UNIFORM PRETRIAL RELEASE AND DETENTION ACT

Prefatory Note and Issues Memorandum

TO: Uniform Law Commission

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The Drafting Committee on Uniform Pretrial Release and Detention Act (formerly on Alternatives to Bail) submits its draft Act to the Conference for a final reading.

I. Introduction

The Uniform Pretrial Release and Detention Act responds to broad bipartisan support for changes to pretrial detention practice. Pretrial detention rates have increased dramatically since the early 1980s.[1] This has been due largely to increased reliance on "money bail," which has resulted in the frequent detention of accused people who are too poor to meet bond conditions.[2] Even at relatively low money-bail amounts, many people remain behind bars.[3]

This money-driven detention practice is both irrational and unjust. It is irrational because poor people are jailed regardless of whether incarceration is necessary; meanwhile, defendants who can meet bond conditions can be released, even if they pose extreme threats to public safety or the integrity of the judicial process. The system is unjust because it results in the needless deprivation of liberty and because it makes that deprivation a function of wealth.[4] In the process, the system imposes the profound costs of detention on already-disadvantaged communities while sparing those who can buy their freedom.[5]

The injustice and irrationality of such detention practices have galvanized pretrial reform efforts across the country.[6] The guiding principle of these efforts is that, as the Supreme Court has written, detention must be a "carefully limited exception."[7] Detention is only justified if there is no less-restrictive measure that can adequately meet the state's interests in administering justice and protecting public safety. A coherent pretrial custody system must therefore enable courts to restrict the liberty of accused persons *only* to the extent necessary to meet those interests. This is particularly important in a system founded upon the presumption of innocence and the prohibition on punishment before conviction.[8] Such a system should encourage courts to support defendants in order to facilitate court appearances and successful participation in civic life while cases are pending. When there is a serious risk that an accused person will interfere with judicial process or harm someone, courts should strive to manage the risk with targeted conditions of release. Detention should be a last resort, including detention on an unaffordable bond. Many states currently are in the process of revising their pretrial laws along these lines.

The Pretrial Release and Detention Act offers a statutory framework for implementing fair, transparent, and rational decision-making about pretrial custody. The Act does not seek to do so

by establishing complete uniformity among the states. Given the extensive array of approaches states display in the details of criminal procedure, the Committee believes that would doom the Act to legislative dust-bins. But it does seek to provide a uniform template that each state may customize. It does this by synthesizing points of consensus about pretrial practice among contemporary courts, legislatures, pretrial experts, scholars, and advocates.

In developing the Act, the Drafting Committee benefitted from a number of recent "model" pretrial laws, as well as existing statutory schemes.[9] The Act hews closest to the American Bar Association's Pretrial Release Standards,[10] the National Association of Pretrial Services Agencies' Pretrial Release Standards,[11] and the existing statutory schemes in the federal system,[12] the District of Columbia,[13] New Jersey,[14] and New Mexico.[15] The Act departs in meaningful ways from each of these models, however, in an effort to facilitate enactment by any state without change to its state constitution or relevant jurisprudence.[16] Most notably, whereas many model and existing pretrial statutes prohibit the imposition of an unaffordable secured bond (or, in some cases, prohibit money bail altogether), this Act does not. Instead, the Act limits the use of money bail by offering alternative methods of release, and by prohibiting the imposition of unaffordable bail unless the substantive and procedural criteria for pretrial detention are met.

II. History in the Conference

In December of 2013 the Director of the American Bar Association Criminal Justice Section submitted a proposal to the Uniform Law Commission to draft a uniform act on Pretrial Justice. Included within the topics for treatment by such an act were conditions of pretrial release and preventive detention. This proposal was considered by the Committee on Scope and Program at its January 2014 meeting and the Committee concluded to take no action at that time.

In 2015 and early 2016, Commissioner Lyle Hillyard asked ULC Staff to research the possible need for a drafting project on the subject of alternatives to the use of money bail as a condition for pretrial release.

In January 2017, the ULC Committee to Monitor Developments in Criminal Justice Reform (CMDCJR) recommended to the Scope and Program Committee the formation of a drafting committee on alternatives to bail. This recommendation was considered by the Scope and Program Committee during its meeting in San Diego in July 2017, and the Committee on Scope and Program referred the proposal back to CMDCJR for further review, with the request that CMDCJR return at the appropriate time with more information on potential state legislation on pretrial bail reform.

In May 2017, CMDCJR received from then-Uniform Law Commission Fellow Mary L. Shelly a memorandum regarding "Bail Reform/Alternatives to Bail." In her introduction to the topic Ms. Shelly wrote:

> It is difficult to defend the use of money bail on its merits. Decades of research show that the pervasive use of money bail in the criminal justice system harms low- income defendants and their communities as well as defendants of color and their communities, and pretrial incarceration for nonpayment of bail increases both negative outcomes for defendants as well as burdens on taxpayers and criminal justice budgets.

In January 2018, the ULC Committee on Criminal Justice Reform asked the Committee on Scope and Program to report on the research it had conducted regarding the kinds of provisions that might be incorporated in an act on alternatives to bail. Thereafter, the Committee on Scope and Program recommended to the Executive Committee that a Drafting Committee be formed. The language of the CMDCRJ recommendation upon which Scope and Program acted is as follows:

> ...[T]he Committee feels that [the "Alternatives to Bail proposal'" dated December 13, 2013, attached to its Report and Drafting Committee Recommendations to Scope and Program, dated June 15, 1917] provides a strong basis and foundation of policies that should be incorporated into the drafting of a uniform act in the subject area.

On January 19, 2018, the Committee on Scope and Program voted to "recommend to the Executive committee that a Drafting Committee on Alternatives to Bail be formed," and, on January 20, 2018, the Executive Committee approved that recommendation.

Thereafter, President Ramasastry appointed the members of the Drafting Committee. It has conducted four in person meetings, one Zoom meeting, two meetings by phone, and used a subcommittee to assist in advancing the drafting of language to refine alternatives and articulate the choices the Commissioner members have made regarding the topic.

The Drafting Committee presented its then-current draft of the Act to the Committee of the Whole during the Conference's annual meeting in Alaska in July 2019, and received numerous and welcome comments on that draft. The Drafting Committee considered all of those comments and suggestions at its meeting in Washington in December and incorporated many, in sum and substance, into the draft that the Drafting Committee presents to the Conference now.

During its discussions, the Committee concluded that the Act should be renamed, and the Executive Committee approved the request.

The Drafting Committee now being presents to the Conference an Act that addresses the charge it was given.

In preparing this Act, the Drafting Committee has benefitted from comments by observers, including representatives of the Pew Research Center, the National Conference of State Legislatures, the National Center for State Courts, the American Civil Liberties Union, the Southern Poverty Law Center, the National Sheriffs' Association, the District of Columbia Pretrial Services Agency, and the ABA Criminal Justice Section Pretrial Justice Committee.

III. Summary of Contents

The Act creates a comprehensive procedural framework for release and detention determinations after arrest. It also includes an optional Article to guide arrest and citation practices (Article II). The Act's procedural schema for pretrial custody determinations is intended to replace a state's existing statutory law governing pretrial release and detention, except for preexisting statutes regulating certain specified collateral matters.

The Drafting Committee has taken this comprehensive approach because the twin problems plaguing the bail system cannot be addressed by more piecemeal interventions. In order to ensure that courts do not needlessly detain a person who cannot post a secured bond, it is essential to (1) stipulate what the court may do in lieu of requiring the bond, (2) when—if ever—the court is authorized to impose a secured bond that the accused person cannot pay, and (3) when—if ever—the court is permitted to order the accused person to be detained outright. Commentators and courts uniformly agree, furthermore, that an order of pretrial detention requires greater procedural protections than an order of pretrial release. In sum, it is impossible to restrict the use of money bail without prescribing standards and procedural rules for alternate methods of pretrial release and detention. States across the nation have begun to reckon with this reality; several have already undertaken wholesale pretrial reform.[17] The Drafting Committee perceived a need for a well-considered statute that could meet the states' interests in comprehensive restructuring.

Following the optional Article guiding arrest and citation practices, the Act requires every arrested person to be brought before a judicial officer within forty-eight hours of arrest for an initial appearance that the Act calls a release hearing (§ 301). This appearance corresponds to what, in current practice, may be called the "initial appearance," "first appearance," "bail hearing," etc., and it may be combined with a probable-cause determination or arraignment, as is already common practice. At the release hearing, the court must determine by clear and convincing evidence whether the accused person is "likely" to engage in any of certain stipulated behaviors that unduly threaten public safety or the administration of justice (§ 303). If not, the person must be released on recognizance (§ 304(a)). If so, the court must determine the least-restrictive method to "satisfactorily address" the risk, taking into consideration the possibility that non-restrictive measures—practical assistance or supportive services—may be beneficial or even sufficient (§§ 305-07). As a general matter, the Act prohibits financial conditions of release that the defendant cannot meet (§ 307).

The Act anticipates that a minority of defendants will present so great a risk that pretrial detention or unaffordable bail is warranted. Courts may temporarily hold these defendants in advance of a detention hearing (§ 308). The Act then establishes substantive and procedural standards for an order of pretrial detention, or any other order that *results* in continued detention (§§ 401-03). These standards are critical because, as the Supreme Court has long recognized, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects."[18] Although the Court has not clearly articulated the due process requirements for an order of pretrial detention, it did endorse the robust limitations required by the federal Bail Reform Act of 1984.[19] This Act broadly adopts those limitations, requiring a court that is contemplating an order of detention (or its functional equivalent) to hold an adversarial hearing and prohibiting detention unless the court finds by clear and convincing evidence that detention is necessary (§§ 402-03). The Act requires courts to hold this detention hearing within seventy-two hours of the release hearing, absent good cause for continuance (§ 401).

The Act's two principal Articles prescribe the two hearings: the release hearing in Article III and the detention hearing in Article IV. Some jurisdictions may prefer to combine the hearings and make final detention determinations at initial appearances. This more streamlined approach is consistent with the Act, so long as courts adhere to the substantive and procedural rules for any order that results in detention.

Consistent with prevailing law, the Act authorizes a court to modify orders of pretrial release or detention at any time, provided that the court complies with the relevant standards and criteria (§§ 501-02). The Act does not alter existing law relating to victims' rights, forfeiture of bonds, or time limits for adjudication (§103).

Finally, we note the following additional aspects of the Act:

- Bail. The Act avoids the word "bail" entirely, because it has a range of conflicting meanings and usages in contemporary law and practice (*see* Comment to § 101).

- Risk assessment and management. The Act requires courts to both assess and manage pretrial "risk." But not every kind or degree of risk justifies infringements on pretrial liberty. The Act therefore strives to articulate both the particular adverse events and the probability of their occurring that might justify some restriction of an accused person's liberty. The Act contemplates that pretrial services agencies and/or actuarial risk assessment tools might inform judicial assessments, but the Act does not require either one (*see* §§ 303-08, 401-03 and Comments).

- Absconding versus nonappearance. The Act encourages courts to distinguish between people who pose a risk of purposeful flight from justice (for whom measures like passport confiscation, electronic monitoring, or even detention might be justified) and people at risk of failure to appear because of logistical or cognitive barriers (*see* §§ 103, 303 and Comments).

- Financial conditions. The Act strives to maintain the availability of financial conditions when appropriate while ensuring that they never result in detention unless the substantive and procedural criteria for detention are met (*see* §§ 307-08, 403 and Comments).

IV. Other Major Issues

It is a daunting challenge to draft a Uniform Act in an area of law that is experiencing sometimes dramatic and rapid change. To address this, the Act has undertaken to recognize trends in pretrial practice and jurisprudence and incorporate some amount of flexibility on undecided matters with potential constitutional implications. The following is a brief discussion of some of these challenges.

Use of "bail schedules". There is a robust body of recent jurisprudence finding that the use of a secured bond schedule violates due process and equal protection when the schedule is the primary mechanism of release.[20] The Eleventh Circuit Court of Appeals, however, has held that the use of a secured bond schedule is constitutional where an indigent arrestee who cannot post a pre-set bond is guaranteed an individualized hearing that results in release within forty-eight hours of arrest.[21] Notwithstanding the Eleventh Circuit holding, the Act does not provide for the use of secured bond schedules at any stage. It does authorize the use of an *unsecured* bond schedule or other mechanisms of "stationhouse release" that do not make release contingent on financial resources (*see* § 203 and Comment).

Constitutional limits on timing for release hearings. There is no uniform federal or state constitutional doctrine establishing the time within which an arrested person is entitled to a judicial hearing. A number of courts, however, have held that a hearing within forty-eight hours of arrest (the same deadline as for a probable-cause determination) satisfies due process.[22] The Act provides for a judicial hearing within forty-eight hours of arrest, but the Act brackets that time requirement in contemplation that jurisdictions might adopt a different one, at the risk that a longer duration may implicate constitutional concerns (*see* § 301 and Comment).

Counsel at first appearances. The Supreme Court has not yet determined whether a first appearance is a "critical stage" of criminal proceedings, such that an arrested person has a Sixth Amendment right to representation by counsel. A number of lower courts have recently held that a first appearance is a critical stage for Sixth Amendment purposes, and there are sound jurisprudential grounds for that conclusion given how the Supreme Court has characterized the "critical stage" inquiry.[23] At present, however, many jurisdictions do not provide counsel at first appearances, and it would require a significant investment to do so. In recognition of the apparent direction of the doctrine, the Act includes a provision establishing a right to counsel at the release hearing, but, in light of present budgetary realities, it also brackets that provision such that a state can elect not to adopt it—again, at the risk that not providing counsel at the release hearing may implicate constitutional concerns (*see* § 302 and Comment).

Federal constitutional standards for pretrial detention. The Supreme Court has likewise not determined definitively what process and substantive findings the federal Constitution requires for a court to detain a defendant pending trial. In *United States v. Salerno*, the Court held that the process and substantive findings required by the federal Bail Reform Act of 1984 were sufficient to withstand a facial constitutional challenge, but the Court did not specify whether, or to what extent, such standards are constitutionally required.[24] However, given that most existing pretrial detention regimes include standards very similar to the Bail Reform Act, and that an increasing number of lower courts have found these standards to be mandated by due process, the Act adopts approximately the same procedural scheme as the Bail Reform Act (except for the Bail Reform Act's often-criticized presumptions and burden-shifting provisions; *see* § 403 and Comment).

State constitutional limits on pretrial detention. Perhaps the most complex and significant open question of constitutional law in the realm of pretrial release and detention is whether state constitutions require the release of "bailable" defendants. Many state constitutions provide that all arrested persons have a "right to bail on sufficient sureties," with a narrow exception for those charged with capital or other very serious felony offenses.[25] The question is whether this right to bail is a right to release—or whether a bailable defendant may be detained if the defendant cannot produce a surety that is "sufficient." In more practical terms, the question is whether the right to bail translates to a right to "affordable bail" (or other guarantee of release) or just a right to have the court authorize release on conditions that the court deems sufficient, whether the arrestee can meet them or not. Neither state courts nor scholars have yet addressed this question thoroughly.[26]

The Act does not take a position on this issue. It provides for states to enumerate the offenses ("covered offenses") for which a person may be held in jail pending trial, either by virtue of a direct detention order or as a result of a financial condition that the defendant cannot meet. If a state's constitution includes a right-to-bail provision that the state interprets as a right to release,

then the state must limit its "covered offenses" to those offenses that are excluded from the right to bail. If a state's constitution includes a right-to-bail provision, but the state does not interpret it as creating a right to release, the state may enumerate its "covered offenses" independently of that constitutional provision, and may, if it chooses, authorize unaffordable bail for some "bailable" defendants (*see* §§ 102, 308, 403 and Comments).

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[1] Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2020 (Prison Policy Institute, March 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html (showing that in early 1980s average pretrial population reported mid-year was around 100,000; today it is around 500,000).

[2] *See, e.g.*, Thomas A. Cohen & Brian A. Reaves, Pretrial Release of Felony Defendants in State Courts 1990-2004 fg.1 & 2 (Bureau of Justice Statistics 2007).

[3] *Id.* at fg.3 (showing that 30% of felony defendants with bond set at $5,000 or less remained in jail, and that for bonds between $5,000 and 10,000 more than 40% of felony defendants in the sample remained in jail); Paul Heaton, Sandra G. Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STANFORD L.REV. 711, 716 n.18, 19 & tbl.1 (2017) (finding that, between 2008-2013, 53% of misdemeanor defendants in Harris County, Texas were detained pretrial on bonds of $5,000 or less; and citing similar figures reported in Baltimore, New York City and Philadelphia); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, fg.10 (2019) (reporting that, *inter alia*, in Philadelphia and Kentucky during 2013, more than 40% of misdemeanor defendants with bonds set at $500 or less were detained); Andrea Woods, Sandra G. Mayson, Lauren Sudeall, Anthony Potts & Guthrie Armstrong, *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reform in Georgia*, __ GA. L. REV. 1169, 1193 (2020) (reporting that across eighteen Georgia counties between May and November 2019, "36.72% of those arrested on new misdemeanor charges only, with no other holds, spent three days or more days in jail"); *id.* (reporting that "[f]rom 2000 through 2019, more than half of the 212,091 people booked on new misdemeanor charges [in DeKalb County] without other holds—112,340 individuals, or 53%—spent three days or more in jail"). The shocking statistics regarding pretrial detention, in terms of both the number of persons detained and the negative consequences arising from those detentions, have become matters of increased general knowledge and concern. Other data on the subject was included in the Drafting Committee's materials circulated prior to the first reading of the Draft at the 2019 annual meeting, and will not be repeated here.

[4] For these reasons, the use of secured bonds without individualized consideration can also be unconstitutional. *E.g.* ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018).

[5] For a discussion of the sometimes shameful conditions of detention, *see, e.g.*, Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment,* 69 WASH. & LEE L. REV. 1297, 1318-21 (2012). The COVID-19 crisis has heightened these costs. *See generally* Jenny Carroll, *Pretrial Detention in the Time of Covid-19*, __ NORTHWESTERN L.REV. __(2020).

[6] *See* Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, Vox.com (Oct. 17, 2018). This is not the first wave of bail reform. A similar situation produced a nationwide bail reform movement in the early 1960s, which culminated in the federal Bail Reform Act of 1966. *See* State v. Brown, 338 P.3d 1276, 1284–88 (N.M. 2014) (chronicling the history of bail in the United States); SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 18-28 (2018); Timothy R. Schnacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform, U.S. Dep't Just. 18 (Aug. 2014), http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf [http://perma.cc/R5TX-UWRK].

[7] United States v. Salerno, 481 U.S. 739, 755 (1987).

[8] 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."); In re Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."); *id.* at 364 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Stack v. Boyle, 342 U.S. 1, 4 (1951) ("This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

[9] AM. CIVIL LIBERTIES UNION, A NEW VISION FOR PRETRIAL JUSTICE IN THE UNITED STATES (2019), https://www.aclu.org/report/new-vision-pretrial-justice-united-states [perma.cc/ME4M-WKLV]; CIVIL RIGHTS CORPS, PRETRIAL RELEASE AND DETENTION ACT (2019), https://cdn.buttercms.com/1ted5IrSx2ynPT8kitB5 [perma.cc/47PA-MADD]; TIMOTHY R. SCHNACKE, CTR. FOR LEGAL AND EVIDENCE-BASED PRACTICES, "MODEL" BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION (2017), http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf [https://perma.cc/46J7AADK]; HARVARD LAW SCH. CRIMINAL JUSTICE POLICY PROGRAM, BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS (2019), http://cjpp.law.harvard.edu/assets/ BailReform_WEB.pdf [perma.cc/3W5B-8LL5].

[10] CRIMINAL JUSTICE SECTION STANDARDS: PRETRIAL RELEASE (AM. BAR ASS'N 2002).

[11] STANDARDS ON PRETRIAL RELEASE (NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES 2020).

[12] 18 U.S.C. § 3142.

[13] D.C. Code Ann. § 23-1321 *et seq.*

[14] N.J. Stat. Ann. § 2A:162-15 *et seq.*

[15] N.M. R. Civ. P. Dist. Ct. 5-409(F)(3).

[16] For further discussion of state constitutional bail provisions, *see infra* Part IV.

[17] New Jersey and New Mexico, for instance, have both amended their constitutions and rewritten their statutory laws governing pretrial release and detention. N.J. CONST. art. I, ¶ 11 (amended 2017); N.J. Stat. Ann. § 2A:162-15 *et seq.*; N.M. CONST. art. II, § 13 (amended 2016); N.M. R. Civ. P. Dist. Ct. 5-409(F)(3). The New York legislature enacted sweeping statutory change to pretrial process in 2019, and additional changes in 2020. *See, e.g.*, Taryn Merkl, *New York's Latest Bail Law Changes Explained* (Brennan Center, April 16, 2020), https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained. The California legislature passed a comprehensive bail reform bill in 2018 that essentially eliminated money bail, but the bill is awaiting a voter referendum in November 2020. *See, e.g.*, Julia Wick, *Newsletter: The Future of Bail Reform in California*, L.A. TIMES (Jan. 24, 2020), https://www.latimes.com/california/story/2020-01-24/cash-bail-boudin-san-francisco-newsletter.

[18] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[19] United States v. Salerno, 481 U.S. 739, 755 (1987).

[20] *E.g.* ODonnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018); *see also, e.g.*, *Knight v. Sheriff of Leon Cty*., 369 F. Supp. 3d 1214, 1219 (N.D. Fla. 2019); *Caliste v. Cantrell*, 329 F. Supp. 3d 296 (E.D. La. 2018); *Shultz v. State*, 330 F. Supp. 3d 1344 (N.D. Ala. Sept. 4, 2018); *Coleman v. Hennessy*, No. 17-cv-06503-EMC, 2018 WL 541091 (N.D. Cal. Jan. 5, 2018); *Buffin v. City & Cty. of San Francisco*, Civil No. 15-4959, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018); *Rodriguez-Ziese v. Hennessy*, No. 5:17-CV-06473-BLF, 2017 WL 6039705 (N.D. Cal. Dec. 6, 2017); *Thompson v. Moss Point,* Civil No. 15-182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Jones v. City of Clanton*, Civil No. 215-34, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015); *Pierce v. Velda City*, Civil No. 15-570, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015); *Cooper v. City of Dothan*, Civil No. 15-425, 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015); *accord* Statement of Interest of the United States Department of Justice at 1, *Varden v. City of Clanton,* Civil No. 15-34, ECF Doc. 26 (M.D. Ala., February 13, 2015); Office for Access to Justice, Civil Rights Division, U.S. Dep't of Justice, Dear Colleague Letter 2 (Mar. 14, 2016), https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf; *In re Humphrey*, 228 Cal. Rptr. 3d 513 (Cal. Ct. App. 2018); *State v. Pratt*, 166 A.3d 600 (Vt. 2017); *State v. Brown*, 338 P.3d 1276 (N.M. 2014).

[21] Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018), cert. denied sub nom. Walker v. City of Calhoun, Ga., 139 S. Ct. 1446 (2019).

[22] *Id.* at 1265-67; *ODonnell*, 892 F.3d at 160-61.

[23] *See Caliste*, 329 F. Supp. 3d at 314 ("The Supreme Court has held that 'critical stages' are those that 'h[o]ld significant consequences for the accused.' There is no question that the issue of pretrial detention is an issue of significant consequence for the accused.") (internal citations omitted); Booth v. Galveston Cty., 352 F. Supp. 3d 718, 738 (S.D. Tex. 2019) ("There can really be no question that an initial bail hearing should be considered a critical stage of trial."); *see also* Paul Heaton, Sandra Mayson, Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 773 (2017) (arguing "that bail-setting should be deemed a 'critical stage' of criminal proceedings" on the basis of new empirical research demonstrating effect of detention on plea-bargaining outcomes).

[24] United States v. Salerno, 481 U.S. 739, 755 (1987).

[25] WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, 4 CRIM. PROC. § 12(3)(b) (4th ed. 2018); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L.REV. 517, 531–32 (1983).

[26] *Cf.* Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1669 (2020) (acknowledging the question). As scholar Tim Schnacke has noted (email of May 15, 2020 to Color-of-Change bail reform listserv; on file with authors), the right to bail was historically understood as a right to release. *See, e.g.*, J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 84, 102-03 (William Brown, Philadelphia 1819) ("[J]ustices must take care that in cases they are bound by law to bail the prisoner, they do not, under the pretense of demanding sufficient surety, make so excessive a requisition, as in effect, to amount to a denial of bail, which is a grievance expressly prohibited."); CHARLES PETERSDORFF, A PRACTICAL TREATISE ON THE LAW OF BAIL IN CIVIL AND CRIMINAL PROCEEDINGS 512 (London, Jos. Butterworth & Son 1824) (repeating Chitty's warning); WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN, VOL II, 139 (London, 1824) (same); *see also* Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 TEMP. L.Q. 475 at 504-505 (1977) (reporting that virtually all defendants in colonial Pennsylvania were released on bail). Nonetheless, quite a number of courts have held rejected claims that state constitutional bail clauses create a right to affordable bail. *See generally* Colin Starger and Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589 (2018) (canvassing this case law).