. Rather, more precision in the bail reform conversation is warranted, and it should be tethered to two principles. One, on a state level, a proposed bail reform must be viable under a jurisdiction’s constitutional limitations.26 And two, on a local level, it must account for a community’s geography, access to resources, demographics, and social structure. To this end, this Article focuses on a demographic often overlooked in bail reform and, indeed, in much discourse surrounding criminal justice—remote, rural communities geographically, culturally, and politically distant from the urban and suburban communities that are the subject and the object of most criminal justice reform research, experimentation, and implementation in the U.S.27

Rural communities generate a relatively small share of the absolute number of pretrial detainees incarcerated in the U.S. Probably as a result, these communities have not commanded the same level of media or research attention as the more densely-populated urban and suburban jurisdic-

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26. That a state’s bail administration must comply with its constitution would seem to be an obvious proposition that requires no discussion. But, as illustrated below, some bail reform proposals are premised on a universal solution that does not differentiate between states with a constitutional right to bail and those without.

27. “Urbanormative” is one term that has been coined for privileging urban and suburban needs and demographics in research and policymaking. See generally Gregory M. Fulkerson & Alexander R. Thomas, Urbanomativity: Reality, Representation, and Everyday Life (2019). See also Alissa P. Worden et al., The Impact of Counsel at First Appearance on Pretrial Release in Felony Arraignments: The Case of Rural Jurisdictions, 31 CRIM. JUST. POL’Y REV. 833–56 (2020) (noting the dearth of criminal justice research focused on rural jurisdictions and recommending that research on court reform should include the study of rural jurisdictions); Anne M. Bartol, Structures and Roles in Rural Courts, in RURAL CRIMINAL JUSTICE: CONDITIONS, CONSTRAINTS & CHALLENGES 79 (Thomas D. McDonald, Robert A. Wood & Melissa A. Pflüg eds., 1996) (“The academic study of courts . . . neglects the rural courtroom. With a few exceptions . . . researchers focus on urban and suburban courts.”). This latter observation was made in 1996; since then, additional scholarly attention has been directed to rural courts. Of particular note in this space is the work of University of Minnesota legal anthropologist Dr. Michele Statz. See, e.g., Michele Statz, On Shared Suffering: Judicial Intimacy in the Rural Northland, 55 L. & Soc’y REV. 5, 9 (2021) (“There is also the documented urbanomativity of state and federal policy makers whose assessments, priorities, and resource allocations fail to recognize rural sociospatial vulnerability.”). Justice-involved indigenous people and communities, many of whom are also situated in rural areas in the U.S., are even more invisible still in academic research. Considering that American Indian/Alaska Native (AI/AN) people are vastly overrepresented as both defendants and victims in the federal criminal system and many state systems, this oversight is especially egregious. This is a topic the Author explores in the context of bail administration in a companion work in progress—Pretrial Justice in Indian Country and Bordertowns—Including Indigenous Communities in the Bail Reform Conversation.
tions that process much higher numbers of defendants. At the same time, rural communities do not always realize the same benefits locally from criminal justice reforms and research. As an example, while incarceration rates have been trending down in the U.S., small and rural counties have been identified as one of the drivers of increased pretrial detention rates in the U.S. This indicates that rural communities have not benefitted in the same way from reforms or innovations that have contributed to lower incarceration rates nationally.

Rural communities, of course, are not merely micro-versions of urban areas. This is particularly evident in bail administration. Rural communities often lack the concentration of human resources and institutional infrastructure that undergird criminal justice systems in cities and suburbs. But rural areas have higher levels of acquaintanceship in their communities. This means that rural residents, including law enforcement officers, prosecutors, judges, and defendants are far more likely to have social or kinship connections to each other than residents in urban and suburban communities. This can translate to more information available to judges making pretrial release and detention decisions in rural communities, as compared to urban and suburban courts, who are administering bail in a “stranger justice” model. Thus, as compared to urban and suburban courts, rural courts often administer bail with a resource deficit, but an informational advantage.

This Article is an effort to model the state-specific, locally-sensitive research and inquiry needed to support practical, workable bail administration reform. It presents original research on bail administration and pretrial release and detention decision-making in a single state—Montana—a state with a constitutional right to bail that includes some of the most remote, rural communities in the lower forty-eight. This Article begins by exploring various constructs of “rural” and “rurality” and providing a short primer

28. See Stephanie J. Vetter & John Clarke, The Delivery of Pretrial Justice in Rural Areas: A Guide for Rural County Officials, PRETRIAL JUST. INST., 1, 3 (2013), https://perma.cc/BS3P-TX2L (stating that “in many urban jurisdictions, significant efforts have been made . . . to realize the vision of a coordinated, evidence-based pretrial justice system . . . . As extensive as these efforts have been, they are geared toward large jurisdictions with high volumes of criminal cases.”).

29. Jacob Kang-Brown & Ram Subramanian, Out of Sight—The Growth of Jails in Rural America, VERA INST. OF JUST. 1, 9–10, 15 (June 2017), https://perma.cc/BWW7-VZEM (“America’s 3,283 jails are the ‘front door’ to mass incarceration . . . .” Between 1970 and 2013 pretrial detention rates in rural areas rose 436% while rates in urban areas declined (making rural counties, not major cities, one of the drivers pretrial detention rates).

30. See Ralph A. Weisheit & L. Edward Wells, Rural Crime and Justice: Implications for Theory and Research, 42 CRIME & DELINQ. 379, 379 (1996) (“The tendency has been for theories and methods to be developed for urban crime problems and then to assume that they have universal application, a perspective that has been called ‘urban ethnocentrism.’”).

31. Montana is the fourth largest state geographically. With a population of 7.4 per square mile, it is the third least-densely populated state. Gregory Lewis McNamee et al., Montana, BRITANNICA (May
on bail administration in the U.S. This background will enable the reader to track the discussion that follows, which maps some of the more common features of contemporary bail reform onto the practical realities of remote rural communities. The Article then describes the demographic, geographic, and legal landscape in Montana against which pretrial release and detention decisions are made in its state trial courts. Next, it presents information garnered through surveying and interviewing Montana trial court judges who make pretrial release and detention decisions. The Article concludes with observations and recommendations for including rurality in bail administration and reform. The hope is that this research will be of value to lawmakers, policymakers, and criminal justice stakeholders not just in Montana, but in similar states whose legislature and policymakers may be evaluating whether a particular bail reform initiative will benefit communities within their jurisdiction.

This project described in this Article was conducted by the Rural Justice Initiative (RJI) at the University of Montana. It was designed and administered by Dr. Laura Kirsch and the Author with substantial assistance and contributions from the 2021-2022 RJI Research Assistant Team. The Pretrial Program at the Office of the Court Administrator of the Supreme Court of Montana, comprising Montana Supreme Court Justice Ingrid Gustafson, Supreme Court Administrator Beth McLaughlin, and Michael Ferriter, Pre-Trial Program Coordinator, provided invaluable guidance and input to RJI in designing this project. Observations, views, conclusions, and any mistakes in this Article are those of the Author alone and do not reflect the views or opinions of any other individuals or entities referenced.


32. RJI collaborates with local, state, and tribal stakeholders to support evidence-based criminal justice policy that integrates the needs and experiences of rural and indigenous communities. RJI’s work is made possible by the generous support of the Angora Ridge Foundation. RJI extends thanks to the Deason Criminal Justice Reform Center at the SMU Dedman School of Law and its Director, Professor Pamela Metzger, for the opportunity to workshop this research project in its early stages at the Center’s monthly Workshop Series in April 2022. The Author is also grateful for the opportunity to workshop a draft of this Article at the October 21, 2022, Law and Rurality Workshop hosted by the Rural Reconciliation Project at the University of Nebraska.

33. Adjunct Psychology Professor, University of Montana.

34. The three outstanding RJI Research Assistants who contributed to the project described in this Article have graduated from the University of Montana: Sebastian Combs with an M.A. in Math, Victoria Hill with a J.D., and Gabriella Ji with a Ph.D. in Psychology. Given their stellar performance and exceptional teamwork as Research Assistants, the Author anticipates great professional success for each of them.


36. A report of the research project discussed in this Article is on file with the Author.
I. DEFINING “RURAL”

“Rural” is a multidimensional concept subject to multiple constructs depending on the metrics used and the purpose of a given inquiry. These constructs “are often based on geography, particularly the ideas of low population density” (meaning “relative physical isolation”) “and of economies based on farming and other extractive industries.” This section identifies the working definitions of “rural” and “rurality” and the jurisdictional unit used for purposes of the research described here. It is not a suggestion that the metrics used for this project are useful for other purposes, or that rural communities in the U.S. are homogenous. On the contrary, there is a rich diversity among rural communities in their geography, demographics, culture, climate, and history. The discussion is intended to highlight the need for legislatures, policymakers, and scholars to exercise precision and care in identifying local, regional, and national differences among jurisdictions so that their bail administration choices and recommendations are informed by the needs and experiences of the communities that will be impacted by them.
This Article puts these concepts to work on two planes in the context of bail administration and reform. The first involves identifying distinctions relevant to bail administration and reform at the rural/urban level. The second examines these distinctions at an even more granular level to identify distinctions among rural jurisdictions that should factor into this analysis, with the goal of isolating attributes of rurality pertinent to bail administration and reform in a subset of rural jurisdictions with population demographics, geography and weather profiles similar to Montana.40 This section provides an overview of some different approaches to defining “rural” and identifies how the term is defined for purposes of the project described in the Article. It then explores factors that distinguish rural communities from urban communities, with a particular focus on factors relevant to bail administration and reform.

A. Metrics Relevant to Rural Bail Administration and Reform

The federal government uses two primary definitions of “rural”—one from the U.S. Census Bureau and the other from the Office of Management and Budget (OMB). Other federal agencies, as well as state and tribal agencies, may employ different definitions.41 The Economic Research Service (ERS) of the United States Department of Agriculture (USDA), which frequently analyzes rural economic conditions, relies on the OMB approach.42

figures, that “[a]pproximately one quarter of the U.S. population lives in nonmetropolitan areas, a figure larger than that for nearly any minority group in America. Further, although most people live in nonrural areas, most places in America are rural.”). 40. This includes Alaska and, in the lower 48, Montana’s regional Mountain West and Northern Great Plains neighbors—Idaho, North Dakota, South Dakota, and Wyoming. Like Montana, these states are geographically large, contain swaths of land with low population density, and often experience severe winter weather conditions, all factors that can be highly relevant to bail administration. Many of these jurisdictions also include Indian country and significant American Indian and/or Alaska Native populations.

41. Pruitt, supra note 37, at 24 (“[T]he federal government supports two main definitions of ‘rural’, as well as many lesser-known, less-used variants.”). See also Sarah Dewees & Benjamin Marks, Twice Invisible: Understanding Rural Native America, FIRST NATIONS DEV. INST. 3 (Apr. 2017), https://perma.cc/7JYY-HBZG (noting that the federal government employs at least 15 definitions of “rural,” “which can lead to confusion when trying to understand the diverse communities found in America’s rural areas and small towns”).

42. See What is Rural?, supra note 37 (“ERS researchers and others who analyze conditions in ‘rural’ America most often use data on nonmetropolitan (nonmetro) areas, defined by the Office of Management and Budget (OMB) on the basis of counties or county-equivalent units (e.g., parishes, boroughs). Counties are the standard building block for publishing economic data and for conducting research to track and explain regional population and economic trends. Estimates of population, employment, and income are available for them annually. They also are frequently used as basic building blocks for areas of economic and social integration, such as labor-market areas.”); see also Metropolitan and Micropolitan: About, U.S. CENSUS BUREAU, https://perma.cc/L6BM-ZRK6 (last updated Nov. 22, 2021).
Whether localities are defined as urban or rural is not static, nor are the “urban” and “rural” definitions used by governments, researchers, and policymakers consistent. Criminal justice reformers and researchers, accordingly, must take care in understanding the criteria and metrics reflected in a particular definition of “rural.” This section outlines two approaches that often inform research in this area—the U.S. Census Bureau and OMB/ERS definitions—while explaining how they are different and how they may be over- or under-inclusive in their methodology.

Historically, “rural” has been primarily defined as anything that is not urban. Up to the 1950 census, the U.S. Census Bureau defined “urban” as any population, housing, and territory in an incorporated place with a population of 2,500 or more. The definition did not refer to population density or consider populations outside incorporated municipalities. Increased suburbanization and population growth outside incorporated municipalities led the Bureau to redefine “urban areas” for the 1950 Census to include densely populated areas within unincorporated areas with “at least 2,500 and less than 50,000 persons.” The Bureau used this approach until 2000, when it changed its urban area criteria to include a population density metric and adopted “urban clusters” as a unit.

Under this approach, “rural” is everything not included within an “urban area” and “urban cluster” area; that is, everything left over after identifying what is urban. Pertinent to the discussion here, following the 2020 Census, the Bureau proposed changes to its urban-rural criteria that will (1) define “urban” as an area that contains at least 2,000 housing units or a population of at least 5,000, and (2) discontinue the distinction between “urban areas” and “urban clusters,” and collapse these areas into a single

43. See Glossary: Census Tract, U.S. Census Bureau, https://perma.cc/43DM-9J9K (last updated Apr. 11, 2022) (noting that census tract boundaries are intended to be “maintained over a long time so that statistical comparisons can be made from census to census,” but that “[c]ensus tracts occasionally are split due to population growth or merged as a result of substantial population decline”).

44. See Dewees & Marks, supra note 41, at 1, 3–4, 6 (explaining that a U.S. Census Bureau “outdated definition” of urban as “any town with more than 2,500 residents” misclassifies many rural areas as urban and has produced an “oft-cited statistic” that 72% of all American Indians and Alaska Natives live in urban areas, when, in fact, most of this demographic lives in rural and small towns and 68% live on or near tribal lands).


46. Id.


category—“urban areas.” The Bureau will continue to define “rural” as “not urban.” The Bureau reports and analyzes data using several different units—census tracts, state and county political boundaries, and tribal census tracts.

The USDA/ERS approach relies on OMB criteria and OMB Metropolitan Statistical Area designations. A Metropolitan Statistical Area (“metro area” for short) includes one or more counties containing a core urban area of 50,000 or more people, together with any adjacent counties with a high degree of social and economic integration with the urban core. OMB also incorporates micro statistical areas, defined as urban areas with at least 10,000, but no more than 50,000 people. Under this approach, rural areas are categorized as either metropolitan or nonmetropolitan. These data categorizations produce more accurate pictures of a state’s rural character overall than population density alone. As shown below, the five most sparsely populated states—Alaska, Wyoming, Montana, North Dakota, and

50. After receiving comments, the U.S. Census Bureau posted a final Notice regarding these and other proposed changes on March 24, 2022. See Urban Area Criteria for the 2020 Census-Final Criteria, 87 Fed. Reg. 16,706, 16,707. As of the drafting of this Article, the Notice was pending and the changes had not yet become permanent.

51. Id.

52. Glossary: Census Tract, supra note 43 (defining “Census Tracts” as “small, relatively permanent statistical subdivisions of a county or statistically equivalent entity . . . that generally have a population size between 1,200 and 8,000 people, with an optimum size of 4,000 people,” and stating that “[a] census tract usually covers a contiguous area; however, the spatial size of census tracts varies widely depending on the density of settlement”).

53. Id. (“State and county boundaries always are census tract boundaries in the standard census geographic hierarchy.”).

54. Glossary: Tribal Census Tract, U.S. CENSUS BUREAU, https://perma.cc/43DM-9J9K (last updated Apr. 11, 2022) (“The tribal census tract concept and criteria are . . . defined independently of the standard county-based census tract delineation. Tribal census tracts are defined to provide statistically significant sample data for small areas within American Indian areas, particularly those American Indian areas that cross state or county boundaries where these boundaries are not meaningful for statistical purposes.”).

55. What is Rural?, supra note 37 (“ERS researchers and others who analyze conditions in ‘rural’ America most often use data on nonmetropolitan (nonmetro) areas, defined by the Office of Management and Budget (OMB) on the basis of counties or county-equivalent units (e.g., parishes, boroughs). Counties are the standard building block for publishing economic data and for conducting research to track and explain regional population and economic trends. Estimates of population, employment, and income are available for them annually. They also are frequently used as basic building blocks for areas of economic and social integration, such as labor-market areas.”); see also Metropolitan and Micropolitan: About, supra note 42 (“The general concept of a metropolitan or micropolitan statistical area is that of a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with that core . . . . The term ‘metropolitan area’ (MA) was adopted in 1990 and referred collectively to metropolitan statistical areas (MSAs), consolidated metropolitan statistical areas (CMSAs), and primary metropolitan statistical areas (PM- SAs). The term ‘core based statistical area’ (CBSA) became effective in 2000 and refers collectively to metropolitan and micropolitan statistical areas.”).
South Dakota—are predominantly rural. However, they all contain pockets of urban and rural metropolitan areas.

“Population density” is a common metric used to measure rurality. The U.S. Census defines “population density” as the “[t]otal population . . . within a geographic entity . . . [divided] by the land area of that entity measured in square kilometers or square miles. Density is expressed as both ‘population per square kilometer’ and ‘population per square mile’” of land area.56 Stated another way, it is the population of a location divided by its land area. The Bureau’s definition of “urban” requires “a core with a population density of 1,000 persons per square mile and may contain adjoining territory with at least 500 persons per square mile.”57 The definition of “rural” is “population densities less than 500 people per square mile and places with fewer than 2,500 people.”58 Using population density alone to measure rurality can produce misleading results if the geographic unit of measurement is too large. For example, if density is measured on a state level and used as a proxy for rurality, the largest and least populated states will be classified as entirely rural. The ten states with the lowest number of people per square mile are: Alaska (1.28/mi²), Wyoming (6/mi²), Montana (7.42/mi²), North Dakota (11.09/mi²), South Dakota (11.78/mi²), New Mexico (17.36/mi²), Idaho (22.11/mi²), Nebraska (25.22/mi²), Nevada (28.59/mi²), and Kansas (35.64/mi²).59 These states certainly contain large amounts of rural areas. Relying on population density alone, however, obscures the fact that even the most sparsely populated states contain pockets of non-rural areas or urban areas.

As others have noted, the many approaches to defining “rural” and “urban” can be incompatible. The Bureau and OMB definitions, for example, are inconsistent because, for example, “a large portion of the ‘rural’ population as defined by the Census Bureau” is located within counties designated as “metro” under the OMB approach.60 And the Bureau’s approach of defining “rural” as everything “not urban” can be overinclusive because it can categorize areas as “rural” that fall within suburban and metropolitan areas.61 These different results are illustrated by comparing the two ERS

57. What is Rural?, supra note 37.
58. Id.
60. Pruitt, supra note 37, at 24.
61. Id. at 25 (noting “measurement challenges” with both approaches and that “[s]ome policy experts note that the Census definition classifies quite a bit of suburban area as rural. The OMB definition includes rural areas in Metropolitan counties including, for example, the Grand Canyon which is located in a Metro county. Consequently, one could argue that the Census Bureau standard includes an overcount of the rural population whereas the OMB standard represents an undercount.”) (citing Defining
maps below. The first is based on the Bureau’s urban/rural criteria; the second reflects the OMB’s county-based metro, nonmetro micropolitan, and nonmetro core categorization. Using the county as the measuring unit, large areas that would be considered “rural” based on population density become categorized as “metropolitan” or “micropolitan.” Unitizing on a county level may be helpful or even inevitable for criminal justice stakeholders and reformers since, as discussed below, criminal justice, including pretrial release and detention, is administered primarily at the local and county levels. However, for other reasons, the county is not always the optimal unit to use in attempting to make national or interstate comparisons because the size of counties in the U.S. can “vary enormously . . . with counties in Western states typically far larger than those in Eastern states.”

B. Urban and Rural Differences in Bail Administration

Scholars focused on rural communities have identified features that distinguish rural culture, some of which are highly relevant to bail administration. Rural communities, for example, while sparse in population, are dense in relationships and interconnectedness. While rural residents may have a lot of physical distance between them, they typically have closer social connections with each other than urban and suburban dwellers. Sociologist William Freudenberg labeled this a “density of acquaintanceships,” describing “the extent to which people in a community know each other personally.” Residents of smaller communities generally experience a “higher density of acquaintanceships,” and these “close interconnections . . . [can] provide a sense of common identity and of belonging to a

\[Rural\ Population, \textit{Health Res. & Serv. Admin.}, \texttt{https://perma.cc/3YQZ-5ZGK} (last visited Apr. 1, 2023).\]

62. Id.


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group."64 This can also be understood as low social privacy. Pertinent to rural criminal law enforcement generally, the nature of rural social relationships may allow for social control in a rural community to be achieved through more informal means than in urban and suburban communities.65 Informal responses to crime may also be a matter of economic necessity driven by resource constraints.66 Relevant to bail administration specifically, law enforcement’s personal familiarity with a defendant’s background may also play a role in whether to set bail and the amount of bail,67 and a rural judge’s familiarity with a defendant’s background may also lead to more individualized attention in pretrial courtroom proceedings.68

“Geography and density of acquaintanceship are reversed in urban . . . settings.”69 An urban resident in the U.S. typically lives in “close physical proximity to others; . . . thus his or her physical privacy is relatively low [but] . . . he or she may have a relatively high level of social privacy.”70

64. Id.

65. Thomas D. McDonald, Some Economic Realities of Rural Criminal Justice, in RURAL CRIMINAL JUSTICE: CONDITIONS, CONSTRAINTS & CHALLENGES 19, 20 (Thomas D. McDonald, Robert A. Wood & Melissa A. Pflüg eds., 1996) (“Social control in the rural setting is more reliant on informal means instead of on the official, bureaucratic machinery of the urban criminal justice system. Informal constraints seem to work with more cost-effectiveness in small social settings where people know one another well and interact with each other continually.”) (citation omitted); see Bartol, supra note 27, at 83. See also Carroll Edmondson, Rural Courts, the Rural Community and the Challenge of Change, in RURAL CRIMINAL JUSTICE: CONDITIONS, CONSTRAINTS & CHALLENGES 93, 95 (Thomas D. McDonald, Robert A. Wood, & Melissa A. Pflüg eds., 1996) (“Social life in rural communities places a premium on personal relationships; as a result, it is characterized by intimacy, familiarity and high visibility.”); Barbara Yngvesson, Beastly Neighbors: Continuing Relations in Cattle Country, 102 YALE L.J. 1787, 1788–89 (1993) (formal law and informal norms of neighborhood in rural communities are “parts of the same social regime shaped by everyday relationships” in the community); see also Emily Prifogle, Whispers, Whispers, and Prosecutorial Discretion in Rural Iowa, 1925–1928, ANNALS OF IOWA, Summer 2020, at 247, 271–72.

66. MCDONALD, supra note 65, at 25 (“The socio-culture of rural areas prefers to handle ['minor crimes'—i.e., misdemeanors and lower-level felonies] with as much informal response as possible . . . The scarcity of resources and the shortage of personnel in small jurisdictions may produce as much or more pressure to dispose of these cases expeditiously.”) (citations omitted).

67. Id. (“The question of whether to set bail, and if so how much, can be importantly influenced by the sheriff. [One researcher] suggests that pre-trial matters such as bail are, to some degree, impacted by the sheriff’s knowledge and assessment of the defendant’s background.”) (citation omitted).

68. Id. at 27 (“The context of personal and political closeness influences the rural court room proceedings. Several observers have suggested that one symptom of this familiarity and related informality is that of ‘individualized’ attention. [One researcher], for example, relates that insofar as judges know the accused, and at least something about the crime incident, they may be expected to provide a substantive inquiry at the arraignment proceedings.”) (citation omitted); see also Bartol, supra note 27, at 79 (“[R]ural courts have unique features that can make them more effective than urban and suburban courts. For example, a lower volume of cases and closer ties to the community may help rural judges fashion more just and relevant solutions to disputes than can urban judges.”).

69. Weisheit & Wells, supra note 30, at 384.

70. Id. (“[A]lthough the urban dweller may be surrounded by others, those persons are unlikely to know (or care) much about the whole of that individual’s social world. In contrast, the rural dweller has substantially more physical privacy but substantially less social privacy.”).
Urban and suburban judges, prosecutors, defense counsel, law enforcement, and court personnel are much less likely to be acquainted with defendants and witnesses in individual cases. Further, when judges do know defendants or witnesses, they can recuse themselves from the proceedings knowing that another judge will be available to take the case.\footnote{71} In this way, criminal justice in urban and suburban jurisdictions is a form of “stranger justice.” Other characteristics associated with rurality identified by researchers that may be relevant to criminal justice reform include rural residents’ greater emphasis on self-reliance, the tendency to mistrust outsiders, and lower level of support for government social programs.\footnote{72} Rural residents may also be more likely to rely on each other than “impersonal bureaucracies.”\footnote{73}

Many rural communities also experience higher poverty rates and generational poverty than urban areas.\footnote{74} Differences in poverty rates among communities are particularly relevant to bail administration in light of the established connection between poverty and justice-involve and the modern proliferation of financial conditions of release (“money bail”) in U.S. bail administration. The imposition of financial conditions of release has been established to result in the routine incarceration of indigent defendants.\footnote{75} And high rates of pretrial detention have been shown to be harmful to individual defendants, their families, and their communities, and

\footnote{71. Bartol, \textit{supra} note 27, at 83 (“In urban courts, judges have a policy of disqualifying themselves when faced with defendants or litigants in a civil suit who they know. Other judges are available to take the cases. In rural areas, such disqualification is impractical.”).}
\footnote{72. Weisheit & Wells, \textit{supra} note 30, at 383–84. (“Rural citizens are also less supportive than are urban residents of government programs that provide welfare, housing, unemployment benefits, higher education, and Medicaid.”) (citing Bert Swanson, Richard Cohen, & Edith Swanson, \textit{Small Towns and Small Towners} (1979)).}
\footnote{73. Victor H. Sims, \textit{The Structural Components of Rural Law Enforcement: Roles and Organizations}, in \textit{RURAL CRIMINAL JUSTICE: CONDITIONS, CONSTRAINTS & CHALLENGES} 41, 51 (Thomas D. McDonald, Robert A. Wood & Melissa A. Pflüg eds., 1996) (“Clear distinctions in attitudes and behaviors exist between rural and urban groups. Rural people tend to depend on friends and acquaintances, and to be somewhat distrustful of impersonal bureaucracies.”) (citation omitted).}
\footnote{74. Weisheit & Wells, \textit{supra} note 30, at 380 (“Much research and policy debate has been based on the assumption that poverty is strongly associated with crime, particularly when poverty is a permanent feature of an area to the degree that young people growing up in the community have little hope that the future will be better than the past. Although this view is almost entirely based on an analysis of urban poverty, some of the deepest ‘pockets of poverty’ in the United States are in rural areas... In many cases this is a feature of the area that has spanned generations and for which little relief is in sight.”); see Vann Newkirk & Anthony Damico, \textit{The Affordable Care Act and Insurance Coverage in Rural Areas}, KFF (May 29, 2014), \url{https://perma.cc/HHB9-LFW6} (a 2014 Kaiser Family Foundation Commission on Medicaid and the Uninsured report finding that, as compared to urban residents in the U.S., rural residents have lower incomes, are less likely to have employer-sponsored health insurance coverage, more likely to rely on Medicaid or other public health insurance, more likely to be unemployed, and less likely to have a post-secondary education; this study defined “rural areas” as “those outside of Metropolitan Statistical Areas (MSAs)" in turn defined as “urban areas with more than 50,000 residents and surrounding suburbs”).}
often unnecessary from a public safety standpoint.\(^{76}\) The negative impacts of financial conditions of release on both an individual and community level are amplified in communities with higher rates of poverty. Substituting non-carceral pretrial surveillance tools, such as drug and alcohol screening and ankle bracelets, for detention is one strategy for displacing money bail or lowering pretrial jail populations. In many jurisdictions, costs associated with these tools and services are imposed on individual defendants. Given high rates of rural poverty in the U.S., these financial burdens are likely to have an even more pronounced impact on rural defendants and their families as compared to urban and suburban counterparts.

High rates of poverty in rural areas often translate to lower tax bases relative to urban and suburban areas.\(^{77}\) Since criminal justice is primarily funded and administered at the county level in the U.S., poverty and lower tax bases can constrain and shape criminal justice reform choices in rural counties. Bail administration and pretrial detention are expensive. Processing, detaining, and supervising defendants require significant human, physical, and capital resources. At a minimum, bail administration requires courtrooms, jails, and the personnel needed to staff them. This includes law enforcement officers, jailers, judges, bailiffs, clerks, and lawyers. These professionals, however, may be in short supply; many parts of rural America experience chronic shortages of criminal justice professionals, especially lawyers to represented people accused of crimes.\(^{78}\)

The list of basic legal resources does not account for resources and services adjacent to modern bail administration that may also be scarce or non-existent in rural areas. These include pretrial services officers, mental health providers, social workers, and organizations or institutions that provide and administer pretrial supervision services. These include substance use counseling and monitoring\(^{79}\) and bail bonding.\(^{80}\) Rural areas may have

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\(^{76}\) Shima Baradaran Baughman, *Dividing Bail Reform*, 105 *Iowa L. Rev.* 947, 960–61 (2020) (“The consequences of being held in pretrial detention . . . can be significant. Besides the potential dangers of jail, the consequences of even short jail stays can be catastrophic for misdemeanor defendants—many of whom are poor or members of historically disadvantaged groups. These consequences include effects on employment, earnings, family destabilization, housing and even broader community effects where incarcerated people are concentrated.”).

\(^{77}\) See Edmondson, *supra* note 65, at 95 (“Economically, the small population of rural communities means that they have a relatively small tax base on which to raise revenue for governmental services. Their tax base further is eroded by a high proportion of poor citizens, especially the elderly.”).

\(^{78}\) April Simpson, *Wanted: Lawyers for Rural America*, *Pew* (June 26, 2019), https://perma.cc/SL5M-XGD4 (in many rural areas, criminal defense is done by contracting defense attorneys); Jessica Pishko, *The Shocking Lack of Lawyers in Rural America*, *Atlantic* (July 18, 2019), https://perma.cc/76WG-YBXJ (where there are few rural attorneys, it becomes harder to represent criminal defendants without incurring professional discipline due to conflicts of interest).

\(^{79}\) See Edmondson, *supra* note 65, at 98 (“Economic conditions and constraints in rural areas also affect the quality and availability of facilities and court support services. . . . Few rural communities have adequate drug treatment services, detoxification centers, juvenile detention centers, shelters for
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limited services and support systems like reliable transportation, medical and mental health care, and even may lack basic resources like shelter available to many defendants such that they can adequately and successfully substitute community supervision for pretrial detention. Some jurisdic-

battered women or facilities for the mentally ill. In some rural areas, residents have to travel to regional centers or urban areas for these facilities. . . . Similarly, distance and economies affect the availability and delivery of court services in rural communities. Services provided by probation officers, pre-trial release and diversion programs, family counseling or mental health and alcohol rehabilitation programs, often are not conveniently available in rural communities. If they are available, either the staff has to travel extensively to deliver the services or clients have to travel a lengthy distance to receive them. . . . Perhaps the most important consequence of the constraints for the rural judiciary is that they limit decision-making options . . . .” (citation omitted)).

80. The commercial bail bonding industry is a much-maligned actor whose role in U.S. bail administration tends to be oversimplified and undertheorized by scholars. As discussed in another article by the Author, in states that permit commercial bail bonding, a private bondsman may be a defendant’s only hope for pretrial release in communities with limited or no pretrial services available, something that describes many rural communities. Gross, supra note 24, at 1046. Although only the U.S. and the Philippines permit for-profit bail bonding, most U.S. states, and many tribes situated within the U.S., do allow commercial bail bonding. Id. at 1069–71. Other countries outside the U.S. and Philippines do use “money bail” as part of bail administration, but they do not allow sureties to charge a fee for securing a bail bond. As with other services that support bail administration in the U.S., rural residents may have less access to this form of pretrial release. As of 2020, Massachusetts, Maine, Oregon, Illinois, Kentucky, Nebraska, Wisconsin, and Washington, D.C., prohibit commercial bail either statutorily or as a practical matter. See 2021 Md. Laws 397; Lucas Hammill, Abolishing Bounty Hunters, 110 Geo. L.J. 195, 1219, 1243 nn.136–37 (2022) (citations omitted); Dave Roback, Bail bondsmen are a thing of the past in Massachusetts, MassLive (Mar. 25, 2014), https://perma.cc/A6NM-76P6; Sturgeon Kennedy, Freedom and Money — Bail in America, PRETRIAL SERVS. AGENCY FOR D.C., https://perma.cc/4FE8-B29Y (last visited May 4, 2023); Becca Costello, Cash Bail Problematic but Nebraska Repeal Unlikely, Neb. Pub. Media (Dec. 4, 2019), https://perma.cc/D7KL-TS9P. Most of these jurisdictions, however, have comprehensive pretrial services that are either administered, supported, or funded on a statewide level (or in the case of Washington D.C., federally funded, citywide pretrial services). See, e.g., About the Pretrial Services Division, MASS.GOV, https://perma.cc/355C-AWT4 (last visited Apr. 2, 2023); Programs, MAINE PRETRIAL SERVS., https://perma.cc/M9P4-6CV2 (last visited Apr. 2, 2023); Office of Statewide Pretrial Services, I.L. CTS., https://perma.cc/EFA4-HYFV (last visited Apr. 2, 2023); Pretrial Services, KY. CT. OF JUST., https://perma.cc/34QI-79V5 (last visited Apr. 2, 2023); What PSA Does, PRETRIAL SERVS. AGENCY FOR D.C., https://perma.cc/Y7UJ-J3X8 (last visited Apr. 2, 2023). Effective September 18, 2023, Illinois became the first state to abolish cash bail entirely. See Rowe v. Raoul, ___ N.E. 3d __, 2023 IL 129248 (Ill. 2023) (rejecting facial challenge under state constitution to Illinois Safety, Accountability, Fairness and Equity-Today (SAFE-T) provisions eliminating money bail and establishing a new set of pretrial detention procedures).

81. Teresa Wiltz, States Struggle With 'Hidden' Rural Homelessness, Pew (June 26, 2015), https://perma.cc/M3SV-RQ9B (“The causes of homelessness in small towns are the same as in big cities: poverty, mental illness, inadequate housing, domestic violence and the psychological wounds of war . . . . But rural areas are more likely to be poor, with limited transportation, making it that much harder for the homeless to get to a center that can provide counseling, a housing voucher or medical care . . . . Most big cities have a well-developed infrastructure for helping the homeless, with dedicated funding for programs and an extensive network of providers . . . . In more rural areas, there might be a program in town or a couple of shelters run by a church. One [community organization] could be responsible for handling vast swaths of a state . . . . There’s not really a system for dealing with rural homelessness . . . . In some places there are shelters; in others, there are none.” (citations omitted)). Outside of bail administration, rurality matters for many of the same reasons it is relevant to pretrial justice. See Rural Health Disparities, RURAL HEALTH INFO. HUB, https://perma.cc/JBD5-RZWX (last updated Nov. 28,
tions have successfully harnessed technology to support pretrial detainees and reduce their reliance on pretrial incarceration. Sending text reminders for court dates to decrease failure to appear rates, offering remote pretrial check-ins, and using GPS monitoring to supervise defendants in the community instead of putting them in jail are a few examples.\(^\text{82}\) In rural parts of the U.S., gaps in access to broadband internet service may foreclose relying on technology to provide these types of support and supervision options for defendants on pretrial release. Given resource constraints and lack of infrastructure, bail reforms that have proven workable and successful in urban and suburban areas may not translate to the needs and experiences of rural jurisdictions.

II. PRETRIAL RELEASE AND DETENTION IN THE U.S.

A. Bail Basics

This section is a (very) high-level overview of contemporary bail administration in the U.S. This is a complex and nuanced area of law and this section is intended to provide enough background to understand the discus-

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\(^{82}\) This is a Map of America’s Broadband Problem: A County-By-County Look at the Broadband Gap, VERGE (May 10, 2021), https://perma.cc/7UTX-RE3S (“With the right eyes, you can even see the broadband gap as a dividing line for the US at large. Counties on the wrong side of the line are poorer and more remote, losing population even as the country grows. This is why there’s no broadband, of course: from a business perspective, building out fiber in [a rural community] is a losing bet. But the lack of fiber also stifles economic activity and makes young people more likely to leave, creating a cycle of disinvestment and decay that has swallowed large portions of our country.”). See also Hannah Meisel, Disparately resourced public defenders prepare for the end of cash bail in Illinois, CAPITOL NEWS ILLINOIS (Sept. 15, 2023), https://perma.cc/GQF5-L5TW (electronic monitoring has historically been rare in rural Illinois due to cost and a lack of cell phone coverage and reliable broadband service, which means when a pretrial detainee is non-compliant with a GPS monitoring condition it could be because they “tampered with the device or they’ve just lost signal because of where they’re at . . . .”).
sion and research analysis at the center of this Article.83 Broadly speaking, a person who is arrested and taken into custody may be released on their own recognizance or personal recognizance (colloquially “O.R.-ed” or “P.R.-ed,” depending on a jurisdiction’s terminology). This means they do not need to meet any conditions, financial or otherwise, to secure pretrial release, other than promising to appear as ordered for future proceedings. Alternatively, they may be granted conditional release and remain at liberty pending resolution of the charges against them, subject to conditions imposed by the trial court. Conditions of release may include financial obligations, requiring the defendant to “secure” their promise to appear with property, such as cash, stocks, bonds, or real property. Conditions of release can also include non-financial obligations like reporting to a pretrial services officer, GPS monitoring, or avoiding contact with alleged victims.

It bears noting that the national conversation about pretrial release and detention suffers from a lack of precision. The terms “bail,” “setting bail,” and “cash bail” are often used interchangeably to refer to a requirement that a defendant post money or property to secure their pretrial release.84 “Bail,” however, is a much broader concept than “bond.” “Bail” refers to any requirement, financial or otherwise, imposed as a condition of release. A “bond” is a promise by the defendant or a third party that the defendant will appear at future court hearings. Providing a bond may, or may not, involve posting or encumbering property to secure that promise. When a court “sets bail,” it is imposing conditions of release, one of which may be a condition that a defendant (or someone on the defendant’s behalf) post a bond to back that financial condition of release. This Article uses the term “bail” to refer to any release condition imposed on a pretrial defendant, including, but not limited to, financial conditions of release.85


84. Early bail administration was based on a “surety” system; it typically did not involve financial conditions of release. See Schnacke, Fundamentals of Bail, supra note 83, at 37–38; see also Koepke & Robinson, supra note 83, at 1733 (stating that “[b]etween the late nineteenth and early twentieth centuries, the commercial bond industry superseded the personal surety system”).

85. Gross, supra note 24, at 1071–72 (“‘Bail’ and ‘bond’ are distinct concepts that are sometimes conflated or confused. Legally, ‘bail’ describes a ‘situation in which one holds something or someone for another.’ In popular usage, it is equated with ‘the process of getting out of jail.’” (citations omitted)). When a court “sets bail,” it is ordering conditions under which it will release the defendant pretrial. See id. (“Conditions of release may have non-monetary and monetary components.”). A common non-monetary condition of release is “requiring a defendant to promise to appear” at future hearings and
A government has a legitimate interest in punishing a person who has been convicted of a crime. But it has only a regulatory interest in detaining a person who has not yet been convicted of a crime. This is the punitive and regulatory divide in detention. It separates authorized from unauthorized restraints on an individual’s liberty imposed by the government. To detain a presumptively innocent person before trial, therefore, the government must be able to point to a non-punitive (i.e., regulatory) basis for the detention. Contemporary bail administration recognizes two legitimate, non-punitive bases for detaining someone who has been accused, but not convicted, of a crime: preventing them from (1) fleeing justice, or (2) harming others pending the resolution of the allegations against them. “Setting bail”—i.e., imposing any condition on a defendant’s release or detaining a defendant pre-trial—requires a nexus between a condition of release and one of these rationales.

A defining feature of criminal justice in the U.S. is its hyper-local character. Most criminal laws and procedures are enacted and administered by state, tribal, and local governments, not by the federal government. Consequently, the criminal justice system in the U.S. comprises a myriad of independently functioning systems operating under different laws and policies. Just as all politics are local, so too is criminal justice administration. That said, the investigation, prosecution, and punishment of violations of state, local, and tribal criminal laws is not entirely without federal regulation. On the contrary, the U.S. Supreme Court has developed a comprehensive and intricate body of federal constitutional jurisprudence that regulates almost every aspect of state criminal procedure. Congress has done the

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86. See United States v. Salerno, 481 U.S. 739, 746–47 (1987) (“To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent.”); but see id. at 760 (Marshall, J., with Brennan, J., dissenting) (“The majority proceeds as though the only substantive right protected by the Due Process Clause is a right to be free from punishment before conviction. The majority’s technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as ‘regulation,’ and, magically, the Constitution no longer prohibits its imposition.”).

87. 18 U.S.C. § 3142(e) (2023); Salerno, 481 U.S. at 751–52.

88. This body of law has developed under the incorporation doctrine, which extends provisions of the federal constitution to the individual state governments. The restraints on the federal government are found in the Bill of Rights. However, under the Supreme Court’s Fourteenth Amendment incorporation jurisprudence, the Court has extended virtually all aspects of the Bill of Rights to the states. See Jordan Gross, Incorporation by any Other Name? Comparing Congress’ Federalization of Tribal Court Crim-
same for tribes under the Indian Civil Rights Act of 1968. Bail administration, however, is unique in the pantheon of constitutional criminal procedure because it is one of the few areas of that has not been federalized, which means the regulation of bail has been mostly left to state and tribal law. As a result, bail administration varies widely across the country.

The federal Constitution, however, does have some things to say about the administration of bail in state and federal courts: it prohibits excessive bail, it requires due process, and it guarantees equal protection. Under these provisions, the Supreme Court has established the following principles as generally applicable to state and federal pretrial release or detention decision-making:

- Arrestees must be brought before a judicial officer within a “reasonable” time following their detention.
- Indigent defendants do not have a federal constitutional right to appointed counsel (i.e., counsel at government expense) at proceedings where initial pretrial release and detention decisions are made. This

89. See generally Gross, supra note 88.
90. The text of the Eighth Amendment, unlike the original constitutions of the states, does not contain a bailability provision—just a prohibition on excessive bail. It is an open question whether the excessive bail prohibition is incorporated into the Fourteenth Amendment. The U.S. Supreme Court has referred to incorporation of the excessive bail provision in dicta. But it has not explicitly incorporated it into the Fourteenth Amendment. See Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (“Bail, of course, is basic to our system of law, and the Eighth Amendment’s proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.”).
91. See U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).
92. U.S. Const. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”)
93. Id. (“[N]or shall any State deny to any person within its jurisdiction the equal protection of the laws.”).
proceeding is sometimes called an “initial hearing,” but it can go by many different names in trial courts throughout the U.S. 97

- There is no federal constitutional right to be admitted to bail. 98 This means the federal government and states that do not recognize a right to bail in their own constitutions can detain a person without setting bail or otherwise offering the possibility of release pending adjudication if that jurisdiction’s statutory criteria for pretrial detention without bail are met.
- Pretrial detention rests on a government’s regulatory, as opposed to its punitive, powers. 99
- For purposes of evaluating the Eighth Amendment’s prohibition on excessive bail, the question of whether bail is “excessive” turns on whether a condition of release is narrowly tailored to meet one of the two regulatory justifications for imposing a release condition: risk of flight or danger to the community. 100
- In making pretrial release and detention decisions, courts must engage in an individualized inquiry as to whether detention or conditions of release are narrowly tailored to prevent that defendant from fleeing or harming others. This means a trial court cannot issue “blanket” detention orders or conditions of release. 101
- When imposing any financial legal obligations, including a financial condition of release, courts must make a meaningful inquiry into that defendant’s ability to pay. This is to ensure a defendant is not detained (if a financial condition of release is at issue) or punished (if a post-adjudication criminal fee or fine is at issue) based solely on indigency,

97. See Andrea Woods et al., Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia, 54 Ga. L. Rev. 1235, 1253 (2020) (reporting results of a statewide bail practices study in Georgia and noting a wide variation in terminology even among counties within a single state for identifying the court session where a misdemeanor arrestee first speaks with a judicial officer about bail). The authors report that terms used within Georgia’s court system for this hearing include “initial appearance,” “first appearance,” “recorder’s court,” or “rights read” proceeding. Id.


99. As explained, pretrial detention or the imposition of release conditions must be justified by a regulatory, non-punitive governmental interest. To date, the Supreme Court has only recognized two legitimate government interests that can justify detaining or encumbering the liberty of an accused person—preventing the defendant from fleeing or harming others pending the resolution of the allegations against them. See Gross, supra note 24, at 1071–72.

100. Salerno, 481 U.S. at 748–49, 752–54.
which would violate that defendant’s right to due process and equal protection of the laws.\footnote{102}{See Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978)) ("[incarceration of those who cannot meet master bond schedule] without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."); see also Issa Kohler-Hausmann, Misdeemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing 135 (2018) (observing that "[money] bail means jail" for many misdemeanor defendants in New York City because of their inability to meet financial conditions of release).}

- A particular amount of money bail is not necessarily constitutionally “excessive” simply because a particular defendant cannot afford it.\footnote{103}{For an insightful article challenging this received wisdom as “normatively flawed and rhetorically illegitimate,” see generally Colin Starger & Michael Bullock, Legitimacy, Authority, and the Right to Affordable Bail, 26 WM. & MARY BILL RTS. J. 589, 593 (2018). The statement that bail is not “excessive” simply because a defendant cannot afford it is a hard circle to square, particularly when considered alongside the jurisprudence prohibiting wealth-based discrimination in criminal punishment and requiring a meaningful ability to pay inquiry before imposing legal financial obligations on a defendant. See, e.g., Bearden v. Georgia, 461 U.S. 660, 661–62 (1983); Tate v. Short, 401 U.S. 395, 396 (1971); Williams v. Illinois, 399 U.S. 235, 236 (1970). Cases cited for this proposition include Hodgdon v. United States, 365 F.2d 679, 687 (8th Cir. 1966); United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988); United States v. James, 674 F.2d 886, 891–92 (11th Cir. 1982); United States v. Beaman, 631 F.2d 85, 86–87 (6th Cir. 1980); United States v. Wright, 483 F.2d 1068, 1070 (4th Cir. 1973); White v. Wilson, 399 F.2d 596, 598 (9th Cir. 1968). See also O’Donnell v. Harris Cty., 892 F.3d 147, 163 (5th Cir. 2018) ("The fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: the County’s mechanical application of the secured bail schedule without regard for the individual arrestee’s personal circumstances.").}

The jurisdiction-specific nature of U.S. criminal justice is said to allow for more experimentation and flexibility in reform as compared to some other nations.\footnote{104}{Justice Brandeis’s oft-cited observation about “states as laboratories” encapsulates this construct of the U.S. criminal justice system: “Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).}

Another aspect that complicates comparisons across jurisdictions
and with other nations is the fact that many (but not all) jurisdictions in the U.S. elect the officials who are charged with bail administration and pretrial detention. This includes prosecutors106 (who make pretrial release and detention recommendations), sheriffs107 (who often run detention facilities that house pretrial detainees),108 and jurists (who make pretrial release and detention decisions). This feature of U.S. criminal justice can make bail administration and decision-making particularly sensitive to political influence.109

Notwithstanding variations among jurisdictions in bail administration law and practice, a typical bail hearing for a defendant in state or local court in the U.S. will likely look about the same. It will be brief. In larger jurisdictions, it may resemble an assembly line. A defendant in custody might appear in court remotely from jail.110 The defendant may or not be represented by counsel. If represented, assistance of counsel will likely be provided by a “duty” public defender who probably will not have had an opportunity to speak with their client for any meaningful length of time or review materials. In an urban or suburban court, the decision-maker will have minimal information in front of them outside of that provided by the prosecutor, law enforcement, and charging documents. This information states from eliminating cash bail completely—is not always accounted for in discussions and research about bail administration and reform. Further, as noted, many rural states retain a constitutional right to bail. To the extent bail reform initiatives hinge on embracing preventive pretrial detention without bail, they automatically exclude the constitutional right to bail states—which, as illustrated below, happen to be states that are rural or mostly rural under any definition of the term: Alabama, Alaska, Arkansas, Idaho, Iowa, Kentucky, Maine, Montana, Nebraska, North Dakota, South Dakota, and Wyoming. Gross, supra note 24, at 1067.


107. See Alan Neuhauser, Running for a Badge: Why Does the U.S. Still Elect Sheriffs?, U.S. News & World Report (Nov. 4, 2016), https://perma.cc/RD3E-BLXC (noting that while towns and cities in the U.S. “and in virtually every nation appoint their police chiefs . . . most American communities with a sheriff elect someone to hold the position. In fact, some state constitutions even require it,” and noting that “[a]ll but four states either mandate or allow for the election of sheriffs”).

108. Id. (noting that sheriffs’ duties can vary significantly within the U.S., as “[a]cross the South and in rural counties, sheriff’s departments are traditionally the main source of law enforcement,” and “[i]n suburbs and cities, they often run county jails, serve court papers and perhaps are in charge of an ambulance squad”).

109. Id. (“[T]rends among elected prosecutors and judges . . . suggest[ ] elected law enforcement officials get more ‘tough on crime’ as re-election approaches. In re-election years, for example, judges are more likely to impose longer sentences, affirm death sentences and even override life sentences to impose death.” (citation and internal quotation marks omitted)).

110. Some jurisdictions authorize trial courts to hold bail hearings for defendants in custody through video conferencing. Colbert et al., supra note 96, at 1719, 1726 (noting that “[i]t has become common for state court judges to preside over pretrial release hearings of lower-income people without counsel present,” that bail hearings typically “move swiftly, aided by video jail broadcasts, which make it unnecessary even to transport arrestees to the local courtroom,” and that “[i]n many jurisdictions, a prosecuting attorney is present and recommends bail, thus stacking the odds even more against an accused”).
will comprise mostly criminal history, including a description of the crime(s) charged and the factual allegations underlying them, all framed from the perspective of law enforcement officers. The trial court may or may not refer to a bond schedule in setting financial conditions of release. The process will be opaque, quick, and dominated by judicial discretion.\footnote{Lauryn P. Gouldin, \textit{Reforming Pretrial Decision-Making}, 55 \textit{Wake Forest L. Rev.} 857, 861 (2020) (discussing the history of bail reform and noting that “[w]hile some reforms have placed limits on judicial power, most have not significantly reduced judicial discretion over pretrial decision-making”).}

In some jurisdictions, the trial court will have access to information from a pretrial services officer and a risk assessment score, which may or may not influence its decision. What may be different in a rural trial court is that the actors involved in pretrial release and detention processes will likely have personal information external to the court record about many defendants and witnesses if they are part of the same community in which the case is being prosecuted.

\section*{B. \textit{The Constitutional Right-to-Bail Divide}}

Bail administration in the U.S. is balkanized because, as noted, it is one of the areas of criminal procedure that has not been federalized.\footnote{Gross, \textit{supra} note 24, at 1068 (“The critical point of departure in bail administration is whether a state recognizes an absolute constitutional right to bail for noncapital offenses or whether it authorizes pretrial detention of noncapital defendants without bail based on future dangerousness.”).} The reason bail administration has been left out of the Supreme Court’s federalization of criminal procedure is that state constitutional bail provisions and laws are worded very differently from their counterpart in the U.S. Constitution. Most original state constitutions said two things about bail. One, like the Eighth Amendment to the U.S. Constitution, they prohibit excessive bail. But, two, unlike the U.S. Constitution, all original state constitutions and bail laws provided for an absolute right to bail by surety in all cases, with the exception of a narrow category of crimes. Virtually all state constitutions originally contained the following provision or some variation thereof: “All persons shall be bailable by sufficient sureties, for \textit{[enumerated offenses]} when the proof of guilt is evident or the presumption great.”\footnote{Matthew J. Hegreness, \textit{America’s Fundamental and Vanishing Right to Bail}, 55 \textit{Ariz. L. Rev.} 909, 916 (2013).}

Under these provisions, all persons charged with crimes other than the offenses carved out from the right to bail have an absolute right to have bail
set. This means a trial court cannot order a pretrial defendant detained by declining to set bail unless they are charged with a non-bailable offense; even then, the state must meet the “evident proof of guilt” and “great presumption” showing before a defendant can be denied bail.\footnote{115. See id. at 1054 (“Where bailability by sufficient sureties is guaranteed, a defendant charged with an offense that is not specifically designated as nonbailable is bailable as a matter of right. The only limitation on this right is the court’s power to demand ‘sufficient sureties’ to secure the defendant’s appearance at future proceedings. Thus, a defendant charged with a bailable offense is entitled to pretrial release if the defendant produces ‘sufficient sureties.’ A ‘sufficient surety’ can be a condition of release with a financial component, such as a pledge of money or property as collateral subject to forfeiture if the defendant absconds. But it doesn’t have to be—it can also be a non-financial bail condition, such as a promise to appear that is not backed by any monetary pledge or collateral.” (citations omitted)). See also 4 WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 12.3(b) (4th ed. 2022) (“Just as it seems to be generally conceded that these right-to-bail provisions in the state constitutions foreclose denial of release to a defendant on the ground that no release conditions would suffice to ensure his appearance, it is likewise clear that they do not permit that broader variety of preventive detention authorized in the federal system—that is, detention based upon nothing more than a finding that a certain defendant charged with a serious offense would be dangerous to some other person or the community if released.” (citations omitted)).\r
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116. Gross, supra note 24, at 1093.\r
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117. Unfortunately, this is a point the UPRDA appears to have missed and some states with a constitutional right to bail will need to consider in evaluating whether to adopt the UPRDA in whole or in part. Timothy R. Schnacke, a leading authority on bail in the U.S., identifies and explains this issue and his analysis of the UPRDA. See Schnacke, supra note 25, at 3 (“In articulating the Act’s goals, the ULC wrote that, among other things, it wished to ‘provide enough flexibility to accommodate variations in state constitutional structure and policy preferences, as well as evolving state and federal jurisprudence.’ Unfortunately, providing ‘flexibility to accommodate variations in state constitutions’ meant leaving open an extremely wide hole, which states might use incorrectly to increase pretrial detention far beyond accepted American legal and historical limits. The UPRDA does this by telling states that although they need to designate which offenses are eligible for pretrial detention (what I call a detention eligibility net, and what the ULC describes as ‘covered offenses’), if a particular state determines that its right to bail is not a right to actual release and is merely a right to have one’s bail set, then it can expand the constitutional exceptions to that right—found in the state’s ‘no bail’ clause of the right to bail provision typically after the word ‘except’—by adding categories eligible for pretrial detention in the statute. In short, it would allow states to detain outside of the constitutional net.”).}
To date, 31 states have abrogated their original constitutional right to bail provisions. As a result, there are now three broad categories relevant to in bail administration. Nineteen states retained their original constitutional right to bail provision. As noted, this only permits detention without bail under very narrow circumstances, typically capital cases. Since capital
cases are exceedingly rare, this translates to a constitutional right to bail for virtually every defendant in those states. Twenty-two states retained their original constitutional right to bail, but expanded the categories of non-bailable offenses beyond capital crimes. In those states, preventive detention is also authorized for other violent offenses besides capital murder, and may also include things like sex offenses or repeat offenses. In these states, bail can be typically be denied based on (1) a finding that the defendant would present a danger to another person or the community if released, (2) the defendant’s criminal history, and (3) their supervision status at the time of the new offense.\footnote{119} In those states, a much larger group of defendants can

\footnote{119. States that have retained a constitutional right to bail but amended it to expand the “net” of non-bailable offenses outside of capital offenses, murder, and treason include Arizona, California, Colorado, Florida, Illinois, Louisiana, Michigan, Mississippi, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington State, and Wisconsin. See \textit{Ariz. Const.} art. IX, § 22; \textit{Cal. Const.} art. I, § 12; \textit{Colo. Const.} art. II, § 19; \textit{Fla. Const.} art. I, § 14; \textit{Ill. Const.} art. I, § 9; \textit{La. Const.} art. I, § 18; \textit{Mich. Const.} art. I, § 15; \textit{Miss. Const.} art. III, § 29; \textit{N.J. Const.} art. I, § 11; \textit{N.M. Const.} art. II, § 13; \textit{Ohio Const.}, art. I, § 9; \textit{Okla. Const.} art. II, § II-8; \textit{Or. Const.} art. I, § 14; \textit{Pa. Const.} art. I, § 14; \textit{R.I. Const.} art. I, § 9; \textit{S.C. Const.} art. I, § 15; \textit{Tex. Const.} art. I, § 11; \textit{Utah Const.} art. I, § 8; \textit{Vt. Const.} ch. II, § 40; \textit{Wash. Const.} art. I, § 20; \textit{Wis. Const.} art. II, § 8. Washington State’s original constitution, for example, provided: “All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great.” Washington amended its Constitution in 2010 to add offenses punishable by life in prison (not just murder) with the following language: “Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature.” Thus, although Washington still recognizes a constitutional right to bail, it has widened its “net” of offenses for which bail can be denied to include any offense punishable by life imprisonment and authorized detention for those offenses based on a propensity for violence, and specifically authorized the state legislature to impose additional limitations on that right for those defendants. See \textit{Wash. Const.} art. I, § 20. \textit{See also Or. Const.}, art. I, § 9, which was amended in 1997 to expand the category of potentially non-bailable offenses to include all felonies by adding the text in italics to its original constitutional bail provision: “All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. . . . The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community.” The only state unaccounted for is Oregon and it appears to be an outlier because its constitution clearly provides for a traditional constitutional right to bail for all crimes other than murder or treason, but its statutory law authorizes detention without bail for a broader category of offense. See \textit{also Or. Const.} art. I, § 14 (“Offenses, except murder and treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.”); \textit{id.} § 43(1)(b) (“Murder, aggravated murder and treason shall not be bailable when the proof is evident or the presumption strong that the person is guilty. Other violent felonies shall not be bailable when a court has determined there is probable cause to believe the criminal defendant committed the crime, and the court finds, by clear and convincing evidence, that there is danger of physical injury or sexual victimization to the victim or members of the public by the criminal defendant while on release.”); \textit{Or. Rev. Stat.} § 135.240(6) (2023) (defining “violent felony” as a “felony offense in which there was an actual or threatened serious physical injury to the victim, or a felony sexual offense”).}
potentially be detained pretrial with no possibility of release than previously, but the constitutional right to bail remains intact for all other defendants. Nine states, as part of bail reform, have abrogated their constitutional right to bail entirely and authorized detention without bail under some circumstances.\textsuperscript{120} As a practical matter, since most preventive pretrial detention is focused on violent felonies, the bail administration practices, laws, and outcomes in the nine states that do not recognize a constitutional right to bail will be very similar to those in the 22 states that have amended their constitutional right to bail provisions. A map illustrating the distribution of state constitutional bail approaches appears below.

Pertinent to this Article, most states that have retained an original constitutional right to bail are “rural” or “mostly rural” under any definition of the term. This includes Alabama, Alaska, Arkansas, Idaho, Iowa, Kentucky, Maine, Montana, Nebraska, North Dakota, South Dakota, and Wyoming. As noted elsewhere and discussed below, there are practical and political considerations a state must weigh before it abandons its constitutional right to bail and makes the leap to a no-bail preventive detention bail administration model. Practical considerations include the type of resource constraints, dispersed or scarce criminal justice services and personnel, and large travel distances that are felt more acutely by rural communities.\textsuperscript{121} Political considerations include citizens’ willingness to authorize their government to detain accused defendants pretrial without bail. Viewed from this perspective, it is no coincidence that preventive detention bail reform “holdouts” include some of the most rural and politically conservative states in the U.S.\textsuperscript{122}

\textsuperscript{120} Georgia, Hawaii, Massachusetts, Maryland, New Hampshire, New York, North Carolina, Virginia, and West Virginia.

\textsuperscript{121} Gross, supra note 24, at 1103 (“Secured money-bail is not a standard in American bail administration. Nor is it a necessary ingredient in a well-administered pretrial system. But money-bail is indispensable in states that recognize an absolute right to bail for noncapital offenses because setting unpayable bail is the only way to detain dangerous but bailable defendants. Moving away from a heavy reliance on money-bail towards preventive pretrial detention is the basic blueprint for modern bail reform. But that requires universally available pretrial supervision services, something that may be out of reach for rural jurisdictions whose population and judicial resources are not as concentrated as they are in urban, or more heavily populated jurisdictions. And it requires giving trial courts the authority to deprive individuals of their liberty before any adjudication of guilt in a wide range of cases. Abuses of the power to detain based on an accusation alone were the inspiration for the original right to bail under English law. And this massive power may be one citizens in some states are not disposed to entrust to their government lightly.”).

\textsuperscript{122} This map is published and made available online by the National Conference of State Legislatures. \textit{See Statutory Framework of Pretrial Release}, NAT’L CONF. OF STATE LEGISLATURES (NOV. 18, 2020), https://perma.cc/93FQ-U3XM.
These fundamental differences among state constitutions illustrate the need for jurisdiction-specific research and analysis. Further, although state constitutional bail provisions are obviously and necessarily implicated in bail administration and reform, the role of other state constitutional protections, especially equal protection and due process guarantees, as a source of bail reform is under-theorized and under-explored. State constitutions are often more protective of their residents’ rights than the U.S. Constitution and thus are a potentially powerful source of lasting jurisdictionally specific bail reform.

III. BLUEPRINT OF CONTEMPORARY BAIL REFORM, MAPPED ONTO RURAL JURISDICTIONS

The following is a list of common features of contemporary bail reform. It is by no means exhaustive. It cannot be, because bail administration in the U.S. is as varied and nuanced as the criminal justice systems in the individual states and the hundreds of local municipalities across the country. This section identifies some universally promoted reform measures and considers them through a rural lens. The purpose is to highlight underlying assumptions that may not hold true outside urban and suburban areas and to point to the need for localized inquiry into reform measures that have been implemented or proposed for urban and suburban communities. Some of these reform measures are collected and consolidated in the Uniform Law...
Commission’s Pretrial Release and Detention Act (UPRDA). UPRDA is billed as providing “mechanisms for states to limit the use of pretrial detention.”123 It is organized around six primary bail administration concepts: (1) using citations in lieu of arrest for minor offenses; (2) establishing a time limit for arrestees to be brought before a judicial officer; (3) providing appointed counsel at pretrial release and detention hearings; (4) making pretrial risk determinations (by unspecified means); (5) reviewing defendants’ financial conditions; and (6) considering the least restrictive conditions of release. Many of these items, of course, already exist in most jurisdictions’ rules, statutes, and decisional law. Not all these items have considerations specific to rural bail administration. Thus, the discussion that follows does not track the UPRDA list entirely. Notably, UPRDA does not consider cash bail head-on. However, limiting cash bail is a natural and necessary outcome if UPRDA’s primary objective—limiting the use of pretrial detention—is pursued by the means proposed: relying on risk assessment and the least restrictive release conditions of release, as informed by a defendant’s financial conditions. Whether and when to rely on financial conditions of release, including cash bail, in bail administration is the central (or at the least the threshold) question in bail reform from which most everything else flows. Thus, UPRDA’s non-position notwithstanding that aspect of bail reform is discussed first below.

A. Limit or Eliminate Reliance on Financial Conditions of Release

A centerpiece of contemporary bail reform is limiting or eliminating reliance on financial conditions of release, specifically the practice of requiring a defendant to post money or property as collateral to secure their pretrial release. As proposed in UPRDA, the substitute is increased reliance on risk assessment determinations. That that invariably means greater authority to detain those defendants identified as posing an unacceptable risk if released pretrial.124 As explained in depth in an earlier article, eliminating

123. Id.

124. A full history of bail reform in the U.S. and modern acceptance of risk-based preventive pretrial detention are well beyond the scope of this Article. For excellent accounts of the history of bail reform generally, and the rise of preventive pretrial detention laws and policies in the U.S., see generally Schnecke, supra note 25; Alexa Van Brunt & Locke E. Bowman, Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next, 108 J. CRIM. L. & CRIMINOLOGY 701, 707 (2018) (describing contemporary bail reform as the “third wave” of bail reform and noting that “despite prior and current efforts, the poor and the indigent remain locked up in local jails throughout the nation. The successes in limiting the reliance on money bail have been driven in part by reformers’ willingness, in the interest of tactical advantage, to concede that undesirable defendants may be restrained on home confinement or electronic monitoring, or even incarcerated on ‘no bond,’ without the possibility of release.”) (citations omitted); Lauryn P. Gouldin, Disentangling Flight Risk from Danger-
cash bail completely is not a viable option in constitutional right to bail jurisdictions.\textsuperscript{125} In jurisdictions without a constitutional right to bail, eliminating cash bail typically also means authorizing pretrial detention with no possibility of release based on future dangerousness for some defendants. Any jurisdiction seeking to reduce its reliance on pretrial detention while retaining supervision over pretrial defendants must fill that need by either funding pretrial services or outsourcing supervision of pretrial defendants to bondsmen.\textsuperscript{126} The concentration of human and financial resources necessary to supplant money bail and carceral supervision with community supervision by professional pretrial services is simply not available in remote, rural communities. That leaves the bondsman to fill the supervision void in rural communities.

By way of example, Washington, D.C.’s bail administration, which was overhauled in 1992, is regularly held up as an example of a jurisdiction that has gotten bail reform right.\textsuperscript{127} Indeed, it boasts one of the lowest pretrial detention rates in the U.S.\textsuperscript{128} Key components of bail administration in Washington, D.C. are a presumption of release without conditions for low-level offenses, a very limited use of cash bail, and robust pretrial ser-
Washington, D.C. is one of the smallest and most densely populated jurisdictions in the U.S. It also enjoys a well-funded pretrial services program. This translates to shorter travel distances to obtain pretrial services and the availability of human resources to deliver them.

Short of re-thinking the U.S. criminal justice system’s compulsion to control and monitor those who come within its ambit, reducing pretrial detention while eliminating reliance on financial conditions of release requires something to fill that void. As discussed in turn below, in contemporary bail reform, non-carceral approaches for managing pretrial defendants typically employ risk assessment tools used in tandem with pretrial supervision in the community. And as discussed, both these features of modern bail administration may pose unique challenges for rural communities and residents.

B. Increase Non-Carceral Pretrial Surveillance

Technology has made new forms of pretrial supervision possible, most notably electronic monitoring. Some applaud the advent of these tools as defendant-friendly alternatives to pretrial incarceration. Others caution that indiscriminate use of “e-carceration” tools can have harmful consequences for defendants. Costs associated with pretrial monitoring tools and other surcharges associated with securing pretrial liberty, for example,

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130. As of 2021, D.C. is the most densely populated jurisdiction in the U.S., with 10,984.43 people per square mile. Population density in the U.S. by federal states including the District of Columbia in 2021, STATISTA (Dec. 2021), https://perma.cc/9GMX-AEVA.

131. As explained in an earlier article, “[r]isk-based bail administration requires a mechanism by which large numbers of defendants can be screened effectively and quickly if courts are to promptly release defendants the state has no interest in detaining pretrial. It also requires some capacity to supervise defendants who are released pretrial subject to non-financial conditions.” Consequently, “to move away from money-based bail administration, courts must have a reliable and affordable substitute for the pretrial screening and supervision functions provided by the bail bond industry. In jurisdictions that have successfully implemented risk-based bail reform, like the federal system and Washington, D.C., that role is filled by professional pretrial services agencies under the supervision of the courts.” Gross, supra note 24, at 1094. See also Vetter & Clark, supra note 28, at 9 (noting that “[p]retrial supervision may be a challenge for rural pretrial justice programs as the county or counties served . . . may span a very large geographical area and may not have much, if any, public transportation. This can make it difficult for defendants to report . . . for appointments . . . and to make court appearances. This problem can be exacerbated if the defendant has lost his or her driver’s license”).

132. “Electronic monitoring may be an extremely effective low-cost pretrial alternative as it allows officials to closely monitor defendants while allowing them freedom to work, meet with attorneys, and remain with family.” Shima Baradaran Baughman, The Bail Book: A Comprehensive Look at Bail in America’s Criminal Justice System 52–53 (2018).

133. For low-risk individuals, supervision-type conditions can actually produce worse outcomes and interfere with their success. See Jenny Carroll, Beyond Bail, 73 FLA. L. REV. 143, 143 (2021) (noting that shifting away from financial conditions of release to supervision tools can result in financial and other costs to defendants).
can result in additional burdens to defendants, most of whom are poor.\footnote{See Richard A. Oppel, Jr. & Jugal K. Patel, One Lawyer, 194 Felony Cases, and No Time, N.Y. TIMES, (Jan. 31, 2019), https://perma.cc/ESS7-RP3K (reporting that in 2019 “roughly four out of five criminal defendants [in the U.S.] are too poor to hire a lawyer and use public defenders or court-appointed lawyer”); Or. ADVISORY COMM. TO THE U.S. COMM’N ON CIVIL RIGHTS, A REPORT ON PRETRIAL DETENTION, RELEASE, AND BAIL PRACTICE IN OREGON 5 (2021) (“Utilizing electronic monitoring is seen as an effective tool for monitoring special defendant populations such as individuals who are perpetrators of domestic violence and viewed to ensure victim safety. Conversely, its usage can be problematic for defendants who have less stable housing. Under such restrictions, these individuals may frequently be in violation and could cycle back into the criminal justice system. In addition, imposing a fee for the very use of the device can be viewed as predatory as these individuals may have challenges with employment due to the legal charges imposed on them.”); See also Ava Kofman, Digital Jail: How Electronic Monitoring Drives Defendants into Debt, PROPUBLICA (July 3, 2019), https://perma.cc/R84X-M97H (“When cities cover the cost of monitoring, they often pay private contractors $2 to $3 a day for the same equipment and services for which EMASS charges defendants $10 a day.”). Moreover, as technology develops, the costs of electronic monitoring become lower. See Defendants Driven into Debt by Fees for Ankle Monitors from Private Companies, EQUAL JUST. INITIATIVE (July 23, 2019), https://perma.cc/K5WZ-G64V.}

For misdemeanor defendants, the “freedom” they are granted while on community supervision may be illusory and may, perversely, keep them tethered to the justice system longer than if they were to simply plead guilty and serve a short jail sentence.\footnote{See, e.g., Complaint at 20, Evenson-Childs v. Ravalli County Sheriff’s Office, 9:21-CV-00089 (D. Mont. Aug. 9, 2021) (alleging pretrial detainee being subject to punishment because pretrial fees accumulate every day plaintiff is at liberty on pretrial release).}

Research shows that low risk defendants, the bulk of pretrial detainees, return to court and do not commit new crimes while on pretrial release.\footnote{L´eon Digard & Elizabeth Swavola, Justice Denied: The Harmful and Lasting Effects of Pretrial Detention, VERA INST. OF JUST., 2019, at 2.} Further, failure-to-appear rates drop when defendants receive a phone or text message reminder about upcoming court appearances.\footnote{Id. at 8.} Thus, release without any conditions should be sufficient in the vast majority of cases to ensure a defendant’s appearance in court and to protect the community. The reality is that replacing incarceration with a host of community supervision tools can lead to over-supervision of pretrial detainees.\footnote{See Sawyer & Wagner, supra note 5 (“Community supervision, which includes probation, parole, and pretrial supervision, is often seen as a ‘lenient’ punishment or as an ideal ‘alternative’ to incarceration. But while remaining in the community is certainly preferable to being locked up, the conditions imposed on those under supervision are often so restrictive that they set people up to fail. The long supervision terms, numerous and burdensome requirements, and constant surveillance (especially with electronic monitoring) result in frequent ‘failures,’ often for minor infractions like breaking curfew or failing to pay unaffordable supervision fees. In 2019, at least 153,000 people were incarcerated for non-criminal violations of probation or parole, often called ‘technical violations.’”).}

Where these costs can be shifted to the defendant and supervision can be outsourced to private companies, there is no cost to the system imposing them. In rural jurisdictions, the increased use of community supervision tools may be extremely attractive given the scarcity of alternatives for
either detention or supervision by a pretrial services agency. However, because rural residents are, on average, poorer than urban and suburban residents, additional costs associated with electronic monitoring may be more onerous for them.

C. Adopt a Validated Risk Assessment Tool

When cash bail and carceral detention are displaced, something else takes its place. In the U.S. bail administration, pretrial risk assessment, more often than pretrial liberty, fills that void. At the outset, policymakers and reformers should distinguish between risk assessment tools, on one hand, and risk and needs assessment instruments, on the other. Both are actuarial tools to rate risk, like those used by insurance companies, with the goal of assigning defendants a risk score to guide decision-making. But risk assessment tools are different. They are based on algorithms that purport to quantify an individual’s risk of committing future offenses. In the pretrial context, they also seek to quantify the risk that someone will fail to appear for future court proceedings. An assessment that includes a needs inventory seeks to identify services and programming that will lessen a person’s risk of reoffending or, in the pretrial context, failing to appear.

Assessment instruments are employed at various points in the criminal justice process. They are used pretrial to evaluate whether an accused

139. See Alex Chohlas-Wood, Understanding risk assessment instruments in criminal justice, BROOKINGS INST. (June 19, 2020), https://perma.cc/7YVV-LWGT.


141. With respect to “future dangerousness,” what these tools predict is an individual’s risk of coming into contact with the justice system in a way that results in an arrest or a conviction, not the risk of actually committing another offense or presenting a danger to others. This is more than a technical detail. Using arrest or conviction data as a proxy for dangerousness in a system that includes racial profiling and over-policing of low-income communities can further cement the relationship between race and perceived dangerousness. See Bernard E. Harcourt, From the Ne’er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law, 66 LAW & CONTEMP. PROBS. 99, 146 (2003) (“[R]acial profiling, assuming its premises and fixed law enforcement resources, may be a self-confirming prophecy. It likely aggravates over time the assumed correlation between race and crime. This could be called a ‘compound’ or ‘multiplier’ or ‘ratchet’ effect of criminal profiling: profiling may have an accelerator effect on disparities in the criminal justice system.”). See also Megan Stevenson & Sandra Gabriel Mayson, The Scale of Misdemeanor Justice, 98 B.U. L. REV. 731, 731 (2018) (noting a “profound racial disparity in the misdemeanor arrest rate for most—but not all—offenses types”); Ethan Corey, New Data Suggest Risk Assessment Tools Have Little Impact on Pretrial Incarceration, APPEAL (Feb. 7, 2020), https://perma.cc/MBH7-E52X (“According to data scientist Cathy O’Neill, author of ‘Weapons of Math Destruction,’ any risk assessment algorithm based on arrest data will necessarily reflect the racial biases that already exist in the criminal legal system. ‘We don’t have crime data. We have arrest data. Most crimes do not lead to arrest, but, in particular, the distribution of the missingness is not equally distributed. We have way more missing white crime than Black crime. And what that means is that when you feed this so-called crime data, which is actually arrest data; into these algorithms, of course they predict that the police are going to go rearrest Black people.’”)}
should be detained or released, and, if released, whether conditions of release should be imposed. In sentencing they are used to evaluate whether and where a convicted defendant should be incarcerated, and what services or programming should be made available to them during incarceration or after release.

Another distinguishing factor is whether a tool incorporates only static factors (immutable facts, such as the defendant’s age, gender, and criminal history); or whether it also incorporates dynamic factors (such as the defendant’s current living or employment status and behavioral health needs). Incorporation of dynamic as well as static factors impact the tool’s relative efficiency and cost. Information about a defendant’s static factors can be gathered from law enforcement and court records without interviewing the defendant. Information about their dynamic factors, in contrast, must come from a wider pool of sources and will require at least one interview of the defendant by a trained pretrial services officer (for release and detention decisions) or probation officer (for sentencing and post-conviction release or incarceration decisions).

The history of risk assessment in U.S. criminal justice has been fluid. The Bureau of Justice Assistance published a history of risk assessment that divides risk assessment into four generations.\textsuperscript{142} It describes the first generation of risk assessment as unstructured professional hunches. The second generation, which emerged in the 1920s, saw the emergence of more objective actuary tables. The third generation incorporated the idea that “rehabilitative efforts will be effective when they match the level of risk, type of criminogenic need, and learning style and motivations (responsivity) of the individual being treated.”\textsuperscript{143} This is a more tailored approach that seeks to target people at high risk to reoffend with many potentially changeable criminogenic needs for the most intensive interventions. Fourth-generation instruments, as described in this history, integrate case planning and risk management efforts.\textsuperscript{144}

The most widely used tools in contemporary bail administration resemble the second-generation tools first introduced in the 1920s.\textsuperscript{145} A common instrument in contemporary bail administration is a pure risk assessment tool. A well-known example is the Laura and John Arnold Foundation (LJAF) Public Safety Assessment (PSA), which has been provided to jurisdictions at no cost, along with technical assistance.\textsuperscript{146} Targeting pretrial ser-
vices at high-risk individuals is a more cost-effective approach than imposing standard conditions of release on all detainees. However, as discussed, robust risk and needs assessment requires human and infrastructure resources. This likely explains why second-generation tools like the PSA, which look exclusively at risk, are attractive to resource-strapped jurisdictions. Using tools like the PSA that are developed and controlled by a private company, while ostensibly free, may involve different costs. It is not uncommon for this arrangement to require a jurisdiction to enter into a contract restricting its ability to alter the tool and limiting its disclosure of information deemed proprietary by the tool developer. Some states, like Montana, have a history of corporate capture of government, which gave rise to strong open records and open government laws. Whether agreeing to this type of contractual opacity is consistent with a particular state’s constitution, laws, and values is an important question policymakers should consider.

A robust debate is underway about algorithmic justice generally, and the proper role of risk assessment tools in pretrial release decision-making specifically. It is useful to situate this conversation about contemporary

147. Algorithmic justice purported cost savings is a selling point to prospective jurisdictions. Whether adopting and implementing these tools actually results in those savings in an important area of inquiry.

148. The outsourcing of aspects of criminal justice to the private sector, including bail administration, of course, is nothing new in the U.S. Many jurisdictions, including Montana, contract with private companies to operate prisons and detention facilities. And, as noted, bail bond companies are part of bail administration in states that authorize commercial bail bonding. See Kristen M. Budd & Niki Monazam, Private Prisons in the United States, SENTENCING PROJECT (June 15, 2023), https://perma.cc/RBUA-454Q; Jessica Silver-Greenberg & Shaila Dewan, When Bail Feels Less Like Freedom, More Like Extortion, N.Y. TIMES (Mar. 31, 2018), https://perma.cc/Q8SE-SLMN.

149. Corporate Capture, CTR. FOR CONST. RIGHTS, https://perma.cc/FM22-J7N9 (last visited Feb. 27, 2023) (“Corporate capture is a phenomenon where private industry uses its political influence to take control of the decision-making apparatus of the state, such as regulatory agencies, law enforcement entities, and legislatures.”).

150. See Sarah Picard, Matt Watkins, Michael Rempel & Ashmini G. Kerodal, Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness, CTR. FOR JUST. INNOVATION (June 2019), https://perma.cc/9X5Q-6RQC (“Risk assessments—automated formulas that measure the ‘risk’ a defendant will be rearrested or fail to appear in court—are among the most controversial issues in criminal justice reform. To proponents, they offer a corrective to potentially biased decisions made by individual judges. To opponents, far from disrupting biases, risk assessments are unintentionally amplifying them, only this time under the guise of science.”). The Uniform Law Commissioners dodged these issues by taking a non-position on the use of risk assessment tools. See UNIF. PRETRIAL RELEASE AND DETENTION ACT, supra note 15, § 303 cmt. (“This Act neither requires nor prohibits the use of actuarial risk assessment instruments. Jurisdictions may decide not to use such tools, or they may use actuarial instruments and direct or authorize courts to consider statistical risk assessments as ‘other relevant information’ under Section 303(3).”). This approach simply underscores the fact that national uniformity in state bail administration is an illusory proposition and that would-be reformers cannot avoid the painstaking work of engaging with these issues on a state-by-state and local level. For an example of the type of jurisdictionally specific research policymakers should encourage and rely on, see Evan M. Lowder, Bradley R. Ray & Eric L. Grommon, Improving the Accuracy and Fairness of Pretrial Release Deci-
criminal justice’s embrace of risk assessment tools within a larger “risk governance” framework. Risk governance is policymaking in which “concerns about risk, efforts to profile risk, and calls for reducing, avoiding, or otherwise managing risk are fundamental” driving forces. In modern criminal systems, this has manifested as “a turn toward . . . ‘evidence-based’ risk governance, as illustrated by ‘contemporary risk assessments [that] rely less on the ‘clinical’, ‘subjective’, or ‘informal’ judgments of legal and criminal justice actors and more on standardized, algorithmic, validated, and actuarial methods of assessment.’” In the pretrial context, risk assessment tools are championed as data-based approaches to decision-making that can counteract bias, decrease detention rates, and lead to the imposition of fewer or less restrictive pretrial release conditions. But they are also criticized for perpetuating disproportionally negative outcomes for racialized and marginalized defendants by magnifying the importance of metrics, especially prior convictions, that are themselves a manifestation of systemic bias. Some researchers caution that algorithmic tools are misused to justify the imposition of more and more onerous pretrial release conditions, rather than creating a smaller net to capture only

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152. Id. at 331.
154. One study designed to evaluate whether a facially race-neutral tool would lead to an over-categorization of defendants as high-risk found that “concerns over risk assessments perpetuating racial disparities are real—even when the assessment tool itself is deemed to be free of bias.” See Picard et al., supra note 150 (describing a study involving more than 175,000 defendants in New York City in which the risk assessment tool used “performed similarly across racial and ethnic groups in terms of its overall predictive accuracy, [but] . . . was more likely to misclassify black defendants as high-risk when compared to Hispanic or white defendants,” and noting that to the extent a “high-risk classification leads to an increased likelihood of high bail or pretrial detention, [this] would potentially foster racially-disparate pretrial outcomes”). A leading voice in this arena, the Pretrial Justice Institute (PJI), initially a proponent of pretrial risk assessment instruments (RAIs), changed course in 2020 and forcefully denounced them as inaccurate. See The Case Against Pretrial Risk Assessment Instruments, PRETRIAL JUST. INST. 1 (Nov. 2020), https://perma.cc/MM4F-MW57 (asserting that pretrial risk assessment instruments do not accurately predict behavior of people released pretrial and are racially biased against Black, Latinx, Indigenous, and low-income people and increase disparities in jails where implemented); see also James Austin, Sarah L. Desmarais & John Monahn, Open Letter to the Pretrial Justice Institute, https://perma.cc/XX7R-VMQK (undated) (challenging PJI’s proposal to scrap pretrial risk assessment instruments completely).
those defendants who warrant detention and leading to presumptive release for the rest (and the vast majority) of pretrial detainees.\textsuperscript{155}

When judicial decision-makers rely on risk assessment tools to justify pretrial detention or onerous conditions of pretrial release based on risk, rather than to decrease reliance on detention and supervision based on the absence of risk, the use of these tools greatly deviates from their intended function. It is fair to say that modern bail administration enterprise has come completely untethered from the original purpose of bail—to ensure the accused’s appearance at trial. Not surprisingly, in a world where “future dangerousness” is deemed a legitimate basis for detention, the use of tools has, in some jurisdictions, increased detention rates and resulted in the disproportionate labeling of minoritized defendants as “dangerous.”\textsuperscript{156} Some researchers question whether these tools are effective in lowering pretrial detention rates.\textsuperscript{157} To the extent a jurisdiction purports to rely on assessment scores, but individual decision-makers do not actually rely on them, this can lend a false veneer of uniformity to bail administration in that locale.\textsuperscript{158}

Consistent with the state-by-state and hyper local nature of criminal justice generally, and bail reform specifically, in the U.S., the use of al-

\textsuperscript{155.} See generally Kristin Bechtel et al., \textit{A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions}, 42 Am. Crim. Just. 443 (2017) (finding little evidence that pretrial supervision conditions generally improve outcomes). An underexamined force in modern pretrial release and decision-making is systemic risk-aversion and the misuse of pretrial incarceration and supervision to engage in punishment and denunciation before a defendant’s guilt has been established.

\textsuperscript{156.} See \textit{Hill}, supra note 23, at 910 (the use of risk assessment tools in bail reform undermines de-carceration objectives because these tools “legitimize dangerousness predictions”).

\textsuperscript{157.} See \textit{Corey}, supra note 141 (reporting that a “first-of-its-kind database and report documenting the use of risk assessment tools [collected from jurisdictions in 46 states, plus the District of Columbia, encompassing more than 1,000 counties] . . . shows little evidence that the tools are leading to reductions in pretrial incarceration rates or eliminating racial disparities in pretrial release decisions”); \textit{see also} \textit{Werth}, supra note 151, at 327–48 (“I suggest that risk techniques throughout legal and crime control arenas operate performatively and tend to reproduce their own logics. . . . [A] number of voices claim that risk and needs assessments can help mitigate or even end the era of mass incarceration . . . [but] risk assessment has, to this point, helped organize the penal state and fortify its legitimacy. Producing offenders and penal subjects as risky beings and reproducing them as such over time, undergrads and provides ideological support for incarcerating, supervising, regulating, and criminalizing a massive number of people, as well as for imposing an array of restrictive post-penal measures to more and more individuals. . . . [T]he rise of this historically unprecedented legal-penal complex has occurred alongside, and in interaction with, the proliferation of risk knowledges, discourses and technologies.”).

\textsuperscript{158.} Megan T. Stevenson & Sandra G. Mayson, \textit{Pretrial Detention and the Value of Liberty}, 108 Va. L. Rev. 709, 771 (2022) (“[B]ail magistrates seem to be engaged in a mental and moral calculus outside of a technical evaluation of risk” and “[t]hey ignore the recommendations associated with the risk assessment more often than not, and use fades over time.”).
Algorithmic tools in bail administration varies widely among and within states, as illustrated in the map below.159:

As shown, states and local jurisdictions within states are, literally, all over the map when it comes to the use of risk assessment tools in bail administration. Some states have enacted uniform laws requiring the adoption of a nationally validated tool like the PSA (as in Arizona and Utah); some states have adoption of a state-specific tool developed “in-house” (as in Alaska and Nevada); some states permit use of a specific tool (as in North Dakota); and other states permit, but do not require, use of a validated tool, without specifying or mandating a specific tool or defining “validated” (as in Montana).160 The role of rurality and resources in this space warrants further examination.161

159. This map, current as of September 2021, was created by MediaJustice and Movement Alliance Project, and is now maintained by the nonprofit organization People’s Tech Project and is available at https://perma.cc/UKZ3-9DML. It is reproduced here with permission.


161. See Or. Advisory Comm. to the U.S. Comm’n on Civil Rights, supra note 134, at 4 (“In Oregon, there are currently five different risk assessment tools in use and the effort to utilize a statewide tool across jurisdictions may be challenging due to the vastly different populations, funding streams, and resources across counties.”).
Regardless of where one lands on the virtues and shortcomings of algorithmic justice, there is no dispute that to be used legitimately and accurately, a risk assessment instrument must be “validated” and it must be validated regularly. That means it must be consistently and empirically reliable.\footnote{162} In a different context, risk assessment tools have been shown to perform differently in different jurisdictions. This warrants caution in adopting “off-the-shelf” tools without “extensive customization to local settings.”\footnote{163} Relatedly, at least one study found urban areas are more likely to witness a decrease in incarceration following the adoption of a risk assessment tool than rural areas.\footnote{164} This points to a need for more study regarding the validity of individual tools not just on a state level, but on a local level.\footnote{165} It is critical, on a state and local level, to ensure that tools in use...
are properly validated for rural demographics and other distinct communities situated within a state’s borders.166

D. Embrace Data-Driven Policies

Relying on data to inform criminal justice law and policy is uncontroversial. Data-driven public policy, however, requires good data. The problem throughout the U.S., partly related to the hyperlocality of U.S. criminal justice, is that very few jurisdictions engage in uniform reporting or centralized reporting of criminal justice data.167 On the pretrial level, local or county courts may collect data regarding bail and pretrial decision-making, while jail data may be collected by the sheriff. Even at the federal level, where criminal justice data collection is more reliable, recent changes in federal reporting systems have produced data gaps.168 At best, criminal justice data collection across jurisdictions in the U.S. is uneven.169 This makes it difficult to measure the relative success or failure of reform initiatives. For policymakers, the data void makes it difficult, if not impossible, to evaluate whether a reform measure with a successful outcome in another state, or even other jurisdictions within the same state, will have the same impact for their community. For criminal justice stakeholders in rural jurisdictions, this challenge is compounded by the absence of rural representation in criminal justice research and data collection described above. It bears emphasizing that data should not be collected for the sake of collec-

166. See generally Dewees & Marks, supra note 41.
167. See, e.g., Keaton Ross, How a Lack of Data Hinders Oklahoma Justice Reform Efforts, OKLA. WATCH (May 9, 2022) https://perma.cc/47WN-9J63 (“Oklahoma doesn’t collect data on the average jail stay or racial makeup of its detention centers. The state also doesn’t track decisions made by 27 district attorney’s offices, including the initial charging of crimes, plea agreements, and bail recommendations. Lawmakers who support criminal justice reform say the absence of aggregate data makes it difficult to quantify and tackle a host of issues, from pretrial incarceration of nonviolent offenders to the availability of diversion programs in rural areas.”).
168. See Weihua Li, What Can FBI Data Say About Crime in 2021? It’s Too Unreliable to Tell, MARSHALL PROJECT (June 14, 2022), https://perma.cc/J7H5-2FVS (reporting that following the FBI’s switch in 2021 from a “nearly century-old national crime data collection program . . . to a new system, the National Incident-Based Reporting System (NIBRS), . . . [n]early 40% of law enforcement agencies around the country [including New York City and Los Angeles, two of the nation’s most-populated cities] did not submit any data in 2021 to a newly revised FBI crime statistics collection program, leaving a massive gap in information”).
169. Recognizing there can be no data-driven policy without reliable data, several jurisdictions, including Montana, are either studying or legislating statewide criminal justice data collection and reporting requirements. See, e.g., Tara Jensen, Criminal Justice Reinvestment in Montana: Improving Outcomes for American Indians, MONT. BUDGET & POL’Y CTR. (July 2018), https://perma.cc/53CU-U3LT. Some jurisdictions, however, are reportedly moving forward with reforms without data. See, e.g., Henry Redman, Bail reform debate proceeds without data following Waukesha tragedy, WISC. EXAMINER (Jan. 11, 2022), https://perma.cc/6DXK-WCLE (reporting that, as of early 2022, “[f]or nearly two months Wisconsin politicians have been debating bail reform despite the lack of true understanding about what the bail system looks like for the majority of people facing criminal charges”).
tion. Indeed, imposing additional data collection requirements on law enforcement could have the unintended consequence of increasing the number of defendants detained pretrial and the length of their detention so they can be processed.170 For resource-strapped rural communities, mandating increased data collection—without providing funding for the staff and technology necessary to ensure best practices are being followed for data collection and storage—will result in unreliable or incomplete information.

The call for more data-driven criminal justice policy has inspired efforts to collect and report jail data on a county-level basis. However, there is no one source that accurately counts the number of inmates in detention centers in most states or at a national level. Further, jail data do not always clearly distinguish between convicted jail inmates and pretrial detainees. National organizations have attempted to undertake the monumental task of accounting for the number of people in jail in the U.S., but these efforts have produced incomplete or inconsistent data.171

E. Enhance Access to Appointed Counsel

Research shows that access to counsel improves outcomes for defendants at pretrial release and detention hearings, leading to lower detention rates.172 Lower detention rates translate into cost savings for counties and local municipalities that fund and operate short-term detention facilities or rent jail beds from other jurisdictions, as may be the case for some rural or small jurisdictions that do not have their own facilities. The availability or absence of counsel at the pretrial release and detention juncture in a given jurisdiction, therefore, is a critical data point for researchers, bail reform advocates, and policymakers alike. Consistent with the research, UPRDA

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170. See Woods et al., supra note 97, at 1235 (noting that law enforcement agencies “may be required to conduct a more expansive collection of identifying information in order to receive state or federal grants” and that if they “believe they are required to arrest and book all individuals charged with misdemeanors in order to comply with other data collection requirements, it will seriously impede their ability to undertake citations practices that would enable many individuals to avoid jail altogether” (citations omitted)).

171. See OR. ADVISORY COMM. TO THE U.S. COMM’N ON CIVIL RIGHTS, supra note 134, at 3–4 (“There are currently 16 different jail management systems utilized in the 31 county jails within Oregon. These different systems make statewide data on pretrial detainees particularly challenging to collect, despite efforts by the Prison Policy Institute, the Marshall Project, and the state Criminal Justice Commission. Depending on the priorities of the jail commander and the staffing available, data can remain out of date or lacking key pieces that would be utilized for studying pretrial detention in Oregon. Some data collection systems do not code for ethnicity, so individuals that identify as Latinx are coded as white. Other systems do not refer to federally recognized tribes that exist within Oregon. This information is important to fully understand the impact of pretrial detention on different racial and ethnic communities within Oregon and to properly study the civil rights implications of bail.”).

and other sources identify increasing the availability of defense counsel at pretrial release and detention hearings as a means to decrease trial courts’ reliance on financial conditions of release.173

As noted, there is no federal constitutional right to appointed counsel at pretrial release and detention hearings. Federal constitutional minimums notwithstanding, defendants in many state and local trial courts already have access to appointed counsel at pretrial detention hearings either under state law, court rules, or public defender office’s policies and procedures.174 As noted infra, for example, Montana judges who participated in RJI’s interview process reported that defendants in Montana are almost invariably represented by duty counsel from a public defender’s office. This was true across urban, rural and mixed judicial districts.

It may be a good first step to ensure counsel is available at pretrial release and detention hearings, as proposed by UPRDA. As a threshold matter, however, this may not be a viable strategy in some rural areas because communities outside population centers face significant challenges in attracting and retaining all types of professionals, not just lawyers.175 Staffing issues aside, the more important (and more difficult) inquiry is whether counsel’s involvement makes an actual difference in that jurisdiction. It is well-known that in high-volume court systems counsel often spend no more than a few minutes with each defendant before their pretrial release and detention hearing and that they rarely have an opportunity to conduct even a cursory investigation to discover outside information to support a pretrial release argument, information such as might be provided by the defendant’s family, employer or community. As a result, counsel will typically have minimal additional factual information to add to the court’s determination that could not be provided directly by the defendant. In jurisdictions that routinely provide access to counsel at pretrial release and detention hearings and yet still have high pretrial detention rates, the critical research inquiry is whether the quality of counsel’s interactions with pretrial defendants and the quantity of factual information available to counsel in advocating for

173. See generally Colbert et al., supra note 96.

174. Id.

175. See Lauren Weisner et al., Criminal Justice System Utilization in Rural Areas, ILL. CRIM. JUST. INFO. AUTH., CTR. FOR JUST. RSCH. & EVAL. (Mar. 2020), https://perma.cc/9L78-TYHP. (“The American Bar Association has identified a lack of legal representation as a crisis point in rural America. While nearly 20% of the U.S. population lives in rural areas, just 2% of small law firms are located in rural counties. Reports indicate some rural counties have no attorneys within 100 miles. This shortage can have a negative impact on rural residents, who, without legal representation, become at risk for eviction, serious injury from domestic violence, and exploitation by those in positions of power.” (footnotes and citations omitted)). As discussed, this situation is not uniform across states or jurisdictions. As noted, RJI’s research indicated that in Montana courts, both rural and non-rural, appointed counsel was uniformly available and typically provided by duty counsel from the Office of the Public Defender, a statewide agency.
pretrial release make a difference, separate and apart from counsel’s legal advocacy.

Another important inquiry is whether involvement of counsel makes the same, less or more of a difference in jurisdictions dispensing algorithmic pretrial justice. For example, evaluating the impact of counsel requires knowing whether judges are more or less likely to depart from the recommendations provided by a risk-assessment tool when counsel is in the mix. Finally, examining whether pretrial defendants fare better in terms of pretrial release and detention in jurisdictions with robust pretrial services might indicate whether resources are better directed towards increased pretrial services staffing than more attorneys. Finally, as explained, risk-based pretrial release and detention policies that are genuinely aimed at releasing as many defendants as possible (rather than sorting the deserving defendants from the non-deserving and justifying the routine detention of people charged with violent felonies) require guardrails for high-risk defendants so they can be safely released pretrial. These guardrails are robust pretrial services and support systems for those defendants. In low resource jurisdictions, pursuing successful risk-based bail administration may require prioritizing funding pretrial services and access to mental and medical health services for defendants over providing robust legal representation at pretrial release and detention hearings.

IV. RURAL BAIL ADMINISTRATION AND REFORM—A STATE-LEVEL INQUIRY

A. Montana—A Mostly Rural, Constitutional Right-to-Bail State

1. Montana Landscape and Demographics

Under any definition of “rural,” Montana is a mostly rural state. It is the fourth largest state geographically and the ninth smallest by population. Montana’s largest city, Billings, has a population of approximately 120,000 people. About 44% of Montana residents live in rural areas. The majority of Montana’s geographic area is defined by the U.S. Census Bureau as “rural,” meaning most population centers have fewer than 2,500 people. But, as cautioned above, although Montana is considered a rural state, not all its residents live in rural areas. On the contrary, Montana con-

176. See McNamee et al., supra note 31; Quickfacts: Montana, supra note 31.
Montana contains several urbanized/metropolitan clusters around its largest cities—Billings, Missoula, Great Falls, and Bozeman.\textsuperscript{178}

2. \textit{Montana Bail Administration}

Montana is a constitutional right to bail state. Montana re-wrote its constitution in 1972, but it retained the bail provision from its 1889 constitution. That provision provides: “[a]ll persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.”\textsuperscript{179} Montana trial courts operate within a comprehensive statutory structure governing pretrial release and detention decisions.\textsuperscript{180} In Montana, bail must be set at the initial appearance. Under state law, this hearing can be conducted remotely.\textsuperscript{181} Trial counsel are not required to be appointed for the bail hearing. However, as noted, most judges responding to the RJI inquiry reported that defendants in their courts are typically represented by duty counsel from the public defender’s office.

Unless charged with a capital offense, a Montana trial court must release a defendant upon reasonable conditions that ensure the appearance of the defendant and protect the safety of the community and any person.\textsuperscript{182} A Montana court may impose any reasonable conditions that will ensure the defendant’s appearance or ensure the safety of the community, including requiring a defendant to post money or property.\textsuperscript{183} If a court concludes a financial condition of release is warranted, it must impose an amount that is “not oppressive,” and that is “considerate of the financial ability of the accused.”\textsuperscript{184}

Montana law sets out specific factors trial courts must consider in setting conditions of release. In 2017, the state legislature authorized Montana


\textsuperscript{181} See Mont. Code Ann. § 46-7-101 (“(1) A person arrested, whether with or without a warrant, must be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance. (2) A defendant’s initial appearance before a judge may, in the discretion of the court, be satisfied either by the defendant’s physical appearance before the court or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other and so that the defendant and the defendant’s counsel, if any, can communicate privately. A judge may order a defendant’s physical appearance in court for an initial appearance hearing.”).

\textsuperscript{182} Mont. Code Ann. § 46-9-106.

\textsuperscript{183} See Mont. Code Ann. §§ 46-9-108; 46-9-111. Montana law authorizes a party to furnish bail in the form of (1) cash, (2) real estate, (3) a written undertaking, and (4) a commercial surety bond. Id. § 46-9-401; see also Siroky v. Richland County, 894 P.2d 309 (Mont. 1995).

\textsuperscript{184} Mont. Code Ann. § 46-9-301(4), (6).
trial courts to use a “validated pretrial risk assessment tool” to “assign release conditions and determine placement options.” The legislature did not define “validated” for purposes of this statute, nor did it require trial courts to adopt a specific tool. The legislature also authorized the Office of the Court Administrator (OCA) to establish a pretrial program and provided funding for a pilot project. Pursuant to the legislative authorization, the OCA established a pilot Pretrial Program. The legislature re-authorized and re-funded the Program in 2019 and 2021. The Pretrial Program partnered with the Laura and John Arnold Foundation (LJAF) and uses only the Arnold Foundation Public Safety Assessment (PSA).

Five counties participated in the initial pilot OCA Pretrial Program: Silver Bow County (where Butte, Montana’s fifth-largest city, is located), Lake County, Lewis and Clark County (where Helena, the state capital and Montana’s sixth-largest city, is located), Missoula County (where Missoula, Montana’s second-largest city, is located), and Yellowstone County (where Billings, Montana’s largest city, is located). Two counties, Flathead County (where Kalispell, Montana’s seventh-largest city, is located) and Cascade County (where Great Falls, Montana’s third-largest city, is located) later joined the OCA Pretrial Program, bringing the total to seven jurisdictions. Gallatin County (where Bozeman, Montana’s fourth-largest city, is located) developed and uses its own risk assessment tool. Like the U.S. as a whole, the pretrial risk assessment map in Montana reveals a patchwork of approaches to bail administration. Although all counties in Montana are operating within the same constitutional and statutory framework, the actual administration of bail on the ground is different in the more populated regions of the state than in rural parts of the state.

As noted, Montana’s seven largest cities are in the eight counties whose courts have adopted risk assessment tools. These counties are the most densely populated regions in Montana and are home to approximately 80% of Montana’s population. Thus, even within a very rural state like Montana, a rural/urban bail administration has emerged, with the use of pretrial risk assessment tools concentrated entirely in urban and suburban jurisdictions. It should be noted, as discussed below, that the eight counties that are home to most of Montana’s residents are geographically large coun-

185. Id. §§ 3-1-708, 46-9-109 (trial court “may use a validated pretrial risk assessment tool”).
186. The literature for the PSA states it was “devised . . . following the review of data from approximately 300 jurisdictions in the United States and in 1.5 million criminal cases.” Montana Judicial Branch Office of Court Administrator Pretrial Program, MONT. JUD. BRANCH, https://perma.cc/2XHH-8CLU (last visited Apr. 2, 2023).
ties that also contain rural areas. The judicial districts corresponding to these counties, therefore, are serving both urban and rural populations. Thus, it would be inaccurate to say that no rural communities in Montana are in a judicial district using a pretrial risk assessment tool. But it is accurate to say that the parts of Montana with the lowest concentrations of people and resources—in other words, its most rural and remote communities—are not part of the risk assessment-based bail reform authorized by the 2017 Legislature.

The OCA Pretrial Program instituted the use of a “Decision-Making Framework” (DMF), a matrix used to identify risk. The matrix is structured around a presumption of release with no financial conditions of release, except where a defendant is charged with a serious or violent offense. The Montana DMF is based on Arnold PSA materials, but the matrix used in Montana was tailored to account for state-specific approaches to certain offenses. Specifically, Montana’s matrix reflects state repeat offender laws for driving under the influence (DUI) and partner/family member assault, as well as special treatment of domestic violence offenses, including partner/family member assault or strangulation. On the Montana DMF, these two categories of offenses are singled out as justifying additional deviations from the otherwise presumptive release conditions indicated on the matrix. For example, using the Montana DMF, a defendant charged with a second or subsequent DUI may be subject to additional release conditions (such as substance testing), and a defendant charged with partner/family member assault or strangulation is subject to at least active pretrial monitoring, and possible additional release conditions (such as a no-contact order).

B. Input from Montana Decision-Makers

1. Survey

Montana’s 56 counties are administratively structured into 22 judicial districts served by 46 district court judges. At any given time, there are approximately 110 jurists across the state making pretrial release and detention decisions. This includes district court judges, justices of the peace, municipal judges, and city judges. This figure does not include tribal court judges. The Rural Justice Initiative (RJI) at the University of Montana, in

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188. The Montana DMF is available at https://perma.cc/SRW3-9N7H.
190. This figure is approximate because although the number of district court judges is fixed, pro tem judges and justices—as well as vacancies and transitions—can increase and decrease the total number of individuals making pretrial release decisions.
191. Tribal courts are, of course, independent of state court systems and were, therefore, not included in this research. Examining pretrial release and detention decisions in tribal and reservation

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https://scholarworks.umt.edu/mlr/vol84/iss2/1
collaboration with the Office of the Montana Supreme Court Administrator, sent a 24-question online survey to 110 Montana judges between November and December 2021, and followed up the survey with interviews. RJI received 56 completed surveys. Of the 56 survey respondents, 19 were district court judges, 20 were justice court judges, 8 were municipal/city court judges, and 9 did not indicate their judicial position. The survey was anonymous and did not collect information on a participant’s judicial district.

There was a nearly even distribution among participants regarding judicial experience. Nearly one-third of survey participants had over ten years of judicial experience (32%); 29% had five to ten years of judicial experience; and 29% had less than five years of judicial experience. Similarly, there was a split between the primary practicing domain, with slightly less than half (49%) of the decision-makers indicating that they primarily handle felony matters, and the other half (51%) of the decision-makers handling primarily misdemeanor matters.

Participants were asked to self-identify their district as rural, urban, or something else. Over half (53%) self-identified their judicial district as rural; about a third (33.7%) identified their judicial district as urban, and the rest identified their judicial district as a mixture of the two (12.4%).

RJI asked survey participants if they use a risk assessment tool in making pretrial release and detention decisions and, if not, to identify the main reason they do not use one. Nineteen respondents (34%) indicated they currently use a pretrial risk assessment tool, with the Arnold Public Safety

border towns is critical because of the disproportionate representation of indigenous people in state and county criminal justice systems in Indian country jurisdictions with significant indigenous populations. Like Montana, these Indian country jurisdictions contain some of the most rural and remote communities in the U.S., many of which are located on or near Indian reservations. The states with the highest percentage of American Indian or Alaska Native residents as a share of total population are mostly in the West. In order, they are: Alaska (26%), Oklahoma (16%), New Mexico (13%), South Dakota (11%), Montana (9%), and North Dakota (7%). American Indians and Alaska Natives are severely over-represented in criminal justice systems in these states. In Montana, for example, although the AI/AN individuals make up a little over 6% of the state’s population, they represent over 20% of the male incarcerated population and over 30% of the female incarcerated population. See Quickfacts: Montana, supra note 31; Population Demographics of Individuals Who are in Custody or Under Supervision of the Montana Department of Corrections, MONT. DEP’T OF CORR. (July 10, 2023), https://perma.cc/GK9W-4CYP; Keith Schubert, New Study of Montana’s Justice System Reveals Further Disparities for Native Americans, DAILY MONTANAN (July 27, 2022), https://perma.cc/8VCG-LM6V (these figures may be understated—the article notes that “[w]hile the study was able to identify areas where Native Americans fared worse in the state’s criminal justice system, their ability to analyze the degree of the disparities was limited because of the lack of data kept throughout the system. According to the study, on average, across all courts, defendants’ race and ethnicity information was missing in 32 percent of cases filed from 2015 to 2020.”). See also Norma Mabie, ‘Form of Erasure’: Indigenous Inmates may be Misrepresented in 2020 Census, Activist Says, GREAT FALLS TRIBUNE (Aug. 26, 2020), https://perma.cc/YC5T-JWW4. These issues are the subject of a companion work in progress by the Author: Pretrial Justice in Out-of-the-Way Places—Including Indian Country and Bordertowns in the Bail Reform Conversation.
Assessment (PSA) being the most commonly used tool. Users of pretrial risk assessment tools were fairly evenly divided between urban and rural judicial districts, with 37% of districts identifying as rural, 42% as urban, and 16% as mixed urban/rural.

Among the two-thirds of participants who did not report using a pretrial risk assessment tool (n=38), 37% reported a lack of access as the main reason for not using a risk assessment tool, a third (32%) indicated they lacked the resources to use a risk assessment tool. A small minority of those respondents (5%) said they simply opted not to use such tools. Twenty-six percent of survey participants selected “other,” and offered a wide variety of reasons for not using a risk assessment tool, including not having enough information, not knowing what a risk assessment tool is, believing that risk assessment tools are irrelevant to their tasks, and believing that the tools are “useless.”

RJI asked survey respondents who indicated that they use a pretrial risk assessment tool about the benefits of the tools.\(^{192}\) The most frequently mentioned benefits include the consistency and uniformity that the tools offer. Many participants also named the tools’ evidence-based algorithm as a perceived benefit. Less commonly listed benefits include ease of use, transparency, efficiency, comprehensiveness, and objectivity.

Fifteen of the 19 respondents who reported using a pretrial risk assessment tool reported that they “occasionally” deviate from the tool’s recommendations. These respondents were evenly distributed across urban, rural, and mixed judicial districts. Few respondents indicated that they either routinely (on one end of the spectrum) or rarely (on the other end) deviated from the tool’s recommendations.

Participants who did not use a pretrial risk assessment tool were also asked to identify what would make them more likely to use one. The most common responses were wanting more information and training on tools, using a tool that is specific to Montana, and validating an existing tool more specifically to Montana’s rurality and demographic makeup.

2. Interview Results

Survey participants were asked whether they would be interested in participating in a more in-depth interview regarding their pretrial release and detention practice. Among the 56 survey participants, 26 indicated a willingness to participate in the interviews. RJI invited all interested prospective interview participants to participate in a follow-up interview. Fourteen judicial decision-makers completed a 31-question interview via phone.

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\(^{192}\) Among the following options: consistency, uniformity, ease of use, efficiency, transparency, comprehensiveness, evidence-based, other.
call between May 20, 2022, to June 9, 2022. During the interview, participants were invited to discuss their caseload, their use of risk assessment tools, the characteristics of their pretrial release and detention cases, as well as their thoughts on ways of improving the pretrial decision-making process.

Of the 14 respondents, 10 identified themselves as district court judges, two as justices of the peace, one as a municipal court judge, and one as both a municipal court judge and a justice of the peace. The participants represented eight different judicial districts. Fifty-seven percent of interview respondents described their district as urban, 14% as rural, and 29% as mixed urban and rural. More than two-thirds of the participants indicated that they had not held a prior judicial position in Montana.

Ten interview participants reported utilizing a pretrial risk assessment tool, eight of whom categorized their judicial district as “urban” reported using a PSA tool. Two of the four interview participants who categorized their judicial district as “mixed” urban and rural reported using a pretrial risk assessment tool. Neither of the two interview participants who categorized their judicial district as “rural” reported using a pretrial risk assessment tool.

Participants’ reasons for not using a pretrial risk assessment tool were unique. One judge reported the tool is “useless.” Another judge said that they have all the information they need from the factors in the statute and the evidence presented by attorneys. Another judge reported that the tool was “not available to me” due to budgetary restrictions. One judge also reported that they have a “better idea about [a defendant’s] character” than what they would have from any pretrial risk assessment tool. One judge reported that pretrial risk assessment tools require time to process that, if used, would result in the defendant remaining in jail for a longer period.

Most participants who use a tool indicated they use a matrix in conjunction with the PSA tool (n=8). All respondents who indicated that they use a matrix responded that they have deviated from the recommendations generated by the tool used.

Judicial decision-makers who indicated that they use risk assessment tools when making pretrial release and detention decisions were asked about the frequency and reasons for deviating from the recommendations generated by the risk assessment tools. Most participants indicated they deviate from the recommendations at least occasionally. Participants provided a wide range of reasons for deviating from recommendations. These ranged from having additional information provided by the state and defense to believing that the scores were inaccurate. Of note, most of the responses to this question were related to additional personal knowledge and understanding of the defendant or the community.
Participants reported a wide range of typical deviations from the matrix, from 10% up to 50% of the time. When the participants deviated from the recommendations, they most often did so by adding more onerous conditions of release. Only one participant noted a typical departure of less onerous conditions of release than the matrix. When asked whether and how the risk assessment scores affect their decision on the financial condition of release, most participants indicated that they consider the score but do not generally put significant weight on it.

Respondents were asked how often defendants were represented by counsel in pretrial release and detention proceedings in their courtrooms and whether counsel was typically provided by the Office of the State Public Defender (OPD) or private counsel. Respondents indicated that most defendants (99–100%) are represented at pretrial release and detention proceedings, and that they are typically provided representation by OPD duty counsel. These responses were consistent across urban, rural, and mixed urban/rural jurisdictions. Respondents reported, on average, spending anywhere from 10–15 minutes, to 25–30 minutes on individual pretrial release and detention hearings.

Survey respondents were told that “[r]esearch indicates that residents of rural jurisdictions are more likely to be acquainted with, or know about, other members of their community than residents in more densely populated communities.” They were advised that the interviewer would use the term “acquainted with” to include any person they know, or know about, because they are part of the same community, including social and professional acquaintances, even if the only reason they knew them was through their judicial position. They were asked to include people as acquaintances even if the only reason they know or know about a defendant is because they have appeared before them. Respondents were asked these questions:

- In percentages, of the defendants who appear before you in pretrial release and detention matters, how many are you acquainted with?
- In percentages, of the defendants who appear before you in pretrial release and detention matters, how often do you know something about their background, family or circumstances outside what is provided to you in court files or at the hearing?
- In instances when you know something about a defendant outside what is provided to you in court files or at the hearing, is that information helpful in making pretrial release and detention decisions?

These responses varied. Since the term “acquainted” was used broadly, often jurists “knew” a defendant because they were in frequent contact with the judicial system. Rural jurists, however, were more likely to indicate that they “knew” someone based on interactions outside the judicial system.

Respondents were asked to identify resources, training, or information that would help them in making pretrial release and detention decisions.
Four jurists indicated that they did not need additional resources; four reported that they would be interested in additional training on risk assessment, pretrial release, and best practices for intervention. Jurists were also interested in learning more about substance use treatment and risk assessment tools specific to domestic violence. Two jurists reported an interest in fostering greater consistency in tool use across the state, as well as having access to data regarding tool use and the development of these tools. Three jurists wanted to see expanded pretrial services, including more drug treatment options. One judge mentioned having access to a social worker in the courtroom to help identify services for defendants, as they indicated is the practice in some local tribal courts.

V. Observations and Recommendations

A. Observations

1. Rurality Matters in Bail Administration and Reform

Researchers and scholars often assume that pretrial release and detention decisions are made in an information void. Rural jurists, however, often have an informational advantage over their urban and suburban colleagues about the individuals who appear before them. Whether this is a good, bad, or neutral thing for individual defendants or the system is beyond the scope of the analysis here. However, the fact that rural law enforcement, court staff, jurists, and defendants are often not strangers and may know quite a bit about each other’s families and life circumstances is an important consideration where a reform measure is developed or researched in the context of a stranger justice model. With respect to pretrial risk assessment tools specifically, jurists operating with an informational advantage may perceive these tools as less useful or attractive.

Further, trial courts in rural jurisdictions with limited jail capacity situated far away from the next available bed may make pretrial release and detention decisions informed entirely by local jail capacity or the availability of law enforcement personnel to transport defendants to a detention facility in another county. Under those circumstances, non-carceral approaches, including community supervision, may be the only viable option in the moment. This is not unlike the drastic decreases in pretrial detention witnessed throughout the U.S. during the height of the COVID 19 pandemic. When carceral options were severely limited in an effort to lessen the transmission risks posed by placing pretrial detainees into congregate housing, trial courts were forced to be far more selective in choosing who would be sent to jail. This indicates a need to examine the extent to which pretrial release and detention decisions are influenced and driven by eco-
nomic and other factors completely unrelated an individualized consideration of a person’s risks and needs. As illustrated by the Montana survey and follow-up interviews, culture and attitudes about risk assessment tools may be one of the most important determinants of the success or failure of algorithmic-based bail reforms in a given court system.\footnote{193}

2. Rural Needs and Experiences Should Inform Bail Administration and Reform

In criminal justice, given the relative numbers involved, urban issues and initiatives typically command most of scholars’ and researchers’ attention.\footnote{194} In bail administration and reform, however, far more attention to jurisdictionally-specific research and analysis is needed. This is complicated and painstaking work\footnote{195} whose audience may be limited to in-state stakeholders. The limited potential audience makes this type of work less attractive to scholars, researchers, and funding sources seeking universal approaches in the hope of producing uniform solutions. But for all the reasons discussed, the nature of criminal justice in the U.S. generally and bail administration in particular is such that only reform proposals informed by, aimed at, and tailored for specific state and local laws, policies, and practices are likely to have practical application.

There is no national consensus on what a “rural” community or what a “rural” court is. What is clear is that rural communities are not just smaller versions of urban and suburban jurisdictions. Rather, rural communities have distinct characteristics, experiences, and needs. Some of these characteristics, especially resource scarcity\footnote{196} and relationship density\footnote{197} can have
significant impacts on law enforcement generally, and bail administration specifically. Regardless of the “rural” definition used, rural communities and rural courts are sufficiently distinct from their urban and suburban counterparts to warrant specialized inquiry, research, and analysis. Legislators and policymakers in states with rural communities considering bail reform initiatives on a statewide level, therefore, should factor rurality into their assessment of bail reform proposals.

One important takeaway from the RJI Montana inquiry is that a reluctance to embrace algorithmic justice tools should not be confused with an unwillingness to embrace reform or a lack of a reform mindset among rural jurists. On the contrary, Montana jurists indicated an interest both in receiving more information and training and in alternatives to carceral responses to criminal conduct such as treatment and problem-solving courts.
B. Recommendations

1. Employ a Right-Sized Definition of “Rural”

Criminal justice in the U.S. is defined and bounded by geography, and justice administration and reform are typically conceptualized—of necessity—on a county level. Unitizing at the county level, however, should be a starting, not an ending point. This is because, as discussed above, particularly in larger rural western states like Montana, a single county can contain both urban and nonmetropolitan rural areas. Further, just as there are multiple definitions of “rural,” what defines a “rural court” is also subject to competing definitions. There seems to be some consensus on the appropriate metrics—namely, the number of full-time judges and population size. But the consensus collapses around whether it includes both general and limited jurisdiction judges and what the size of a rural population is.200 In evaluating bail reform measures and deployment of resources, therefore, states should first inventory their jurisdiction’s understanding of what is rural both on a county level, but—more importantly—on a community level.

2. Use or Develop Tools Validated for Specific Rural Demographics

One of the most critical unanswered questions about national risk assessment tools is whether a tool based on national criminal justice data can be considered properly validated for every jurisdiction in the U.S. given its wide regional variations in demographics. In Montana and some other western states, for example, American Indians/Alaska Natives (AI/AN) are the most numerically significant minoritized demographic. The AI/AN demographic is vastly over-represented in the justice-involved populations in Montana and many of its neighbor states. But the AI/AN demographic is frequently completely absent from national criminal justice statistics. Further, even within states, there may be variations in population density and concentrations of specific demographics that render a tool invalid for a particular area within a state. For example, AI/AN communities in many western states, including Montana, are heavily concentrated on Indian reservations and bordertowns (areas within a state’s borders that are adjacent to Indian reservations). Many of these communities are extremely remote; indeed, communities in and around Indian country are among the most rural communities in rural states. In states with numerically significant communities, such as rural AI/AN residents, that are not included national criminal

200. See id. at 94 (“[T]here is no consensus about what constitutes a ‘rural court’; competing definitions include any general jurisdiction trial court with no more than two full-time judges, . . . [a court serving a population of] 60,000 or less . . . or 50,000 or less . . . .”).
justice data, it is critical to carefully evaluate whether a risk assessment tool developed based on data that does not include this population can be considered “validated” in that state or local court system. Policymakers considering statewide mandates to adopt a particular uniform risk assessment tool, especially if they are developed by a national organization based on misaligned data, should evaluate whether those tools will be viewed as legitimate in their courts. As illustrated by the RJI Montana inquiry, some jurists reported routinely ignoring or adjusting PSA recommendations, precisely because they don’t view the tools as properly validated for their jurisdiction. The resulting off-matrix pretrial release and detention decisions may make jurisdiction-wide uniformity unattainable or at least illusory.

3. Engage Rural Community Stakeholders

Criminal justice reform comes from multiple sources. Although bail administration is framed and bounded by a state’s constitutions and laws, actors other than legislatures play a significant role in criminal justice reform generally, and in bail reform specifically. Courts engage in bail reform by amending their court rules or issuing opinions governing bail administration in their jurisdictions. Prosecutors engage in bail reform when they set office-wide policies instructing their deputies when and whether to seek financial conditions of release. Municipal judges and local governments reform bail administration in their localities by amending local laws, policies, and procedures for setting bail in matters involving

201. See Jorgensen & Smith, supra note 14, at 2–3 (“There are four main categories of actors who implement bail reforms in the U.S.: courts, prosecutors, city and county governments, and state legislatures. . . .”). Jorgensen and Smith tether bail reform to cash bail by defining “bail reform” as “any policy change that is intended to and could reasonably be expected to reduce the number of people detained pretrial because they cannot afford to post cash bail.”

202. Id. at 3 (“Local and state courts have implemented bail reforms by making changes to court rules, which govern how judges can make decisions. Such changes may include establishing a presumption of release on one’s own recognizance for certain crimes, considering a defendant’s ability to pay when setting bail, reducing or eliminating the use of bond schedules, and/or requiring judges to assess whether unsecured bonds or non-monetary conditions of release would be sufficient to assure court appearance and public safety before imposing cash bail. Courts in the following states and counties have implemented rule changes intended to modify how bail is used in their jurisdictions: Cook County, IL (2017), Indiana (2016), Maryland (2016), Missouri (2019), Mecklenburg County, NC (2010, 2019), Ohio (2020), Fort Bend County, TX (2020), and Travis County, TX (2020).” (citations omitted)).

203. Id. (describing opinions from the Supreme Courts of New Mexico in 2014, Nevada in 2020, and California in 2021 as three examples of court rulings creating bail administration requirements for those states).

204. See id. at 3–4 (“Since 2017, prosecutors from at least 16 jurisdictions have announced that their offices will no longer seek cash bail for certain crimes. Examples of these jurisdictions include Los Angeles County, CA (2020), Cook County, IL (2017), Hennepin County, MN (2021), Prince George’s County, MD (2019), Brooklyn, NY (2017), Manhattan, NY (2018), Chittenden County, VT (2020). Additionally, Virginia had a cluster of at least five prosecutors announce between 2018 and 2020 that they would no longer seek cash bail for certain crimes.” (citations omitted)).
violations of their local ordinances. State legislatures, of course, enact laws that govern bail administration on a statewide level. Some reform initiatives originate with outside actors, like nonprofits who seek to work within, or create disruptions to, the bail system. An example is the creation of community bail funds to provide indigent defendants the same access to bail bonds as other defendants.

Reformers targeting reliance on cash bail should be aiming both at the constitutional and statutory structure of bail administration in each state. But they also need to be in dialogue with local courts, prosecutors, defense counsel, elected officials, including sheriffs—and nonprofits to identify that community’s resource capacity and motivation to divert more pretrial defendants away from carceral detention. In communities bordering Indian reservations, the stakeholder group must include a county or locality’s tribal government counterparts and law enforcement partners. Reformers would also be well-advised to understand and account for the functional and economic role commercial bail bond companies play in bail administration in communities that lack detention facility capacity or professional pretrial services, conditions common to many remote, rural communities. In many communities, bail bondsmen may be part of the acquaintanceship dynamic described above.

4. Measure and Publish Jurisdiction-Specific Results

“Reform” cannot be measured without uniform collection and centralized reporting of data. That undertaking, of course, requires human resources to collect, enter, and organize data. It also requires physical resources, like hardware and software to perform these tasks. One item RJI investigated was the frequency with which Montana jurists who use a risk assessment tool deviate from its recommended outcomes and the reasons for the deviation. Given the prevalence of risk assessment tools in contem-

205. Id. at 4–5 (“The third category of bail reform actors is city and county governments. There is significant variation in the types of reforms that have been implemented at the local level, though they can be separated into two main types: changing local laws on the use of cash bail . . . [and] expanding pretrial services.”). The authors note that the availability and types of pretrial services available in a community do not, in and of themselves “qualify as bail reform,” but, as they note, providing or expanding pretrial services can be employed as a tool for reducing pretrial detention to the extent increased services provide an alternative to pretrial incarceration. (“[M]any cities and counties have taken steps to establish or expand their pretrial services in an effort to change how cash bail is used and to reduce pretrial detention. Pretrial services broadly refer to services that people may interact with leading up to trial, such as court-ordered supervision, court date reminders, or behavioral health supports. . . . By expanding pretrial services, cities and counties create alternative conditions of pretrial release that can lead to a decreased reliance on cash bond.”).

porary bail administration, more inquiry is needed into when and why trial courts deviate from a risk assessment tool recommendation.\textsuperscript{207} In particular, pertinent to the issues discussed in this Article, it is important to investigate whether there is a discernable geographic difference between judges who deviate from risk assessment tool recommendations, and to understand the basis for the deviation, including whether it is based on information outside the court files.

5. Explore the Legislative Middle Ground

In popular discourse, contemporary bail reform is often framed as a zero-sum proposition with cash bail at the center. But as the discussion above illustrates, bail administration is a complex undertaking in which local and regional differences matter. As discussed, completely removing the financial component from the bail equation has proven impossible without granting the government more authority to detain defendants pretrial based on their perceived future dangerousness. If the real complaint of bail reform is the \textit{commercial} aspect of the bail equation and the “professional bail bondsman system, with all its abuses . . . in full and odorous bloom,”\textsuperscript{208} regulation, rather than elimination, may prove a more attainable target in states with a constitutional right to bail.

Where cash bail is concerned, for states unwilling to extend courts’ pretrial detention powers, the choice does not need to be binary between authorizing unregulated financial conditions of release (cash bail), on one hand, or expanded preventive detention, on the other. Several jurisdictions, including Illinois before it embarked on its recent no cash bail initiative, successfully displaced commercial bail bonding by authorizing the deposit of 10\% of a secured bond amount with the court clerk (sometimes called a “deposit bond”). Unlike the 10\% bond issued by a commercial bondsman, this 10\% bond amount is returned to defendants who comply with their pretrial conditions of release, less a small administrative fee.\textsuperscript{209} As noted in a publication prepared for the National Institute of Justice in 1980 (when, it bears noting, most states only authorized pretrial detention to guard against

\begin{thebibliography}{10}
\bibitem{Stevenson & Mayson, supra note 158, at 771} (“[B]ail magistrates seem to be engaged in a mental and moral calculus outside of a technical evaluation of risk” and “Ignore the recommendations associated with the risk assessment more often than not, and use fades over time.”).
\bibitem{Article 110 of the Illinois 1963 Code} for example, provided that an eligible accused could obtain pretrial release three ways: (1) being released on his personal recognizance; (2) executing a bail bond and depositing 10\% of the bond or $25, whichever is the greater, with the clerk; with 10\% of the bail retained by the clerk as a bail bond cost; or (3) executing a bail bond and securing it by a deposit with the clerk of the full amount of the bail in cash or stocks and bonds, or double the amount in unencumbered nonexempt Illinois real estate. 725 Ill. Comp. Stat. § 110-7 (1963).
\end{thebibliography}
the risk of flight and did not explicitly recognize future dangerousness as an authorized basis for pretrial detention), “[w]hile a percentage deposit system is not the ‘final answer’ its importance and applicability in jurisdictions which currently rely on bail bonding for profit cannot be overstated.”210 In jurisdictions that choose to retain money bail, this type of regulation may be the more practical approach to addressing the exploitation inherent in commercial for-profit bail bonding.

CONCLUSION

The Montana inquiry described here tells a story of two spaces in which pretrial release and detention decisions are made. One comprises urban and urban-adjacent courtrooms where these decisions are made in a high-volume stranger justice context. The other comprises courtrooms in low-population, remote communities which typically have fewer resources, but often have far more direct information and context for the decision at hand and more time in which to form individualized inquiries and tailored outcomes.

Absent a future intervention by the U.S. Supreme Court in the interpretation of the Eighth Amendment, or Congress in the form of national legislation, the legal contours of U.S. bail administration will remain a state-by-state proposition. Bail is administered in thousands of courtrooms every day across the U.S. under state laws and local rules and policies. The aggregate economic impacts of bail administration are realized on a state and national level. But the immediate economic and human impacts of bail administration are experienced on the local level by individuals, their families, and their communities. Thus, to be successful, bail reform would be approached as a multi-tiered undertaking that calls for small-scale research and consideration of each jurisdiction’s unique character and needs.