The Unexceptional Exception: Preventive Detention Under New Jersey's Bail Reform

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Abstract

Advocates have celebrated the movement to abolish cash bail as progressive reform. This paper argues that the movement's flagship achievement—the New Jersey Criminal Justice Reform Act (CJRA)—has traded one injustice for another. Where the old system jailed presumptively innocent individuals because they were poor, the new system jails them because an algorithm and the charge against them deem them dangerous—too dangerous for every nonmonetary bail condition in combination with cash bail. The paper makes three contributions.

First, it situates the CJRA within the three waves of American bail reform and shows that New Jersey is a national outlier: it presumes detention in certain noncapital cases on a bare finding of probable cause, without the heightened evidentiary standard nearly every other state requires.

Second, drawing on empirical studies of pretrial risk assessment instruments and eight years of New Jersey data—more than 300,000 warrant charges, over 135,000 prosecution motions for detention, and nearly 60,000 detention orders—it shows that risk-based systems overpredict dangerousness and expand preventive detention beyond any "carefully limited exception."

Third, it argues that these changed circumstances, together with modern supervision technology that answers the government's central concern of 1987, require the Supreme Court to revisit *United States v. Salerno*—and that unreliable prediction severs the rational relation between preventive detention and the public safety it promises, leaving a regulatory statute that punishes in fact. The paper concludes by proposing statutory amendments that align the CJRA with the majority state approach and restore the presumption of innocence to pretrial procedure.

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Things are not always what they seem; the first appearance deceives many; the intelligence of a few perceives what has been carefully hidden.

— Phaedrus, Roman fabulist (1st c. C.E.)

INTRODUCTION

Liberty was the norm.[1] Detention is now *normal*. The nationwide debate over bail reform turns on a single, glaring inequity in the cash bail system[2]: individuals arrested for low-level offenses who cannot afford cash bail languish in jail pretrial, while wealthier individuals arrested for serious crimes buy their pretrial freedom; some rearrested on bail.[3] In response, many states have rewritten their pretrial procedure, taking money out of the equation and replacing it with nonmonetary release conditions based on individual risk.[4] Many jurisdictions now use algorith-

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1 *Cf.* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

2 Bryce Covert, *America Is Waking up to the Injustice of Cash Bail*, THE NATION (Oct. 19, 2017), http://www.thenation.com/article/archive/america-is-waking-up-to-the-injustice-of-cash-bail/; Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM), https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality ("The use of money bail is one of the most troubling features of our deeply unequal justice system.").

3 JOINT COMM. ON CRIM. JUST., REPORT OF THE JOINT COMMITTEE ON CRIMINAL JUSTICE 1–2 (Mar. 10, 2014) [hereinafter JCCJ REPORT], http://www.njcourts.gov/sites/default/files/sccr/reports/finalreport2014.pdf ("[T]he current system presents problems at both ends of the spectrum: defendants charged with less serious offenses, who pose little risk of flight or danger to the community, too often remain in jail before trial because they cannot post relatively modest amounts of bail, while other defendants who face more serious charges and have access to funds are released even if they pose a danger to the community or a substantial risk of flight."). As this paper argues, risk-based systems present serious problems not only at "both ends of the spectrum" but throughout it.

4 Isabella Jorgensen & Sandra Susan Smith, *The Current State of Bail Reform in the United States: Results of a Landscape Analysis of Bail Reforms Across All 50 States* 2 (Harv. Kennedy Sch. Fac. Rsch. Working mic risk assessment instruments (RAIs) to gauge an arrestee's dangerousness when a court must decide between pretrial release and preventive detention. Shifting from wealth-based to risk-based bail thus appears fairer.[5] But "[t]hings are not always what they seem."

Bail reform proponents present RAIs as a panacea: low-risk arrestees can be released pending trial, easing jail overcrowding, while arrestees deemed too dangerous can be detained—without any bail.[6] Critics respond that RAIs are biased.[7] This paper addresses a different concern: how courts determine a presumptively innocent individual's dangerousness when deciding whether to order pretrial *preventive* detention. It focuses on one state's reform—the New Jersey Criminal Justice Reform Act (CJRA),[8] which stands apart from nearly every other state bail law in how it determines dangerousness and presumes detention for noncapital offenses that have historically been guaranteed pretrial release.[9]

Paper Series, Paper No. RWP21-033, 2021) (analyzing bail reform measures taken in the fifty states).

5 JCCJ REPORT, *supra* note 3, at 3 ("A risk-based system is fairer than the current one because it is based on objective factors unrelated to wealth, race, or ethnicity. It will promote defendants' liberty interests by significantly reducing the number of defendants held in jail before trial.").

6 *Id.* (explaining that a system based on individual risk "promotes public safety by expressly permitting judges to consider danger to the community while deciding whether to release or detain a particular defendant. If a judge determines that no conditions of release will protect the community, he or she may order a defendant detained pending trial."). *But see* John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1731–32 (2018) ("A bail regime predicated on pretrial risk assessment may reduce the overall incidence of pretrial detention, especially where a risk assessment replaces a money bail system. Simultaneously, however, such a bail regime could lead to an increase in the number of defendants who are preventively detained pretrial—meaning they were never offered a path of release.").

7 Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 495–96 (2018) ("Among academics, the turn to actuarial risk assessment has engendered both excitement and apprehension, but criticism has centered on its potential to exacerbate race and class inequalities.").

8 Act of Aug. 11, 2014, ch. 31, 2014 N.J. Laws 467.

9 David B. Harris, *Bail Reform Went Too Far – We've Given up Constitutional Protections*, NJ.COM (June 19, 2017, 3:32 PM), Part I discusses the three waves of bail reform and the federal Bail Reform Act of 1984 (BRA).[10] More than three decades ago, in *United States v. Salerno*, the Supreme Court upheld the BRA,[11] which authorized federal courts to preventively detain arrestees facing noncapital charges on a finding of dangerousness alone. Congress worried about crimes committed by individuals released pretrial and about the government's inability to surveil them adequately.[12] Yet recent empirical work shows that supervising arrestees is far easier today—undermining the rationale on which *Salerno* rests.[13]

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http://www.nj.com/opinion/2017/06/nj_bail_reform_went_too_far_in_eliminating_prevent.html. *Cf.* John Raphling, *California Ended Cash Bail—but May Have Replaced It with Something Even Worse*, THE NATION (Sept. 24, 2018), http://www.thenation.com/article/archive/california-ended-cash-bail-but-may-have-replaced-it-with-something-even-worse/ ("[M]oney bail allowed her to get free. Under the new law, that option will not exist."). In 2022, Alabama adopted Aniah's Law, which, like the CJRA, permits pretrial preventive detention of individuals charged with certain serious noncapital offenses. ALA. CODE § 15-13-3(b)-(c) (West 2026). The statute authorizes a court to deny bail—after a pretrial detention hearing and upon indictment or a probable-cause finding—when the prosecution proves by clear and convincing evidence that no combination of release conditions will reasonably ensure the defendant's appearance or protect public or individual safety, and the defendant is charged with one of thirteen enumerated felonies, ranging from murder and first-degree sexual offenses to human trafficking, terrorism, and aggravated child abuse; the statute further requires that such a defendant be held without bail pending the hearing. *See also* Brandon Moseley, *Alabama Senate Passes Aniah's Law*, ALA. POL. REP. (Apr. 8, 2021, 7:37 AM), http://www.alreporter.com/2021/04/08/senate-passes-aniahs-law/.

10 *See infra* Part I. The BRA is codified as amended at 18 U.S.C. §§ 3141–3150.

11 *Salerno*, 481 U.S. at 741.

12 *Id.* at 742 ("Responding to 'the alarming problem of crimes committed by persons on release,' . . . Congress formulated the Bail Reform Act of 1984 . . . as the solution to a bail crisis in the federal courts.") (citations omitted).

13 Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1114 (2019) (noting "[o]ther empirical work shows that risks of dangerousness and flight can be successfully managed at significantly lower cost than pretrial incarceration") (citation omitted); Mayson, *supra* note 7, at 494 ("As a practical matter, flight risk may be less of a concern than it once was because it is hard to truly flee from justice in today's hyper-connected world.").

Part II analyzes the CJRA and compares it with bail procedure across the nation. It shows that the CJRA is an outlier: it presumes detention in certain noncapital cases on a bare finding of probable cause and lacks a heightened evidentiary standard—unlike all but two other state bail systems.[14] Part II also details the problems with RAIs generally and with the CJRA's instrument in particular. Studies have found that RAIs are biased and overpredict individual risk, and wrongful risk determinations produce wrongful preventive detention.

Part III turns to a more fundamental presumption: innocence. It argues that the Supreme Court should revisit *Salerno*. Because dangerousness cannot be predicted reliably, detention premised on prediction fails even the rational-relation floor; the regulatory label collapses, and what remains is punishment *before* trial. The paper concludes by proposing statutory changes to align the CJRA with the majority state approach.[15] The CJRA has set a dangerous precedent—as Alabama's new law shows—and has traded one injustice for another. The charge is not this paper's alone. Those who led the fight against cash bail warned that its abolition must not become a warrant for preventive detention,[16] and the latest comprehensive assessment concludes that every prevailing reform model—New Jersey's included—has failed to keep pretrial detention the "carefully limited exception" the Supreme Court promised.[17] This paper parts ways with

14 *See infra* Part II.

15 *See infra* Part III.

16 *See* Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 708–10 (2018) (urging that "cash-based pretrial incarceration should not be replaced" with expanded preventive detention and that reform heed the "lessons of history").

17 *See* Shima Baradaran Baughman, *Eliminating Pretrial Detention*, 104 B.U. L. REV. 1669, 1669–70, 1676 (2024) [hereinafter Baughman, *Eliminating*] (concluding that "all four prevailing bail reform schemes are irredeemably flawed" and fail to keep detention the "carefully limited exception" *Salerno* promised); *see also* Shima Baradaran Baughman, *Taming Dangerousness*, 112 GEO. L.J. 215, 215–16 (2023) [hereinafter Baughman, *Taming*] (finding that the three reform movements "collectively failed to improve pretrial detention rates").

that verdict only on the remedy.[18] In the end, the paper answers the question Justice Marshall posed in dissent: "If it suffices to accuse, what will become of the innocent?"[19]

I. Three Waves of Bail Reform

In *Powell v. Alabama*,[20] the Supreme Court described the time between arrest and trial as "perhaps the most critical period of the proceedings."[21] Small wonder, then, that bail[22]—the conditional right to pretrial release after arrest—still fuels constant debate and litigation.[23] On any given day in the United States, about half a million presumptively innocent individuals sit in jail only because they cannot afford the cash required to secure release, with widespread and devastating effects.[24] Indeed, the harm of pretrial detention itself drove states to reevaluate their

18 Baughman, *Eliminating*, *supra* note 17, at 1669–70 (proposing near-total elimination of pretrial detention and a statutory ninety-percent release target); *see infra* Part II.A.

19 *Salerno,* 481 U.S. at 764 (Marshall, J., dissenting) (quoting Coffin v. United States, 156 U.S. 432, 455 (1895)). *See also* Mikaela Rabinowitz, *"What Will Become of the Innocent?" Pretrial Detention, the Presumption of Innocence, and Punishment Before Trial*, 7 UCLA Crim. Just. L. Rev. 1 (2023) (examining pretrial detention after *Salerno* through Justice Marshall's question); and Michael J. Eason, Note, *Eighth Amendment—What Will Become of the Innocent?*, 78 J. Crim. L. & Criminology 1048, 1061–65 (1988) (pressing the question in *Salerno*'s immediate wake).

20 287 U.S. 45 (1932).

21 *Id.* at 57.

22 Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 912 n.3 (2013) (defining bail as "security required by a court for the release of a prisoner who must appear in court at a future time") (citation omitted).

23 Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1817 (2024) ("[B]ail, and bail reform, have attracted increasing attention, in part because history is thought to bear on the meaning of bail-related constitutional provisions.").

24 Wykstra, *supra* note 2. *See also* Miguel F.P. de Figueiredo & Dane Thorley, *Pretrial Disparity and the Consequences of Money Bail*, 81 Md. L. Rev. 557, 557–60 (2022) (presenting empirical evidence of disparities in bail decisions and their consequences).

cash bail systems.[25] How, then, can a bail system that *presumes detention* be the answer?

For most of American history, the right to bail in noncapital cases was "automatic and inalienable."[26] Unless charged with a capital crime, the law guaranteed every accused pretrial release.[27] The first wave of bail reform, during the civil rights era, sought to curb the wrongful use of pretrial detention against indigent arrestees.[28] The second wave reversed course, taking the "law and order" approach that the Nixon and Reagan administrations fostered,[29] and legislatures began amending "one of the oldest, and perhaps the most stable, rights in Anglo-American history."[30] The second wave bore its first fruit in the District of Columbia's 1970 preventive-detention statute—the nation's first—which the District's highest court upheld, en banc and over vigorous dissent, in *United States v. Edwards*. Congress then borrowed the District's model for the BRA. Even that first experiment was cabined: detention could run no more than sixty

25 JCCJ Report, *supra* note 3, at 1–2 ("Research during the past half century has clearly and consistently demonstrated that being incarcerated before trial can have significant consequences: defendants detained in jail while awaiting trial (1) plead guilty more often; (2) are convicted more often; (3) are sentenced to prison more often; and (4) receive harsher prison sentences than those who are released during the pretrial period. Those outcomes hold true even when other factors are taken into account, such as current charge, prior criminal history, and community ties.") (citations omitted).

26 Hegreness, *supra* note 22, at 912–13.

27 *Id.* at 912. Even in capital cases, bail could be denied only when the proof was evident or the presumption great. *Id.*

28 Koepke & Robinson, *supra* note 6, at 1731–32. *See also* Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail*, 52 Akron L. Rev. 1043, 1058–70 (2018) (tracing the 1966 and 1984 federal reforms and the states' adoption of preventive detention); Van Brunt & Bowman, *supra* note 16, at 704–20 (chronicling all three waves).

29 *Id.* at 1732; Hegreness, *supra* note 22, at 956 ("The conservative revolution that started with the 'law and order' campaigns of 1968 has moved rights in a different direction—one perhaps best described as a 'reverse' constitutional movement. The rescinding of the constitutional right to bail is perhaps the greatest triumph of the conservative revolution, but both liberal and conservative scholars have overlooked its significance.").

30 Hegreness, *supra* note 22, at 915–16.

days, and only after an adversary hearing at which the government proved, among other findings, a substantial probability that the accused had committed the charged crime. The CJRA presumes from the charge what the District had to prove about the person. In *United States v. Salerno*,[31] the Supreme Court rejected a constitutional challenge to the BRA,[32] altering the fundamental right to bail in noncapital cases.[33]

Salerno marked a seismic shift in bail law, and its aftershocks continue: federal courts may deny bail in noncapital cases and preventively detain presumptively innocent individuals whose release would pose too great a danger to the community.[34] The states followed, altering the historic right to bail enshrined in their constitutions and statutes.[35] State courts, too, gained authority to order pretrial preventive detention.[36] Although "[e]very state that joined the Union after 1789 secured the right to bail either in their state codes or their state constitution,"[37]

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31 481 U.S. 739 (1987). The BRA's model was the District of Columbia's preventive-detention statute of 1970—the nation's first—upheld over dissent in United States v. Edwards, 430 A.2d 1321, 1331–43 (D.C. 1981) (en banc). The District detained for no more than sixty days, D.C. Code § 23-1322(d)(2) (1973), and only upon particularized findings: clear and convincing evidence of detention eligibility, a qualifying pattern of dangerous conduct, and a substantial probability that the accused committed the charged offense. *Edwards*, 430 A.2d at 1334, 1363–64.

32 *Id.* at 741 (upholding the BRA under the Fifth and Eighth Amendments).

33 Hegreness, *supra* note 22, at 960; *see, e.g.,* United States v. Himler, 797 F.2d 156, 158–59 (3d Cir. 1986) ("The 1984 Act marks a radical departure from former federal bail policy. Prior to the 1984 Act, consideration of a defendant's dangerousness in a pretrial release decision was permitted only in capital cases. . . . Under the new statute judicial officers must now consider danger to the community in all cases in setting conditions of release. Furthermore, a defendant's dangerousness may serve as a basis for pretrial detention.") (citations omitted).

34 Hegreness, *supra* note 22, at 960 (explaining that the BRA "completely changed bail law" by authorizing federal courts to deny bail in noncapital cases based on danger to the community).

35 *Id.* at 962. Note, however, that "New York is thus an exception, along with Virginia, in not historically protecting an automatic right to bail for persons accused of noncapital felonies." *Id.* at 930.

36 *Id.* at 962.

37 *Id.* at 953; *see also* Funk & Mayson, *supra* note 23, at 1842–43, 1892 (explaining that "[e]very new state incorporated the Penn clause into its constitution" and that William Penn's right-to-bail model was one today all but nineteen states allow courts to deny bail in noncapital cases based on a finding of dangerousness.[38]

Over time, many states recognized the systemic inequity of conditioning pretrial liberty on a deposit of money with the court.[39] First, acknowledging that many arrestees pose little risk to public safety yet remain jailed only for lack of resources, states rebuilt their bail systems around individual risk.[40] Nonmonetary conditions for most offenses would improve arrestees' chances of avoiding detention and lower jail populations.[41] Second, studies showed that pretrial detention itself causes myriad adverse effects.[42] Detainees often gave up claims of innocence and accepted wrongful plea bargains just to regain their liberty.[43] Yet as detailed below, risk-based bail systems can pro-

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"Congress and almost every new state to enter the Union after 1789 chose to follow").

38 Hegreness, *supra* note 22, at 960–62.

39 JCCJ REPORT, *supra* note 3, at 34 ("[T]he Committee analyzed responses by other jurisdictions that have also sought to address the adverse effect of money bail upon the poor.").

40 PRETRIAL JUST. INST., WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING 1 (Jan. 2019), http://www.prisonpolicy.org/scans/pji/where_pretrial_improvements_are_happening_jan2019.pdf ("Efforts to improve pretrial justice are underway across the country, from small towns that seek to lower jail populations to Congress, where legislation has been introduced that would restrict federal funding to states that continue to rely on money bail.").

41 State v. Robinson, 160 A.3d 1, 4 (N.J. 2017) (explaining that under the CJRA "[d]efendants who pose less risk can be released on their own recognizance or on conditions that pretrial services officers monitor").

42 Stuart Rabner, *Hobbs Lecture: Criminal Justice Reform in New Jersey*, 50 SETON HALL L. REV. 619, 620 (2020).

43 *Id.* (noting defendants "faced pressure to plead guilty to 'time served'"); *see, e.g.,* Jamiles Lartey, *TV Made America's Bail System Famous. Now Reformers Want to End It*, THE GUARDIAN (Aug. 30, 2017, 7:00 AM EDT), http://www.theguardian.com/us-news/2017/aug/30/new-jersey-bail-reform-criminal-justice-bond-money; Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665, 687 (2018) ("In felony cases, the stakes are even higher. Factually innocent defendants plead guilty, often to avoid the real risk of a far more severe sentence if they should lose at trial."). *Cf.* United States v. Edwards, 430 A.2d 1321, 1355 (D.C. 1981) (Ferren, J., concurring in part and dissenting in part) (observing that detained defendants are "likely to lose employment, strain relationships with family and friends," and face "[c]onditions of confinement . . . so duce the same injustice, if not a greater one: when a court wrongly deems a presumptively innocent arrestee too dangerous for conditional release and orders preventive detention on that basis, the consequences are precisely those bail reform sought to remedy—defeating its very purpose.[44] As John Logan Koepke and David G. Robinson put it, "[i]f it were determined that judges or pretrial risk assessment tools cannot predict dangerousness with adequate reliability, 'pretrial detention [might] not be rationally related to the goal of reducing pretrial crime.'"[45]

II. Bail Reform in the Several States

Many jurisdictions have reformed their cash bail systems, but the reforms vary widely.[46]

A. The Majority State Approach

The right to pretrial release has deep constitutional roots across the states. "For two centuries—from 1776 to 1976—[the right to bail] was one of the best-protected constitutional rights in America."[47] Today, only three states may constitutionally deny pretrial release solely on a finding of dangerousness.[48] Under the majority state approach, preventive detention requires the state to meet a heightened evidentiary standard.[49] As Figure 1 sum-

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harsh or intolerable as to induce him to plead guilty" (quoting Campbell v. McGruder, 580 F.2d 521, 532 (D.C. Cir. 1978))).

44 Koepke & Robinson, *supra* note 6, at 1791.

45 *Id.* (quoting Eason, *supra* note 19, at 1065).

46 *See* Jorgensen & Smith, *supra* note 4, at 2.

47 Hegreness, *supra* note 22, at 916; *see also id.* at 921 ("At some point in their history, 42 of the 50 states had a Right to Bail Clause. Of the original 13 states, more than half have protected the right to bail in their state constitutions, and most of the rest have done so by statute. Of the 37 states that were not one of the original 13 colonies, all but West Virginia and Hawaii adopted a Right to Bail Clause in their original constitutions. When states spoke, from Vermont to Alaska, their voice was virtually unanimous: The right to bail was a fundamental constitutional right in America.") (citations omitted).

48 New Jersey, New Mexico, and, as of 2022, Alabama. *See supra* note 9.

49 Generally, proof evident or presumption great, clear and convincing evidence, or substantial evidence. *See infra* notes 50–53.

marizes, many states still protect the traditional right to bail in their constitutions: all offenses are "bailable" except capital crimes when the proof is evident or the presumption great.[50] Others allow courts to deny bail in certain noncapital cases—most only where the proof is evident or the presumption great,[51] and a handful under a lesser evidentiary standard.[52] Some state constitutions lack a right-to-bail clause, but the right is protected by statute, with varying standards and conditions.[53] This, then, is the majority state approach: either all noncapital of-

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50 ALASKA CONST. art. I, § 11 ("In all criminal prosecutions, . . . [t]he accused is entitled . . . to be released on bail, except for capital offenses when the proof is evident or the presumption great."); *accord* ARK. CONST. art. II, § 8; CONN. CONST. art. I, § 8; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 17; IOWA CONST. art. I, § 12; KAN. CONST. Bill of Rights § 9; KY. CONST. § 16; ME. CONST. art. I, § 10; MINN. CONST. art. I, § 7; MO. CONST. art. I, § 20; MONT. CONST. art. II, § 21; NEV. CONST. art. I, § 7; N.D. CONST. art. I, § 11; OR. CONST. art. I, § 14; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; WYO. CONST. art. I, § 14; TEX. CONST. art. I, § 11. *But see id.* § 11a (permitting denial of bail in limited circumstances).

51 ARIZ. CONST. art. II, § 22(A) ("All persons charged with crime shall be bailable by sufficient sureties, except: . . . 3. For felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge."); *see also* State v. Wein, 417 P.3d 787 (Ariz. 2018) (holding that § 22(A)(1)'s categorical denial of bail for sexual-assault charges facially violates due process); *accord* CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 19; DEL. CONST. art. I, § 12(a) (amended 2025); FLA. CONST. art. I, § 14; ILL. CONST. art. I, § 9; LA. CONST. art. I, § 18(B); MICH. CONST. art. I, § 15; NEB. CONST. art. I, § 9; OHIO CONST. art. I, § 9; OKLA. CONST. art. 2, § 8; PA. CONST. art. I, § 14; R.I. CONST. art. I, § 9; VT. CONST. ch. II, § 40.

52 S.C. CONST. art. I, § 15 ("[B]ail may be denied to persons charged . . . with violent offenses defined by the General Assembly, giving due weight to the evidence and to the nature and circumstances of the event."); *accord* UTAH CONST. art. I, § 8; WASH. CONST. art. I, § 20; WIS. CONST. art. I, § 8(3).

53 These states are Georgia, Hawaii, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Virginia, and West Virginia. *Compare, e.g.,* N.H. REV. STAT. ANN. § 597:1-c (2024) (denying bail for "[a]ny person arrested for an offense punishable by up to life in prison, where the proof is evident or the presumption great"), *with* GA. CODE ANN. § 17-6-1(e)(3) (2025) (providing that when an individual "is charged with a serious violent felony and has already been convicted of a serious violent felony, . . . there shall be a rebuttable presumption that no condition or combination of conditions will reasonably . . . assure the safety of any other person or the community").

fenses are bailable by sufficient sureties or, where a court may order preventive detention based on dangerousness, a heightened evidentiary standard applies. For the reasons that follow, it is the approach New Jersey should adopt.

The consensus runs deeper than nose-counting. The majority rule reflects a shared judgment that pretrial liberty may yield only to proof—"the proof evident or the presumption great," or its modern analogue, clear and convincing evidence.[54] The American Bar Association has urged the clear-and-convincing standard for every detention order,[55] and a recent analysis argues that the Due Process Clause itself—read through *Salerno* and *Addington v. Texas*—compels it whenever the state seeks pretrial detention.[56] Arizona—a right-to-bail state graded among the nation's leaders—still holds thousands of unconvicted people in its jails, a reminder that the heightened standard is necessary but not sufficient.[57] And California's experience counsels humility about risk-based substitutes: the legislature abolished cash bail and adopted algorithmic assessment, only for the voters to repeal the scheme before it ever took effect.[58]

54 *See* Gross, *supra* note 28, at 1053–55, 1064–70 (cataloging the state constitutional bail guarantees and their heightened standards).

55 *See* Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 883 (2022) (noting the American Bar Association's recommendation of a clear-and-convincing standard for pretrial detention).

56 Marty Berger, Note, *The Constitutional Case for Clear and Convincing Evidence in Bail Hearings*, 75 STAN. L. REV. 469, 469–71 (2023) (arguing that *Salerno*, read with *Addington v. Texas*, 441 U.S. 418 (1979), makes clear and convincing evidence the constitutional floor for pretrial detention).

57 *See* Henry F. Fradella & Christine S. Scott-Hayward, *Advancing Bail and Pretrial Justice Reform in Arizona*, 52 ARIZ. ST. L.J. 845, 846 (2020); *see also supra* note 51 and accompanying text.

58 Adam Peterson, Development, *The Future of Bail in California: Analyzing SB 10 Through the Prism of Past Reforms*, 53 LOY. L.A. L. REV. 263, 286–87 (2019); *see also id.* at 296 (noting that under the CJRA certain charges yield an automatic recommendation of detention). California's voters rejected the scheme by referendum (Proposition 25) on November 3, 2020.

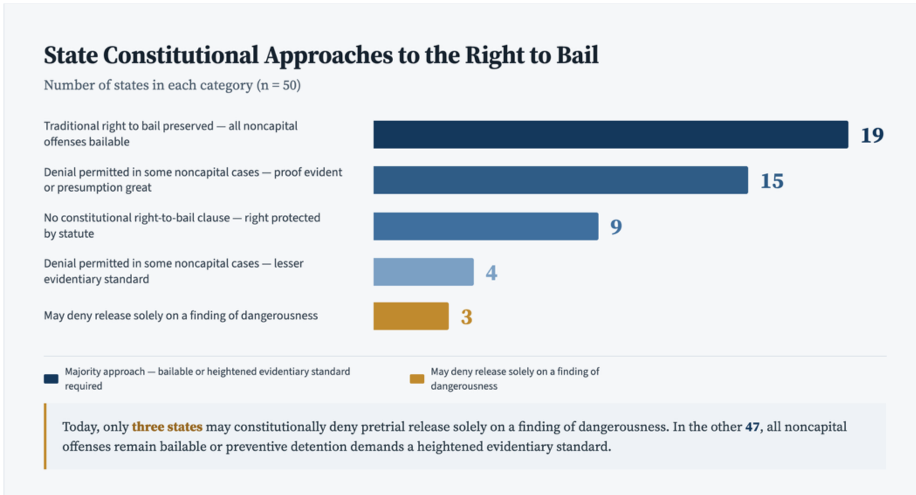

Figure 1. State Approaches to the Right to Pretrial Release Under State Constitutions

Although the New Jersey and New Mexico preventive detention schemes are nearly identical, one difference matters. In New Mexico, a detention hearing is available when an arrestee is charged with a felony "which authorizes a sentence of life in prison *without the possibility of parole*."[59] Under the CJRA, by contrast, the presumption of detention applies to crimes carrying "an ordinary or extended term of life imprisonment."[60] As the New Mexico Supreme Court has explained, "[w]e emphasize that the relevant consideration for a court is not the category or punishability of the charged crime."[61] But under the CJRA, once a court finds probable cause that a presumptively innocent individual "committed murder . . . or a crime that carries a sentence of life imprisonment, a rebuttable presumption of detention applies."[62]

The "relevant consideration" thus becomes precisely the "punishability of the charged crime"—and the charged crime triggers the presumption that "no amount of monetary bail, non-monetary condition[,] or combination of monetary bail and conditions would reasonably assure . . . the protection of the safety

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59 Rule 5-401(G)(2)(a)(iii) NMRA (emphasis added).

60 N.J. STAT. ANN. § 2A:162-19(b)(2) (West 2026).

61 State v. Groves, 2018-NMSC-006, ¶ 33, 410 P.3d 193, 198–99 (citations omitted).

62 State v. Ingram, 165 A.3d 797, 803 (N.J. 2017).

of any other person or the community."[63] If the charge alone triggers the presumption of detention, New Jersey's risk-based system differs little from its former wealth-based system, in which the more serious the charge, the higher the bail—and the greater the chance of detention.[64]

Unlike the majority state approach, moreover, both states' constitutional amendments omit a heightened evidentiary standard for preventive detention.[65] The CJRA "on its face authorizes the Legislature to require only very weak evidence to lock up defendants, who may later be found not guilty."[66] The CJRA's most troubling feature—apart from presuming detention on probable cause—is that the RAI recommends detention almost automatically even when an arrestee receives the *lowest* risk scores,[67] has no criminal record, was falsely accused, or acted in self-defense.

And the trade often goes unmentioned: to offset the CJRA's presumption of release for most crimes, the New Jersey Legisla-

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63 § 2A:162-19(b)(2).

64 *See* Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 13–14 (2008) ("These schedules set higher bail amounts for more serious crimes since they are rooted in the belief that more serious crimes contain higher penalties and hence it is more likely that (a) the defendant will flee, and (b) the defendant is dangerous and will re-offend while out on bail. In this way, the severity of the charges becomes the predominate factor in the decision whether to release a defendant on OR [own recognizance] or set bail at a specific amount. But the evidence does not support the proposition that the severity of the crime has any relationship either to the tendency to flee or to the likelihood of re-offending.") (citations omitted).

65 *Compare* N.M. CONST. art. II, § 13 (amended 2016) ("Bail may be denied by a court of record pending trial for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."), *with* N.J. CONST. art. I, ¶ 11 (amended 2017) ("Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably . . . protect the safety of any other person or the community.").

66 Harris, *supra* note 9.

67 State v. C.W., 156 A.3d 1088, 1106 (N.J. Super. Ct. App. Div. 2017) ("We recognize the public defender and the ACLU have argued that a Pretrial Services recommendation to detain is automatic, or at least virtually automatic, for any defendant charged with a sexual assault.").

ture went further than nearly every other state and constitutionalized preventive detention with a significantly weaker evidentiary burden.[68] Where the previous system guaranteed bail to everyone charged with a noncapital offense,[69] the CJRA expanded the list of detention-eligible noncapital crimes—widening the detention net without the evidentiary standard the other forty-seven states require.[70] "Under the new system, judges determine what non-bail methods will assure defendants' appearance at trial, reducing the risk that defendants will lose their jobs or families. However, the effort to achieve this improvement in the bail system made the system as a whole worse, by adding preventive detention."[71]

New Jersey recognized that vast numbers of people sat in jail before trial solely because they could not afford bail, and it made the right policy choice in providing nonmonetary release conditions.[72] "In that way, low-level offenders will not be penalized because they cannot afford to post bail."[73] But how does the CJRA determine which arrestees are low-level offenders who should not be *penalized* by pretrial jailing?[74]

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68 *See* Harris, *supra* note 9 (noting that the New Jersey ACLU and Public Defender "supported this change, apparently because they saw it as a worthwhile trade-off for another change they wanted: specifically replacing money bail with other methods of assuring that defendants will not abscond before trial. That other change was needed, but the price exacted for it –allowing preventive detention– was too high.").

69 State v. Robinson, 160 A.3d 1, 5 (N.J. 2017) (explaining that before 2017, "New Jersey had long guaranteed defendants the right to bail. The 1844 Constitution added a provision that had existed by statute for more than a century: 'All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or presumption great.'").

70 Harris, *supra* note 9.

71 *Id.*

72 *See Robinson,* 160 A.3d at 6; Harris, *supra* note 9 ("The problem with New Jersey's bail system was not the absence of preventive detention, but the reliance on defendants posting money bail. People who couldn't pay even small amounts of bail spent time in jail, often with devastating consequences for jobs and family relationships. On the other hand, people with similar charges who were able to pay bail were released.").

73 *Robinson,* 160 A.3d at 6.

74 This statement by Chief Justice Rabner—referring to presumptively innocent individuals as offenders—is as perplexing as it is revealing. Senator Norcross shared similar sentiments at the public hearing on the

B. The CJRA's Risk Assessment Instrument Overpredicts Danger

A central feature of the CJRA is its algorithmic risk assessment. New Jersey's courts partnered with the Laura and John Arnold Foundation and adopted its automated RAI,[75] which has two components: the Public Safety Assessment (PSA), which measures risk, and the Decision-Making Framework (DMF), which manages it.[76] After collecting an arrestee's criminal history, the PSA applies nine risk factors[77] to generate two scores

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proposed constitutional amendment authorizing pretrial detention: "It is time that we give our justice system the ability to weigh the public risk certain offenses pose to keep residents safe when considering bail of dangerous criminals." State v. Ingram, 155 A.3d 597, 605 (N.J. Super. Ct. App. Div. 2017) (emphasis added), *aff'd*, 165 A.3d 797 (N.J. 2017). Apart from equating the risk "certain offenses" pose with the risk certain individuals pose, Norcross echoes the Chief Justice in labeling presumptively innocent individuals "dangerous criminals." The Chief Justice is right, however, that detention based only on one's inability to post bail penalizes. This paper argues that the CJRA's dangerousness-based detention procedure is inadequate and its risk of error too high, producing wrongful preventive detention—pretrial, pre-conviction punishment that violates the norms of the criminal law in general and substantive due process in particular. His next sentence supplied the pedigree: "More to the point, this measure would bring New Jersey in line with the Federal courts, which has allowed [sic] judges this discretion since 1984." *Ingram*, 155 A.3d at 605. The charge thus names the "dangerous criminal" before anyone has assessed the person—judgment first, and an assessment that changes nothing: the presumption holds though the accused scores the lowest risks and has no record, no evidence of dangerousness is required, and the State never proves the "identified and articulable threat" that United States v. Salerno, 481 U.S. 739, 751 (1987), demands. The charge makes detention a fait accompli. And the federal example is offered as its own justification: in de Tocqueville's phrase, as Justice Frankfurter borrowed it, "to confound the familiar with the necessary." Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964).

75 Holland v. Rosen, 277 F. Supp. 3d 707, 718 (D.N.J. 2017), *aff'd*, 895 F.3d 272 (3d Cir. 2018).

76 *Id.*

77 ACLU OF N.J., NAT'L ASS'N OF CRIM. DEF. LAW. & N.J. OFF. OF THE PUB. DEF., THE NEW JERSEY PRETRIAL JUSTICE MANUAL 8 (Dec. 2016) [hereinafter N.J. MANUAL], http://www.nacdl.org/getattachment/50e0c53b-6641-4a79-8b49-c733def39e37/the-new-jersey-pretrial-justice-manual.pdf. The PSA considers nine factors: (1) age at current arrest; (2) current violent on a scale of one to six—Failure to Appear (FTA) and New Criminal Activity (NCA)—plus a "flag" for the likelihood of New Violent Criminal Activity (NVCA).[78] The PSA thus helps courts decide whether to bail or jail an arrestee.[79] The scores then feed the DMF, which recommends the level and type of conditions and monitoring needed to manage the risk a defendant would pose if released.[80]

Proponents maintain that RAIs adequately predict whether an arrestee will fail to appear or commit a crime if released.[81] A risk-based system therefore seems fairer than one that tethers

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offense, with a sub-factor for current violent offense while age twenty or younger; (3) pending charge at the time of arrest; (4) prior disorderly persons conviction (excluding ordinance violations and petty disorderly persons offenses); (5) prior indictable conviction, with a sub-factor for any prior conviction; (6) prior violent conviction; (7) prior failure to appear at a pre-disposition court date within the past two years; (8) prior failure to appear at a pre-disposition court date more than two years ago; and (9) prior incarceration of fourteen days or more. *Id.*

78 *Id.*

79 State v. Robinson, 160 A.3d 1, 7 (N.J. 2017) ("[P]retrial services officers prepare a risk assessment for each defendant for the court's use, . . . and monitor defendants who are released on conditions.").

80 State v. C.W., 156 A.3d 1088, 1092–93 (N.J. Super. Ct. App. Div. 2017).

81 PRETRIAL JUST. INST., THE CASE AGAINST PRETRIAL RISK ASSESSMENT INSTRUMENTS 1 (Nov. 2020) [hereinafter AGAINST RAIS] ("[RAIs] are actuarial tools intended to estimate two key outcomes for those who are released pending trial: the likelihood that someone will fail to appear for court, and the likelihood that someone will be arrested for a new crime before the disposition of their case."). *But see* KESHA MOORE, THURGOOD MARSHALL INST., NAACP LEGAL DEF. & EDUC. FUND, PRETRIAL JUSTICE WITHOUT MONEY BAIL OR RISK ASSESSMENTS: PRINCIPLES FOR A RACIALLY JUST BAIL REFORM 2 (Jan. 2022), http://tminstituteldf.org/wp-content/uploads/2022/01/TMI_PretrialJusticeWithoutCBorRA2.pdf ("Unfortunately, many states have replaced their money bail system with equally problematic [RAIs] that attempt to use statistical measures to identify and designate some individuals as safe for release, while categorizing others as meriting close scrutiny, and perhaps pretrial detention, because they purportedly pose a serious risk to the public.").

release to wealth,[82] and supporters expected jail populations to fall as more arrestees won release on nonmonetary conditions.[83]

Critics counter that RAIs "perpetuate racial bias" and wrongly label arrestees "risky."[84] Several studies support the critics.[85] Citing the civil rights community's concerns, the Pretrial Justice Institute withdrew its support for pretrial risk assessments in 2020.[86] Critics argue that RAIs overpredict by design because they attempt to "predict statistically rare outcomes, (*e.g.*, failure to appear and violence while awaiting trial)."[87] And they inherit the past: instruments trained on data from the money-bail era make what Koepke and Robinson call "zombie predictions"—reanimating outcomes produced under conditions reform has since changed, and so overstating today's risk with yesterday's failures.[88]

The evidence bears the critics out. In the District of Columbia, arrestees' appearance rates have stayed at or above 87% and

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82 Moore, *supra* note 81, at 8–9 ("[RAIs] are the latest version of these instruments, and they have gained support because of their perceived efficiency and accuracy. They rely on historic criminal justice system data patterns that correlate with the desired behavior, such as a court appearance and a lack of arrests during the pretrial period.").

83 *Id.* at 10 ("Supporters of risk assessments expected them to lower the overall numbers of people in jail awaiting trial without jeopardizing public safety.").

84 AGAINST RAIS, *supra* note 81, at 1.

85 Moore, *supra* note 81, at 10 ("In July 2018, LDF joined a coalition of 100+ civil rights, digital justice, and grassroots organizations to issue a shared statement of civil liberties concerns about using risk assessments as a substitution for money bail [by] identif[ying] the problematic and discriminatory impact of risk assessments and stated that we should not use these tools in pretrial decision-making.").

86 *Id.* at 11 ("We now see that pretrial risk assessment tools, designed to predict an individual's appearance in court without a new arrest, can no longer be a part of our solution for building equitable pretrial justice systems. Regardless of their science, brand, or age, these tools are derived from data reflecting structural racism and institutional inequity that impact our court and law enforcement policies and practices. Use of that data then deepens the inequity.").

87 *Id.* at 13.

88 Koepke & Robinson, *supra* note 6, at 1755–57 (defining "zombie predictions" and warning that training data "often come from times and places that are materially different from the ones where the predictions are being made").

rearrest rates at or below 12%—better than national averages.[89] Another study found that 89–91% of individuals the RAI flagged as high-risk for new violent criminal activity were never arrested for a violent crime while awaiting trial.[90] Study after study shows that RAIs *overpredict* individual risk, producing wrongful preventive detention and over-incarceration.[91] No national study has shown that RAIs reduce pretrial detention;[92] several show the opposite.[93]

Against these findings, the comparison with the system the CJRA replaced is striking. Before, the individuals most at risk of pretrial jailing were those charged with low-level offenses who could not afford bail. Now, the most vulnerable are those erroneously found dangerous, falsely accused, or wrongfully charged with the most serious crimes.[94] A violent charge should not stand

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89 Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21, 28 (Erik Luna ed., 2017).

90 Moore, *supra* note 81, at 13 (citation omitted).

91 *See id.* at 10 ("After extensive evaluation, LDF and other prominent civil rights organizations, including the Leadership Conference on Civil and Human Rights, American Civil Liberties Union, and the Civil Rights Corps, began to warn policymakers about the potential dangers of risk assessments. We identified problems with biased data that informs statistical algorithms, the conflation of future arrest with 'danger,' and the lack of transparency and accountability in these tools that ultimately lead to overincarceration of people of color.").

92 *Id.* at 13.

93 *Id.* (citations omitted) ("In Montgomery County, Maryland, for example, the percentage of people held without bail soared from 3.4% to 19.3% within a year of implementing Maryland's statewide risk assessment tool. A similar pattern of increases in pretrial incarceration occurred across New Jersey and in Lucas County, Ohio after implementing the PSA risk assessment instrument as part of bail reform. The increase in pretrial detention in some jurisdictions employing risk assessments is not surprising because, as explained above, risk assessment instruments overpredict individual risks.").

94 State v. C.W., 156 A.3d 1088, 1108 n.11 (N.J. Super. Ct. App. Div. 2017) ("[T]he DMF process should determine whether a defendant's pending charges involve certain offenses 'in which the majority of the time a recommendation of preventative detention would be appropriate regardless of the risk assessment results.' Those offenses are escape, murder, aggravated manslaughter, manslaughter, aggravated sexual assault, sexual assault, robbery, or carjacking. . . . Defense counsel and the ACLU argue that these categories . . . routinely produce an as a proxy for dangerousness: no data suggest that a criminal charge reliably predicts pretrial rearrest.[95] And according to a 2017 National Registry of Exonerations study, the crimes producing the most exonerations are murder, sexual assault, and drug offenses.[96] In other words, the most severe offenses are those for which, under the CJRA, detention is presumed on probable cause—offenses "in which the majority of the time [the PSA's] recommendation of preventative detention would be appropriate regardless of the risk assessment results."[97]

Recall that the greatest number of exonerations involves defendants falsely charged with and wrongfully convicted of the gravest offenses,[98] and that bail reform aimed to reduce pretrial detention precisely because of its severe downstream consequences. From that vantage, the CJRA appears less concerned with *individual risk* than with the severity of the charge: certain noncapital offenses serve as a proxy for dangerousness.[99] That statutorily presumed dangerousness—and the detention it warrants—persists even when the arrestee receives the lowest RAI scores and has no criminal record.[100] The CJRA thus fixes on the charge and perceived dangerousness, unlike the majority state approach, which asks whether the *evidence* shows the defendant committed the crime charged.[101]

'automatic' and computer-generated Pretrial Services recommendation for detention.").

95 Moore, *supra* note 81, at 22 ("Approximately 90% of persons accused of violent crimes are not likely to be rearrested awaiting trial, so they should not automatically be relegated to pretrial incarceration under the guise of public safety.") (citation omitted).

96 SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES ii (Mar. 7, 2017), https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/Race_and_Wrongful_Convictions-2%20(1).pdf.

97 *C.W.,* 156 A.3d at 1108 n.11.

98 Gross et al., *supra* note 96, at ii.

99 *See* Karnow, *supra* note 64, at 13–14.

100 *C.W.,* 156 A.3d at 1108 n.11. *Cf.* Koepke & Robinson, *supra* note 6, at 1775–76 & n.215 (documenting the Attorney General's May 2017 recalibration of the decision-making framework "to favor lower standards for pretrial detention").

101 *See supra* Part II.A and notes 50–53 (noting that nearly all states authorizing preventive detention in noncapital cases require a

The strongest case for risk-based tools cuts against the CJRA, not for it. The instruments' leading defender argues that well-validated results should not merely inform the release decision but dictate it, precisely because the algorithm outpredicts the judge—and that letting it govern would shrink the detained population.[102] Taken on its own terms, the argument condemns New Jersey's practice: the CJRA does not let its instrument govern; it overrides even the lowest risk scores with a charge-triggered presumption of detention.[103] And the accuracy premise remains contested—the very study that defender answers found the tool reduced some disparities while overpredicting for others, and the broader literature shows these instruments overpredict the rare harms they are built to forecast.[104]

Professor Laurence Tribe captured the root of the problem over fifty years ago: when the system "detains persons who could safely have been released, its errors will be invisible," because "no detained defendant will commit a public offense."[105] "[E]ach decision to detain fulfills the prophecy that is thought to warrant it, while any decision to release may be refuted by its results."[106] The inevitable consequence, Tribe warned, is "a continuing pressure to broaden the system in order to reach ever more potential detainees": what "begins as an ounce of detention . . . may well

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heightened evidentiary standard, *e.g.,* proof evident or presumption great, clear and convincing evidence, or substantial evidence).

102 Christopher Slobogin, *Presumptive Use of Pretrial Risk Assessment Instruments*, 72 AM. U. L. REV. F. 133, 133–34 (2023) (proposing that the results of well-validated instruments "should not only inform pretrial outcomes but should dictate them").

103 *See supra* notes 97–100 and accompanying text.

104 *See* Melissa Hamilton, *Modelling Pretrial Detention*, 72 AM. U. L. REV. 519, 581 (2022) (finding that the algorithmic tool reduced race and gender disparities overall while noting that gender-neutral tools "overpredict recidivism for females"); Doaa Abu Elyounes, *Bail or Jail? Judicial Versus Algorithmic Decision-Making in the Pretrial System*, 21 COLUM. SCI. & TECH. L. REV. 376, 376–78 (2020) (surveying the critiques); Mayson, *supra* note 7, at 495–96.

105 Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 375 (1970).

106 *Id.*

become the first step of a profound shift in our system of criminal justice."[107]

III. THE PRESUMPTION OF INNOCENCE: REVISITING *UNITED STATES V. SALERNO*

A. The Presumption of Innocence, Not Detention

Courts and scholars have long disagreed about whether the presumption of innocence applies only at trial[108] or extends to pretrial procedure.[109] Either way, a presumption of *detention* upon a finding of probable cause conflicts with the principle that every accused remains cloaked in the presumption of innocence until proven guilty beyond a reasonable doubt—at trial.[110] Because the CJRA presumes detention for particular charges, and because the PSA often recommends detention even for an arrestee with the lowest risk scores, the charged offense can outweigh every other factor. That system undermines not only the purpose of bail reform but the foundation of the legal system itself: "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[111]

The *Salerno* dissenters saw the stakes.[112] The presumption of innocence means the state may not subject even a child—

107 *Id.*

108 Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("[The presumption of innocence] has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.").

109 Shima Baradaran, *The Presumption of Punishment*, 8 CRIM. L. & PHIL. 391, 401–02 (2014) (tracing the presumption of innocence and due process through English and early American history and arguing that pretrial detention of suspects undermines both). *See also* Abu Elyounes, *supra* note 104, at 379 (situating the presumption-of-innocence objection within the risk-assessment debate).

110 Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

111 Stack v. Boyle, 342 U.S. 1, 4 (1951).

112 *Salerno,* 481 U.S. at 755–67 (Marshall, J., dissenting); *id.* at 767 (Stevens, J., dissenting). The dissents had a precursor. Six years before *Salerno*, dissenting from the en banc decision that upheld the District of much less an adult—to "the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement" on "proof insufficient to convict."[113] Justice Marshall identified the crux: "[T]he very pith and purpose of [the BRA] is an abhorrent limitation of the presumption of innocence."[114] The BRA, he explained, marked the first time Congress declared "that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue." Such statutes, "consistent with the usages of tyranny," "have long been thought incompatible with the fundamental human rights protected by our Constitution."[115] The Supreme Court has never decided whether the Constitution protects the right to bail in noncapital cases against state abridgment—though it has hinted that it might.[116]

In *Stack v. Boyle*,[117] the Court recognized the fundamental nature and historical pedigree of the federal right to bail in noncapital cases, its purposes, and the repercussions of its violation.[118] Concurring, Justice Jackson explained that bail "is not a

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Columbia's preventive-detention statute, Judge Mack observed that her concern was not with the defendant—who, while detained, had "entered pleas of guilty in both cases"—but with "MY constitutional rights for I, like millions of Americans have lived, for a time at least, believing that the United States Constitution prohibited my punishment for a crime until such time as I have been found guilty of committing that crime." United States v. Edwards, 430 A.2d 1321, 1365 (D.C. 1981) (Mack, J., dissenting). And she invoked Professor Foote's reminder that "there is a value in unrealized ideals and to close that gap between ideal and reality by abandoning the ideal is not a course lightly to be undertaken." *Id.*

113 In re Winship, 397 U.S. 358, 367 (1970) ("[I]ntervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult."); *see also* Stevenson & Mayson, *supra* note 89, at 38–39 (discussing the presumption of innocence and pretrial detention).

114 *Salerno*, 481 U.S. at 762–63 (Marshall, J., dissenting).

115 *Id.* at 755.

116 Hegreness, *supra* note 22, at 931 n.67 (citation omitted).

117 342 U.S. 1 (1951).

118 *Id.* at 4 ("From the passage of the Judiciary Act of 1789 . . . to the present . . . federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to device for keeping persons in jail upon mere accusation"; "the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." Without that conditional privilege, "even those wrongly accused are punished by a period of imprisonment while awaiting trial" and are handicapped in preparing a defense.[119]

The *Salerno* Court upheld the BRA in part because Congress's purpose was regulatory rather than punitive: preventing crime by arrestees on pretrial release.[120] But the Court confirmed that the BRA demands more than accusation: "the Government proves by clear and convincing evidence that an arrestee presents *an identified and articulable threat to an individual or the community*."[121]

Justice Marshall thought that rationale hollow. The majority, he wrote, deemed the Act "a regulatory rather than a punitive measure," but "[t]he ease with which the conclusion is reached suggests the worthlessness of the achievement."[122] The CJRA produces a perverse result: certain noncapital charges trigger a presumption of detention—even for a defendant with no record and the lowest risk scores—without the state ever proving "an identified and articulable threat."[123] When a court then finds probable cause and orders detention, the most vulnerable group suffers the worst harm: the factually innocent, wrongfully accused of serious crime, are punished *before* conviction—a notion anathema to our system of justice.[124] And each

conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

119 *Id.* at 7–8 (Jackson, J., concurring).

120 *Salerno,* 481 U.S. at 747 ("We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy. The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals.") (citation omitted).

121 *Id.* at 751 (emphasis added).

122 *Salerno,* 481 U.S. at 759 (Marshall, J., dissenting).

123 *Id.*

124 *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

wrongful detention on an erroneous finding of dangerousness inverts bail reform's purpose.

Despite the real inequities of cash bail, by altering the fundamental right to bail in noncapital cases, deploying biased RAIs, constitutionalizing preventive detention, presuming detention on probable cause, and providing inadequate means of determining dangerousness, the CJRA creates problems different in degree and in kind. It trades one injustice for another.[125]

B. Salerno's Factual Premises Have Eroded

Although Justice Scalia joined the *Salerno* majority, he pressed the prediction problem at oral argument.[126] When Solicitor General Fried explained that the BRA sought to minimize monetary bail while "taking those *few people who are a danger* or who might flee and putting them in jail for that reason," Justice Scalia replied: "But that depends on how good your predictive factors are. . . . So you really are stuck with defending the rough validity of the predictive factor."[127] The Solicitor General continued: "There is a question, of course: How are you going to calibrate the prediction? How many false positives will you tolerate? And I suppose in future cases which raise the issue of the proper level of prediction, . . . you may wish to address that question."[128]

The Court should now address that question, because the cases raising the "proper level of prediction" are legion. From the CJRA's effective date of January 1, 2017, through December 31, 2024, 303,266 defendants—over three hundred thousand—were charged on a warrant.[129] New Jersey prosecutors filed 135,779

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125 Louis Nelson, *Ruth Bader Ginsburg: We're 'Not Experiencing the Best of Times,'* POLITICO (Feb. 24, 2017, 9:07 AM), http://www.politico.com/story/2017/02/ruth-bader-ginsburg-the-state-of-america-235340 ("[W]hen the pendulum swings too far in one direction, it will go back."). Justice Ginsburg offered as an example the detention of Japanese-American citizens in 1942.

126 Oral Argument at 17:00, United States v. Salerno, 481 U.S. 739 (1987) (No. 86-87), OYEZ, https://www.oyez.org/cases/1986/86-87 (last visited July 14, 2026) [hereinafter Oral Argument].

127 *Id.*

128 *Id.* at 17:43–18:03.

129 *Chart D (Warrant): Pretrial Detention Decisions, January 1, 2017–December 31, 2017,* N.J. COURTS, http://www.njcourts.gov/sites/default/files/cjrreport.pdf; the motions for preventive detention,[130] and judges granted 59,599.[131] Put another way, over eight years, prosecutors argued that nearly every other individual charged by warrant (45%) posed so high a risk that only jail would suffice[132]—that no combination of conditions "would reasonably assure the [defendants'] appearance in court when required, the protection of the safety of any other person or the community, and that [these defendants would] not obstruct or attempt to obstruct the criminal justice process."[133] The year-by-year figures show that preventive detention under the CJRA is neither rare nor shrinking:

corresponding Chart D in each annual report for 2018 through 2024 and the January–June 2025 mid-year report, *collected at Criminal Justice Reform Reports*, N.J. COURTS, https://www.njcourts.gov/public/concerns/criminal-justice-reform (all reports last visited July 14, 2026). *Cf.* Koepke & Robinson, *supra* note 6, at 1775 n.213 (noting that as of 2018 New Jersey had released too little data to determine whether defendants were "systematically overestimated as riskier than they truly were"—the determination the eight-year record now permits).

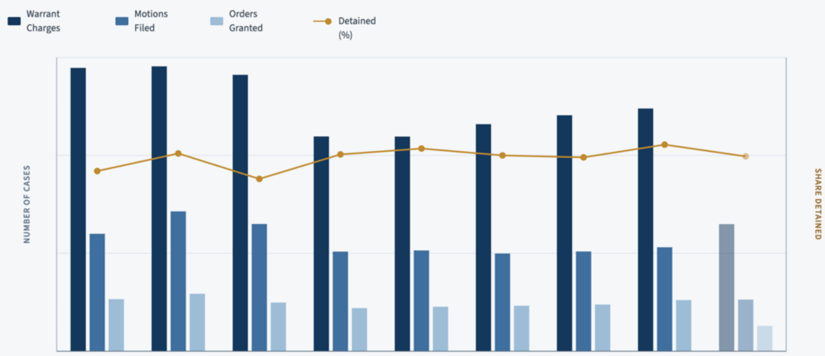
130 *See* sources cited *supra* note 129.

131 *See* sources cited *supra* note 129.

132 *See* sources cited *supra* note 129.

133 N.J. STAT. ANN. § 2A:162-19(b) (West 2026).

New Jersey Pretrial Detention Decisions



* January–June 2025 reflects a partial year and is shown at reduced opacity.

Year	Warrant Charges	Motions Filed	Orders Granted	Detained (%)
2017	43,399	17,981	7,974	18.4%
2018	43,645	21,422	8,797	20.2%
2019	42,343	19,487	7,456	17.6%
2020	32,896	15,267	6,604	20.1%
2021	32,880	15,439	6,817	20.7%
2022	34,778	14,973	6,966	20.0%
2023	36,147	15,285	7,153	19.8%
2024	37,178	15,925	7,832	21.1%
Total, 2017–2024	**303,266**	**135,779**	**59,599**	**19.65%**
*Jan.–June 2025**	*19,463*	*7,909*	*3,880*	*19.9%*

> Over the eight full years, prosecutors moved to detain in **44.8%** of warrant cases, and judges granted **nearly 44%** of those motions—ordering **19.65%** of all warrant defendants jailed pretrial.

Figure 2. New Jersey Pretrial Detention Decisions, 2017–June 2025 (Chart D, Warrant)[134]

For nearly 60,000 presumptively innocent individuals, judges agreed.[135] Thus, even in New Jersey—a pioneering state that replaced money bail with widespread pretrial risk assessment—nearly one-fifth of defendants are detained pretrial, and reforms built on risk assessment may expand the instances of preventive detention.[136] Risk-based systems, in short, may reduce pretrial detention in general while increasing the number

134 Over the eight full years, prosecutors moved to detain in 44.8% of warrant cases, and judges granted nearly 44% of those motions—ordering 19.65% of all warrant defendants jailed pretrial. Figures are the author's calculations from the reports collected *supra* note 129.

135 *See supra* note 129.

136 Koepke & Robinson, *supra* note 6, at 1785.

of arrestees preventively detained on inaccurate findings of dangerousness in particular.[137] Consider what follows when a court wrongly deems an arrestee too risky for release and jails her for that reason alone.

The root of the problem traces back to *Salerno* itself. Chief Justice Rehnquist proclaimed: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception. We hold that the provisions for pretrial detention in the Bail Reform Act of 1984 fall within that carefully limited exception."[138] New Jersey's numbers refute the second half of that statement. To be sure, scholars and researchers see New Jersey differently: the leading fifty-state landscape analysis "highlight[s] New Jersey's bail reform as a promising example"—indeed, the only reform it deems mature enough to earn that designation.[139] But a promising example of a "carefully limited exception" should not produce nearly 60,000 detention orders in eight years—let alone prosecutors moving to detain every other arrestee without any bail.[140]

From 2017 through 2024, judges granted nearly 44% of all detention motions filed.[141] Of the more than 300,000 warrant charges in that period, 59,599 arrestees (19.65%)—presumptively innocent—were detained pretrial.[142] Numbers that high are hard to call a "carefully limited exception."[143] The verdict is not New Jersey's alone: the most comprehensive recent review

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137 *Id.* at 1783 ("[E]ven where risk assessment tools are adopted to advance explicitly liberal reforms, nothing inherent to risk assessment guarantees liberal results."). If that is so, and presumptively innocent individuals are inaccurately deemed too dangerous for pretrial release and ordered preventively detained, then what was intended as a non-punitive regulatory measure protecting the legitimate and compelling interest in community safety must instead be classified as the epitome of punishment—before conviction—in violation of, among other things, substantive due process.

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

139 Jorgensen & Smith, *supra* note 4, at 2; *see also id.* at 20 (concluding that newer reforms elsewhere lack "sufficient evidence to deem them promising examples").

140 *Id.*

141 *See supra* note 129.

142 *See* sources cited *supra* note 129.

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

concludes that none of the prevailing reform models has kept detention a "carefully limited exception."[144] Empirical studies, moreover, show that pretrial detention causally raises the likelihood of conviction and incarceration,[145] driven mainly by guilty pleas—some defendants plead guilty only because they are detained.[146]

On these figures, "detention prior to trial or without trial" is neither carefully limited nor the exception.[147] One study noted that before the CJRA took effect, New Jersey projected the DMF would recommend release on recognizance—the least restrictive condition—for 26.9% of defendants.[148] The actual figure was 7.5%, a difference of 19.4 percentage points.[149] Comparing projected with actual figures for 2017 and part of 2018, the study found the projected and actual intensities of pretrial supervision nearly perfectly reversed, and difficult to explain on the available data.[150]

The gaps have a ready explanation: the CJRA invites the state to move for preventive detention, even though jail's toll on the detainee is well documented—indeed, that toll was the very

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144 Baughman, *Eliminating*, *supra* note 17, at 1676; *see also* Van Brunt & Bowman, *supra* note 16, at 708–10. *See also* Koepke & Robinson, *supra* note 6, at 1791 (asking "how many such cases are allowable" before detention may no longer be called the exception).

145 Mayson, *supra* note 7, at 556.

146 *Id.* (explaining that scholars posit this phenomenon as a major source of wrongful convictions); *see also* Colin Starger, *The Argument That Cries* Wolfish, MIT COMPUTATIONAL L. REP. 1, 6 (2020) (demonstrating, in a five-year study of Maryland's four largest counties, that 60% of all cases ended in nolle prosequi—or, as Chief Justice Rehnquist would call it, "detention without trial"). For a detailed account of how pretrial detention pressures factually innocent defendants into pleading guilty, *see* Mike Apsan-Orgera, *Serious Doubts:* Brady v. United States *and a Half Century of Evidence to the Contrary* (2026) (unpublished manuscript), https://mikeapsan-orgera.com/writing-samples.

147 *See* Mayson, *supra* note 7, at 556.

148 Koepke & Robinson, *supra* note 6, at 1773.

149 *Id.*

150 *Id.* at 1775 (questioning whether (1) more defendants than anticipated were charged with offenses carrying a presumptive recommendation of detention or more onerous supervision, (2) arrestees were systematically overestimated as too risky for pretrial release, or (3) judges increased release conditions even for arrestees deemed low risk).

catalyst for bail reform.[151] These failures are not merely administrative; they are constitutional. *Salerno* upheld the Bail Reform Act as regulation rather than punishment because detention pursued a legitimate preventive purpose through individualized, clear-and-convincing findings of an “identified and articulable threat.”[152] The rational relation between means and end thus runs through prediction: the state may jail an arrestee only because releasing him would endanger the community. Yet *Salerno* never said what degree of predictive accuracy the Constitution demands,[153] and the answer supplied in the decision’s immediate wake has aged into a warning: when dangerousness cannot be reliably predicted, detention premised on prediction loses its rational relation to crime prevention—and with it, under *Kennedy v. Mendoza-Martinez*, its claim to be regulation rather than punishment.[154] The record assembled here answers the reliability question, and the answer is fatal. The instruments overpredict the rare harms they exist to forecast; New Jersey’s own projections of restraint inverted in practice; and nearly one in five presumptively innocent arrestees is jailed.[155] The CJRA then deepens the defect: it makes the charge, not even the score, the operative predictor—presuming the very dangerousness no one can reliably show. A detention scheme that cannot connect its means to its preventive end fails rational-basis review, the most forgiving test the Constitution knows; it cannot begin to satisfy the scrutiny owed a liberty interest the Court itself calls

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151 JCCJ REPORT, *supra* note 3.

152 *Salerno*, 481 U.S. at 747–51 (upholding the Act as regulatory rather than punitive where detention pursued “preventing danger to the community,” a “legitimate regulatory goal,” on clear and convincing proof of an “identified and articulable threat”).

153 Koepke & Robinson, *supra* note 6, at 1791 (observing that *Salerno* “said nothing about ‘what degree of risk it thought constitutionally sufficient to justify detention’” (quoting Mayson, *supra* note 7, at 498)); *see* Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1145 (2018) (calling the degree-of-risk question “the most important [element] of risk assessment”).

154 Eason, *supra* note 19, at 1065; *see* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (identifying, among the marks distinguishing regulation from punishment, whether the sanction rationally connects to a nonpunitive purpose); *supra* text accompanying note 44.

155 *See supra* Part II.B; *supra* notes 129–35 and accompanying text.

"fundamental."[156] In short: "[T]he bail system needed change to eliminate the counterproductive over-reliance on money bail, but giving up the constitutional protection against preventive detention was too great a cost."[157]

CONCLUSION

As bail reform took hold in the states and at the federal level[158] in the latter half of the twentieth century, critics questioned whether dangerousness could be predicted accurately enough to justify preventive detention.[159] In cases of self-defense—or where one is wrongly accused—this form of detention recalls a scene from Lewis Carroll's *Through the Looking-Glass*. The Queen observes that the King's Messenger is "in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all." Alice asks, "Suppose he never commits the crime?" "That would be all the better, wouldn't it?" the Queen replies.[160]

The mistake Alice recognizes looms large in the CJRA. As Professor Tribe observed, risk-based detention is "an experiment that can only confirm and never rebut the experimenter's hy-

156 *See Salerno*, 481 U.S. at 750–51 (acknowledging the "importance and fundamental nature" of the pretrial liberty interest).

157 Harris, *supra* note 9.

158 Tribe, *supra* note 105, at 371 (noting President Nixon's proposed legislation "whereby dangerous hard core recidivists could be held in temporary pretrial detention when they have been charged with crimes and when their continued pretrial release presents a clear danger to the community") (citation omitted). Tribe presaged what was to come: although the legislation might produce "psychological comfort," its costs included a minority insecurity that would spread, ultimately threatening "the fundamental security provided for all of society by a system that guarantees that no one need fear prolonged imprisonment as a criminal until it is proved beyond a reasonable doubt that he has engaged in clearly prohibited conduct." *Id.* at 374 (citation omitted).

159 *Id.* at 373 & n.6 ("There is no basis for the assumption that bringing dangerousness to the surface as a criterion for pretrial detention would significantly improve the predictive performance of the judges administering the system.").

160 *Id.* at 375 (quoting LEWIS CARROLL, THROUGH THE LOOKING-GLASS 88 (Harper & Bros. 1902)).

pothesis."[161] And because a bail system authorizing preventive detention "on grounds of dangerousness is predicated on a finding about the sort of person the defendant *is* rather than a finding about the sort of thing he has *done*, it has all the vices inherent in a law that makes the crime fit the criminal."[162] Just as the American Bar Association maintained that courts could not "'with any degree of tolerable accuracy predict in advance the defendants who will commit a further crime,'"[163] judges cannot accurately predict whether the person before the court is more likely than one not before the court to be arrested for violating the law.[164] And when prediction fails at that threshold, the constitutional footing fails with it: detention premised on unreliable prediction no longer bears a rational relation to the safety interest that alone can justify it.

Yet policymakers often frame the issue as binary: pretrial systems must be resource-based or risk-based-with-detention, and nothing in between.[165] That false dichotomy mirrors the one discussed above—that defendants are either high-risk and wealthy or low-risk and poor.[166] Both miss the mark.[167] Society today is highly interconnected; reasonable alternatives short of jail can adequately supervise defendants released pretrial.[168]

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161 Tribe, *supra* note 105, at 375.

162 *Id.* at 392.

163 Koepke & Robinson, *supra* note 6, at 1740 n.60 (citation omitted).

164 Mayson, *supra* note 7, at 497 ("One way to start thinking about what level of risk justifies restraint is to ask a related question: is the answer different for defendants than for people not accused of any crime?").

165 JCCJ REPORT, *supra* note 3, at 2 ("[T]he current system presents problems at both ends of the spectrum: defendants charged with less serious offenses, who pose little risk of flight or danger to the community, too often remain in jail before trial because they cannot post relatively modest amounts of bail, while other defendants who face more serious charges and have access to funds are released even if they pose a danger to the community or a substantial risk of flight.").

166 *See id.*

167 *See id.*

168 Funk, *supra* note 13, at 1114 (noting "[o]ther empirical work shows that risks of dangerousness and flight can be successfully managed at significantly lower cost than pretrial incarceration") (citation omitted); Mayson, *supra* note 7, at 494 ("As a practical matter, flight risk may be less of a concern than it once was because it is hard to truly flee from justice in today's hyper-connected world.").

The point echoes the *Salerno* oral argument.[169] The system should respect both defendants' rights and community safety—for example, by replacing the presumption of detention in jail with a presumption of detention at home, with GPS monitoring if necessary.[170] Solicitor General Fried acknowledged the Second Circuit's view that surveillance could secure defendants' pretrial release and good behavior.[171] He told the Court: "[W]e live in a world which is anonymous, which is crowded, which is not the world of the 15th Century. And it's not always possible to keep tabs on people by surveillance."[172] He had a point—in 1987.[173] But just as 1987 was a world apart from the fifteenth century, today is nothing like the late twentieth.[174] We now have ample means to supervise pretrial release through nonmonetary conditions.[175]

As Justice Scalia once explained, the Latin maxim *cessante ratione legis, cessat ipse lex* "had to do, not with a changing of the common-law rule, but with *a change of circumstances that rendered the common-law rule no longer applicable to the case*."[176] Dozens of empirical studies suggest that courts can manage danger and flight risk at far lower cost than pretrial incarceration—to the benefit of every stakeholder: presumptively

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169 Oral Argument, *supra* note 126, at 20:33–20:43.

170 *See* Funk, *supra* note 13, at 1114.

171 Oral Argument, *supra* note 126, at 20:33–20:43.

172 *Id.*

173 *See id.*

174 *See id.*

175 Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1350 (2014) ("[T]here are powerful doctrinal, textual, and historic reasons to conclude that the constitutional prohibition against excessive bail includes a right, for many non-dangerous defendants, to have the option of electronic monitoring in lieu of imprisonment.").

176 Rogers v. Tennessee, 532 U.S. 451, 474 (2001) (Scalia, J., dissenting) (emphasis added); Funk v. United States, 290 U.S. 371, 385 (1933) (quoting Beardsley v. City of Hartford, 50 Conn. 529, 542 (1883)) ("If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances.").

innocent individuals, factually innocent individuals, public safety, the judicial process, and those who pay for these public goods.[177] The community holds the right to safety, the right not to be jailed on mere accusation, and the right to insist that the system detain undeterrable individuals.

The remedy is not to abandon bail reform but to finish it. New Jersey should align the CJRA with the majority state approach in three ways. First, before a court may order preventive detention, the state should have to prove dangerousness by clear and convincing evidence—the standard *Salerno* itself demanded and that most states already require.[178] Second, the charge-based presumption of detention should go; no defendant should be jailed on the fact of accusation rather than an individualized finding of danger. Third, supervised release should become the default, with home detention and GPS monitoring reserved for the rare arrestee no lesser condition can safely manage. Monitoring is no panacea, and the proposal must be designed around its documented failures: monitored release often does not produce release, and monitoring fees can jail the poor as surely as money bail did.[179] Reform along these lines would keep faith with the poor whom cash bail failed while restoring the presumption that has protected the accused for centuries.[180]

To answer the ancient concern Justice Marshall raised in his *Salerno* dissent: under the CJRA, what becomes of all presumptively innocent arrestees—and in some cases, the factually innocent—is detention before conviction when accusation alone suffices. And as Justice Stevens recognized, neither the presumption of innocence nor the Excessive Bail Clause permits the bare fact of indictment to mark out a special class whose members

177 *See* Funk, *supra* note 13, at 1114.

178 *See* 481 U.S. at 751; Berger, *supra* note 56, at 469–71.

179 *See* Hamilton, *supra* note 104, at 558–60 (documenting that electronic-monitoring orders frequently leave defendants jailed behind more-restrictive conditions and that monitoring fees burden indigent defendants).

180 This prescription aligns with the "just model" reform's own historians urge, *see* Van Brunt & Bowman, *supra* note 16, at 708–10, and stops short of the near-abolition Professor Baughman proposes, *cf.* Baughman, *Eliminating*, *supra* note 17, at 1669–70; *see also* Zina Makar, *Carcerality's Inertia*, 63 HOUS. L. REV. 1075, 1076 (2026) (urging procedural "friction" that forces the state to justify each continued deprivation of pretrial liberty).

alone may be jailed on predictions of future dangerousness.[181] The CJRA enshrines exactly that class. Footnote four of *Carolene Products* supplies the closing word. Justice Stone anticipated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[182] The footnote's placement sharpens the point. Stone appended it to the presumption of constitutionality he announced for "regulatory legislation affecting ordinary commercial transactions"—the very presumption *Salerno*'s regulatory label borrows—and withdrew that presumption where legislation "appears on its face to be within a specific prohibition of the Constitution."[183] The special class Justice Marshall warned against is the special condition Justice Stone described: a class marked by accusation alone, unable to look to the political process for protection. The accused, to be sure, are not "discrete and insular" in the classic sense. On Professor Ackerman's refinement, that strengthens the claim: it is the "anonymous and diffuse" who are "systematically disadvantaged in a pluralist democracy," and a class defined by nothing more than an accusation is anonymity and diffusion in their purest form.[184] Such a class is owed not *Salerno*'s deference but footnote four's more searching inquiry.

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181 *Salerno*, 481 U.S. at 769 (Stevens, J., dissenting).

182 United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

183 *Id.*

184 Bruce A. Ackerman, *Beyond* Carolene *Products*, 98 HARV. L. REV. 713, 723–24 (1985); *see also* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993) (arguing that legislatures systematically undervalue the rights of the accused); *see generally* Wiseman, *supra* note 175 (applying footnote four's logic to pretrial defendants).