

BAIL AND MENTAL ILLNESS

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Abstract: In many parts of the United States, the bail system is strikingly unfair in imposing burdensome, and often unmeetable, financial conditions on pretrial liberty even for low-risk defendants. Reforms that reduce or eliminate cash bail and lower pretrial detention rates have made progress in recent years but now face growing opposition, even in generally progressive jurisdictions such as San Francisco and New York City. One source of this opposition is rising concern about crime—particularly crime associated with the unhoused, who disproportionately suffer from mental illness, including substance abuse disorder. This is not a coincidence: one effect of a cash-bail system, underappreciated in the legal literature, is to incapacitate (for example, “get off the streets”) indigent, mentally ill defendants. Mentally ill individuals are arrested—often for low-level misdemeanors—and repeatedly cycle through the criminal justice system where they often fail to meet traditional pretrial release conditions. Indeed, three U.S. jails serve as the country’s largest psychiatric “treatment” facilities for mentally ill defendants. Pretrial justice systems that routinely jail the mentally ill thus serve as deeply inadequate substitutes for adequate mental health treatment. They mask the need for a more effective alternative, over-stretch the capacity of jails and prisons, and negatively impact mentally ill defendants through inadequate care. But despite the manifest shortcomings of this approach, it provides at least short-term relief to those affected by crime. And bail reforms that make it more difficult to “solve” the problem of mentally ill defendants by locking them up without providing alternative solutions—or at least identifying the underlying pathologies—are at risk of significant opposition, failure, or retrenchment.

As a first step toward addressing the mutually destructive relationship between pretrial justice and mental health treatment, this Article argues for a disaggregation of mentally ill and traditional defendants within the pretrial criminal justice system in all respects: in arrest decisions, in pretrial screening, in judges’ determinations of pretrial release and conditions for release, and in data collection and reporting. Moreover, bail reformers should call for increased mental health funding to accompany reductions in pretrial detention. This will address only a small facet of the nation’s massive mental health crisis. But it will help to produce a more just bail system for all and move toward ending the cycling of mentally ill defendants through the U.S. criminal justice system.

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INTRODUCTION

A majority of the individuals detained in local, state, and federal jails and prisons in the United States are not convicted criminals. Rather, they are presumed innocent but detained on bail.¹ These high pretrial detention rates result from judicial denial of bail altogether or, more commonly, defendants' inability to afford the bail amount set by a judge.² The result is a system that removes productive workers from the workforce, separates parents from their children, increases recidivism, and incentivizes defendants—innocent and guilty alike—to take plea deals that will get them out of jail.³

There has been growing scholarly and bipartisan political attention to the deeply flawed U.S. bail system, with scholars focusing primarily on the link

¹ As of mid-year 2018, 66% of all inmates in city and county jails in the United States were unconvicted detainees awaiting trial. ZHEN ZENG, U.S. DEP'T OF JUST., NCJ 253044, JAIL INMATES IN 2018, at 6 (2020), <https://bjs.ojp.gov/content/pub/pdf/ji18.pdf> [<https://perma.cc/KMY5-58M5>]. For example, in 2012, 73.3% of the population in New Jersey county jails consisted of defendants being held pretrial. MARIE VAN NOSTRAND, NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION 11 (Luminosity & Drug Policy Alliance 2013), <https://search.issuelab.org/resources/15179/15179.pdf> [<https://perma.cc/863B-YUMS>]. Municipal pretrial defendants were confined for an average of eighty-nine days while awaiting trial. *Id.*

² Thirty-eight percent of the total population of New Jersey county jail inmates consisted of individuals who “had an option to post bail but were held in custody solely due to their inability to meet the terms of bail.” VAN NOSTRAND, *supra* note 1, at 13. Twelve percent of the jail population held only on bail was held because they were unable to pay bail set at \$2,500 or less. *Id.* In Pennsylvania, between 2016 and 2017, “more than half of all people assigned cash bail did not post it,” resulting in 97,000 individuals detained pretrial due to an inability to post a bail bond. ACLU OF PA., BROKEN RULES: HOW PENNSYLVANIA COURTS USE CASH BAIL TO INCARCERATE PEOPLE BEFORE TRIAL 8 (2021), https://www.aclupa.org/sites/default/files/field_documents/broken_rules_statewide_bail_report.pdf [<https://perma.cc/S83M-LGU9>] (reporting statistics and analysis conducted with the support of Data Science graduate students at the University of Pennsylvania). For a discussion of misdemeanor arrests that lead to pretrial detention, higher conviction rates, and other problems, see generally Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017).

³ Brookings estimates that there are billions of dollars in monetary losses due to individuals missing work and losing their jobs while detained on bail. WILL DOBBIE & CRYSTAL YANG, THE ECONOMIC COSTS OF PRETRIAL DETENTION 8 (Janice Eberly & James Stock eds., Brookings 2021), https://www.brookings.edu/wp-content/uploads/2021/03/15872-BPEA-SP21_WEB_DobbieYang.pdf [<https://perma.cc/PP7H-9FMQ>]. The system is also costly for taxpayers, who foot the bill of building and staffing more prisons and jails to house large numbers of pretrial defendants. For documentation of these many effects, see Heaton et al., *supra* note 2, at 787; Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1354–58 (2014); Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 555 (2012); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1318–21 (2012); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2491–93 (2004) (showing how bail practices increase the likelihood of guilty pleas); JUST. POL'Y INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 24–26 (2012), <https://justicepolicy.org/wp-content/uploads/2022/02/bailfail.pdf> [<https://perma.cc/4WBP-2AN3>].

between excessive misdemeanor arrests, money bail that leads to pretrial detention, and higher likelihood of conviction and plea bargaining, all of which leads to mass pretrial detention and incarceration.⁴ And bail reformers have achieved remarkable success in a number of jurisdictions.⁵ But these reforms toward reduced pretrial detention rates (progressive reforms) are facing pushback in response to rising crime, and, in some cases, a homelessness crisis, including high-profile crimes committed by unhoused and mentally ill defendants.⁶ Politicians and voters are now calling for bail reform in the other direction—toward more pretrial detention and the increased use of cash bail for more types of crimes.⁷ In one stark example from New York City, Mayor Eric Adams has repeatedly championed *regressive* bail reform, pointing to high recidivism and rising crime.⁸ At the same time, he has endeavored to reduce crimes committed by the mentally ill by proposing to involuntarily commit

⁴ See *supra* notes 2–3 and accompanying text.

⁵ See, e.g., KRISTIN BECHTEL, JOHN CLARK, MICHAEL R. JONES & DAVID J. LEVIN, PRETRIAL JUST. INST., DISPELLING THE MYTHS: WHAT POLICY MAKERS NEED TO KNOW ABOUT PRETRIAL RESEARCH 2 n.1 (2012) (highlighting the “third wave” of bail reform). See also *infra* Part I for scholarly discussions of this third wave.

⁶ See, e.g., Steven Strang, Note, *Assisted Outpatient Treatment in Ohio: Is Jason’s Law Life-Saving Legislation or a Rash Response?*, 19 HEALTH MATRIX 247, 247–49 (2009) (noting a murder committed by an individual with schizophrenia and “often-violent psychosis”—particularly when he was unmedicated—and noting the law it prompted in Ohio); Sean Roman Strockyj, *The Assisted Outpatient Treatment Jury Trial*, 14 ALBANY GOV’T L. REV. 236, 237–38 (2020–21). A meaningful percentage of individuals detained who have mental health issues were previously unhoused. See DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUST., NJC 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 4 (2006), <https://bjs.ojp.gov/content/pub/pdf/mhppji.pdf> [<https://perma.cc/S73X-S7NT>] (“State prisoners (13%) and local jail inmates (17%) who had a mental health problem were twice as likely as inmates without a mental health problem . . . to have been homeless in the year before their incarceration.”); Ali Watkins, *A Horrific Crime on the Subway Led to Kendra’s Law. Years Later, Has It Helped?*, N.Y. TIMES (Sept. 11, 2018), <https://www.nytimes.com/2018/09/11/nyregion/kendras-law-andrew-goldstein-subway-murder.html> [<https://perma.cc/2R8L-CADR>] (describing the subway death of Kendra Webdale in New York City, caused by an unhoused defendant with paranoid schizophrenia who had been hospitalized more than twelve times prior to the murder and often avoided treatment when released, and the law that resulted from public attention to this incident). For discussions of the connection between homelessness, mental health, and criminal arrests, see Daniel A. Martell, Richard Rosner & Ronnie B. Harmon, *Base-Rate Estimates of Criminal Behavior by Homeless Mentally Ill Persons in New York City*, 46 PSYCHIATRIC SERVS. 596, 596–99 (1995) (noting that 2% of New York City’s mentally ill population is unhoused, whereas the mentally ill population arrested for crimes, 43% of them were unhoused, and concluding that “homeless mentally ill defendants were grossly overrepresented among mentally disordered defendants in New York City’s criminal justice system”).

⁷ See, e.g., Dana Rubinstein, Emma G. Fitzsimmons & Grace Ashford, *Adams Won’t Let Up on Bail Reform, Putting Pressure on Hochul*, N.Y. TIMES (Aug. 3, 2022), <https://www.nytimes.com/2022/08/03/nyregion/bail-reform-adams-hochul.html> [<https://perma.cc/F79J-LHYG>].

⁸ *Id.*

mentally ill individuals.⁹ In other states, the same pressures have also stalled or halted progressive bail reform efforts altogether.¹⁰

The legal literature has extensively documented the ills of the pretrial process, but it has largely missed the fundamental contribution of mental illness to this deeply dysfunctional system.¹¹ Mentally ill defendants,¹² who tend to receive inadequate treatment in jail and upon release, now repeatedly cycle through pretrial detention or release and back into incarceration.¹³ Indeed, three U.S. prisons now serve as the largest “psychiatric facilities” in the nation for mentally ill individuals, housing more patients than any individual hospitals or dedicated community treatment centers.¹⁴ As an Urban Institute report

⁹ Press Release, Eric Adams, New York City Mayor, Mayor Adams Announces Plan to Provide Care for Individuals Suffering from Untreated Severe Mental Illness Across NYC (Nov. 29, 2022), <https://www.nyc.gov/office-of-the-mayor/news/870-22/mayor-adams-plan-provide-care-individuals-suffering-untreated-severe-mental/#/0> [<https://perma.cc/S5A3-BNLU>] (showing directives that would expand the factors justifying involuntary commitment of mentally ill individuals). The directives to ease the path toward involuntary commitment also include provisions aimed to improve treatment for the mentally ill outside of hospitals, however, such as a dedicated phone line that police can call to receive coaching on effectively interacting with mentally ill citizens. *Id.*

¹⁰ See, e.g., Assemb. J. Res. 1, 2023–2024 Leg., 106th Sess. (Wis. 2023), <https://docs.legis.wisconsin.gov/2023/related/proposals/ajr1> [<https://perma.cc/KW5T-DAEJ>] (showing a proposed constitutional amendment in Wisconsin that would expand the use of cash bail).

¹¹ See, e.g., *supra* notes 2–3 and accompanying text (describing the factors the scholarship traditionally focuses on).

¹² This Article defines mental illness following the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (5th Edition) definition of “mental disorder,” which includes, for example, schizophrenia, bipolar disorder, major depressive disorders, and substance use disorders. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20, 87, 123, 155, 481 (5th ed. 2013).

¹³ See Martell et al., *supra* note 6, at 596–99; *infra* Part II (discussing the issues inherent in grouping mentally ill and non-mentally ill (traditional) defendants for the purpose of pretrial release); see, e.g., Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, The Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW. J.L. & SOC. POL’Y 42, 53–54 (2012) (describing Harris County Sheriff Adrian Garcia’s description of this problematic cycling); THE JUDICIARY & DEP’T OF HEALTH, S. OF HAW., HAWAI’I MENTAL HEALTH CORE STEERING COMMITTEE: A JOINT REPORT 2 (2020), <https://www.courts.state.hi.us/wp-content/uploads/2020/02/MH-Core-Steering-Committee-Report-1.9.2020.pdf> [<https://perma.cc/F8J6-6FSY>] (arguing that “[o]ur street corners depict the consequence of applying a criminal justice model to an illness, then compounding the damage through underfunded treatment and services” and that “[t]hose in Hawai’i suffering from mental illness too often languish in our community jails, as jails have replaced mental health facilities as the primary institutions for housing the mentally ill and our courts have become a revolving door”); Devin Taseff, *The Illinois Bail Reform Act of 2017: Roadmap to Reform, or Reform in Name Only?*, 38 N. ILL. U. L. REV. 528, 549 (2018) (noting that “[a]n estimated forty percent of the jail population in the United States has some form of chronic mental illness”). Some “innate” mental disorders also contribute to substance abuse disorders. See generally Michael A. Cerullo & Stephen M. Strakowski, *The Prevalence and Significance of Substance Use Disorder in Bipolar Type I and II Disorder*, 2 SUBSTANCE ABUSE TREATMENT PREVENTION & POL’Y 29 (2007).

¹⁴ See *infra* note 133 and accompanying text (identifying and discussing these facilities).

observed, by the 2000s or earlier, it was “clear that the criminal justice system had become the primary public response to inappropriate behaviors by the mentally ill, and that persons with mental illness were over-represented within criminal justice populations.”¹⁵

Pretrial justice systems that routinely jail the mentally ill thus function as “band-aids” for inadequate mental health treatment. In the long term, however, they exacerbate the underlying problems. They mask the need for a more effective alternative, over-stretch the capacity of jails and prisons, and negatively impact mentally ill defendants through inadequate care. But despite the manifest shortcomings of this approach, it provides at least short-term relief to those affected by crime. Bail reforms that make it more difficult to “solve” the problem of mentally ill defendants by locking them up without providing alternative solutions—or at least identifying the underlying pathologies—are at risk of significant opposition, failure, or retrenchment.

Failing to distinguish between mentally ill and non-mentally ill (traditional) criminal defendants in pretrial interactions with the criminal justice system, data collection, and data reporting causes several problems. First, from a political economic perspective, it limits the viability of bail reforms that reduce pretrial detention rates for all defendants and provides fodder for a trend in the opposite direction. Judges, bar associations, tax watch groups, private foundations, think tanks, and many politicians from diverse political backgrounds support a growing consensus that cash bail—allowed only in the United States and Philippines—produces unfair and unproductive results.¹⁶ But progressive

¹⁵ SHELLI B. ROSSMAN ET AL., URB. INST., CRIMINAL JUSTICE INTERVENTIONS FOR OFFENDERS WITH MENTAL ILLNESS: EVALUATION OF MENTAL HEALTH COURTS IN BRONX AND BROOKLYN, NEW YORK 1 (2012).

¹⁶ See generally, e.g., Thomas John Walsh, *As I See It: Pretrial Services: A Way to Reduce Jail Populations*, 94 WIS. LAW. 38–44 (May 14, 2021), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=94&Issue=5&ArticleID=28394> [<https://perma.cc/AYV8-YUV8>] (observing that “[c]ash bail is increasingly recognized as unfair and counterproductive to public safety” and that “[e]ven relatively low bail amounts of a few hundred dollars are beyond the reach of many economically struggling defendants and their families”); 57 JUDGES’ J., Summer 2018, at 2–3 (showing a special issue of The American Bar Association’s *The Judges’ Journal* in which judges and others highlight injustices associated with cash bail and alternatives to the system); Press Release, Inst. for Const. Advoc. & Prot., Georgetown L., More Than 80 Current and Former Prosecutors and Law Enforcement Leaders Call for Bail Reform in Legal Filing (Jan. 30, 2019), <https://www.law.georgetown.edu/icap/our-press-releases/more-than-80-current-and-former-prosecutors-and-law-enforcement-leaders-call-for-bail-reform-in-legal-filing/> [<https://perma.cc/NF44-9NYU>] (describing an amicus brief filed in the Fifth Circuit arguing for bail reform); Brief of Amici Curiae Current and Former Prosecutors, Department of Justice Officials, Law Enforcement Officials, and Judges in Support of Plaintiffs-Appellants, *Daves v. Dallas County*, 64 F.4th 616 (5th Cir. 2023) (No. 18-11368), 2021 WL 1566352 (showing the brief); Press Release, Eugene DePasquale, Pa. Auditor Gen., Auditor General DePasquale Calls for New Criminal Justice Reforms to Improve Lives, Reduce Taxpayer Costs (June 9, 2020), <https://www.paauditor.gov/press-releases/auditor-general-depasquale-calls-for-new-criminal-justice-reforms-to-improve-lives-reduce-taxpayer-costs>

bail reforms already face stiff resistance in the form of lobbying pressures from cash bail companies and police departments—repeat players in the system with concentrated, well-organized interests—as well as “tough on crime” politicians and voters.¹⁷

In the face of strong pressures to maintain cash bail, the aggregation of mentally ill and traditional defendants adds yet another political challenge for progressive bail reforms. Pretrial detention, or conditions imposed upon pretrial release of defendants, are typically designed to ensure safety and presence at trial (as well as trial integrity).¹⁸ When states implement reforms, critics often look to these metrics to judge the effectiveness of reforms.¹⁹ In New Jersey, where the legislature eliminated cash bail and imposed alternative conditions to ensure trial integrity and community safety, the numbers were initially positive, showing twenty percent or higher reductions in pretrial detention without increased crime or missed trials.²⁰

Despite these promising results suggesting the effectiveness of pretrial release programs in lieu of cash bail and high pretrial detention rates, mentally ill defendants and traditional defendants sometimes respond in different ways to

[<https://perma.cc/GFP4-CU93>] (noting that “[j]udges frequently require defendants to post cash bail, which results in low-income defendants being incarcerated prior to trial and driving additional costs to taxpayers” and calling for reforms).

¹⁷ See *infra* note 107 and accompanying text (describing various attacks on bail reform measures by such organized interest groups).

¹⁸ Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 845 (“[A]pppearance at trial has historically been the principal driver of judicial decisions around bail and pretrial detention.”); *id.* at 847 (noting “judicial and community concerns about a second, separate risk: the danger that a defendant released before trial poses to public safety”); Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 733 (2011) (“Under U.S. law, the purpose of bail was to ensure the appearance of defendant to ‘submit to a trial, and the judgment of the court’ and not for preventing future crimes.” (quoting *Taintor v. Taintor*, 83 U.S. (16 Wall.) 366, 371–72 (1872))); *id.* at 746 (observing that “[r]estricting accuseds’ rights based on ‘community safety’ and without a determination of guilt are themes that soon extended to the Supreme Court” in the 1980s).

¹⁹ See, e.g., Charles Fain Lehman, *Yes, New York’s Bail Reform Has Increased Crimes*, CITY J. (Sept. 22, 2022), <https://www.city-journal.org/article/yes-new-yorks-bail-reform-has-increased-crime> [<https://perma.cc/WVE2-3KX6>] (arguing that high rates of recidivism among those on pretrial release is evidence of how New York City’s novel reforms have failed).

²⁰ GLENN A. GRANT, N.J. JUDICIARY, CRIMINAL JUSTICE REFORM REPORT TO THE GOVERNOR AND THE LEGISLATURE FOR CALENDAR YEAR 2017, at 4 (2018), <https://www.njcourts.gov/sites/default/files/2017cjrannual.pdf> [<https://perma.cc/SLG3-SE8C>] (noting “a reduction of the pretrial jail population by 20% from January 1, 2017 to January 1, 2018, and a reduction of 35% from January 1, 2015 to January 1, 2018” after the implementation of criminal justice reform in New Jersey); GLENN A. GRANT, N.J. JUDICIARY, 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 13–14 (2019), <https://www.njcourts.gov/sites/default/files/2018cjrannual.pdf> [<https://perma.cc/KR6C-NMZ3>] (comparing 2014 pre-criminal justice reform in New Jersey with 2017 post-criminal justice reform, noting that “the rate of alleged new criminal activity for individuals released pretrial under CJR was virtually the same as the rate for defendants under the cash bail system” and that “[t]he average court appearance rate was more than 89[%] in both 2014 and 2017,” with 92.7% of defendants making pretrial court appearances in 2014 and 89.4% making pretrial court appearances in 2017).

detention alternatives, such as electronic monitoring, periodic check-ins by law enforcement, and free rides to hearings and trials.²¹ Traditional defendants can more easily understand and rationalize these types of incentives, but inadequately treated schizophrenia, severe substance use disorders (SUDs), bipolar disorder, and other mental health conditions impede some defendants' ability to internalize the incentives.²² The empirical data are mixed with respect to crimes and appearance rates for mentally ill defendants released pretrial, but the data suggest that individuals with mental illness demonstrate "higher levels of criminal activity post-release."²³ Combining the recidivism rates for these defendants with traditional defendants' appearance and crime rates tends to make progressive bail reforms appear problematic. Additionally, given that many jails release mentally ill defendants without medication or a treatment and support plan, the risk of recidivism is real, if not realized.²⁴ This is true particularly for the many unhoused, mentally ill defendants who struggle to comply with traditional release measures, such as regular phone or in-person check-ins at a specified address.²⁵

A system that demonstrated effective pretrial detention alternatives for the two groups—or, at a minimum, collected and published data for these groups separately—could avoid some of the general public backlash against progressive bail reforms. It could also enhance public support for both bail reform and enhanced mental health services.

Beyond creating political problems for all criminal defendants by impeding progressive bail reform, aggregation of mentally ill and traditional individuals at the pretrial stage also deeply disserves mentally ill defendants and their families. Untreated mental illness can lead to crime or behavior perceived as arrest-worthy, which starts a problematic cycling through the criminal justice

²¹ See, e.g., Alissa Riker & Ursula Castellano, *The Homeless Pretrial Release Project: An Innovative Pretrial Release Option*, 65 FED. PROBATION 9, 10 (2001) (noting the initial ineligibility of unhoused people for a San Francisco pretrial release program for misdemeanor defendants due to the fact that "staff could not maintain contact with the defendants to remind them of subsequent court dates").

²² Cf. *id.* at 9 (noting that criminal justice system actors face a "dilemma" regarding how to "enable this specific clientele [unhoused defendants with mental and physical health challenges] to meet court demands and provide individualized services relevant to their mental, medical, and emotional needs" and noting mentally ill unhoused defendants with "poor appearance records and obvious psycho-social needs").

²³ ROSSMAN ET AL., *supra* note 15, at 6 (citing Jacques Baillargeon, Ingrid A. Binswanger, Joseph V. Penn, Brie A. Williams & Owen J. Murray, *Psychiatric Disorders and Repeat Incarcerations: The Revolving Prison Door*, 166 AM. J. PSYCHIATRY 103 (2009)). See *infra* Part II and note 122 for a discussion of higher recidivism rates for individuals with substance use disorders.

²⁴ See *infra* Part II.

²⁵ See *infra* notes 121, 179–184 and accompanying text.

system.²⁶ Most state statutes direct judges to treat mental health as a factor in assessing a defendant's dangerousness and likelihood to appear at trial, along with factors such as employment and ties to the community that tend to inversely correlate with mental illness—making pretrial detention of these defendants more likely.²⁷ Once incarcerated, these defendants are more likely to endure physical violence than they would be if housed in psychiatric treatment facilities.²⁸ Unsurprisingly, they also tend to receive inadequate medication and other treatment while detained, making it more likely that they will recidivate upon release.²⁹ Furthermore, even if a judge releases a mentally ill defendant pretrial, this release often occurs without conditions tailored toward the defendant's circumstances—thus setting up the defendant for failure.³⁰

Finally, the current approach of jailing millions of mentally ill defendants pretrial disserves society.³¹ Taking these defendants off the streets and locking

²⁶ Individuals with mental illnesses are not necessarily more likely than non-mentally ill individuals to commit violent acts. See Noman Ghiasi, Yusra Azhar & Jasbir Singh, *Psychiatric Illness and Criminality*, STATPEARLS, <https://www.ncbi.nlm.nih.gov/books/NBK537064/> [<https://perma.cc/UM27-L29C>] (Mar. 30, 2023) (“The popular belief is that people with mental illness are more prone to commit acts of violence and aggression A large body of data suggests otherwise.”). Nevertheless, police often tend to arrest people with mental illness at a disproportionate rate, such as for jaywalking or wandering, due to society’s tendency to equate “behavior and conduct problems” with psychological disorders and criminality. *Id.* Furthermore, “[c]ertain psychiatric conditions do increase a person’s risk of committing a crime,” particularly untreated conditions. *Id.*; see also Heather Stuart, *Violence and Mental Illness: An Overview*, 2 WORLD PSYCHIATRY 121, 121 (2003) (noting that “[m]ental disorders are neither necessary nor sufficient causes of violence,” but “[s]ubstance abuse is a major determinant of violence”). But see ELISA JÁCOME, STANDFORD INST. FOR ECON. POL’Y RSCH., HOW BETTER ACCESS TO MENTAL HEALTH CARE CAN REDUCE CRIME 2 (2021), <https://siepr.stanford.edu/publications/policy-brief/how-better-access-mental-health-care-can-reduce-crime> [<https://perma.cc/A3PD-Y6XD>] (noting that “[l]ow-income men with prior mental health histories . . . were almost three times more likely to have been incarcerated by age 24 than those that had never received a diagnosis” and concluding that this and other statistics show a “well-established relationship between mental illness and criminal activity”). For a thorough review of “the association between mental illness and crime” and the factors that complicate causal analyses (e.g., the ties between other social conditions and mental illness), see Richard Frank & Thomas G. McGuire, *Mental Health Treatment and Criminal Justice Outcomes* 5–15 (Nat’l Bureau of Econ. Rsch., Working Paper No. 15858, 2010), https://www.nber.org/system/files/working_papers/w15858/w15858.pdf [<https://perma.cc/U64X-BG22>]. Cf. THE JUDICIARY & DEP’T OF HEALTH, S. OF HAW., *supra* note 13, at 6 (noting a community mental health expert’s observation that “there must be a universal presumption that every single person that comes into contact with law enforcement has a significant history of trauma” and describing programs that train first responders to de-escalate conflicts between first responders and individuals in a mental health crisis).

²⁷ See *infra* Part II.

²⁸ THE JUDICIARY & DEP’T OF HEALTH, S. OF HAW., *supra* note 13, at 5 (noting that individuals with mental illness are more likely to “be victims of violent crimes” when housed in a correctional facility in lieu of a psychiatric facility).

²⁹ See *infra* Part II; *infra* note 222.

³⁰ See *infra* Part II.

³¹ For discussion of trends toward greater criminalization of acts by mentally ill, unhoused individuals as “[d]einstitutionalization and cuts in federal housing funding caused an influx of mentally ill

them up is an expensive and self-defeating band-aid that minimizes, and helps to perpetuate, the problem of inadequate services for mentally ill individuals. Making the problem “disappear” by moving it behind jail and prison walls weakens or prevents what might otherwise be widespread calls for meaningful reform.

As a first step toward addressing the mutually destructive relationship between pretrial justice and mental health treatment, this Article argues for a system that reforms the pretrial system to address two materially different classes of defendants: mentally ill and traditional defendants.³² Ideally, legislatures should prohibit arrest for low-level misdemeanors, expand the role of social workers as emergency responders, and better train police to de-escalate situations involving mentally ill individuals and channel them to appropriate treatment networks.³³ Among the myriad benefits of this approach is a reduction in the utility of the criminal justice system as a substitute for adequate mental health services—if we can’t jail them, we’ll be more likely to treat them.³⁴

In addition to focusing on pre-booking (police stage) diversion from the criminal justice system, or as a first step toward a broader solution, legislatures should also create more effective pretrial screenings of defendants’ mental health. The purpose of this approach would be to design better pretrial options for mentally ill defendants, recognizing practical implementation challenges and differences in the ways individuals respond to these alternatives. To more effectively identify the problems in, and confronted by, pretrial justice systems, individual jurisdictions and research agencies, such as the Bureau of Justice Statistics, should collect and report pretrial data for both classes of defendants. Finally, bail reformers should call for increased mental health funding to accompany reductions in pretrial detention to address the massive societal problem of inadequate mental healthcare.

homeless on the streets,” see Carly Masenthin, *Peace of Mind: Improving Conflicts Between Law Enforcement and the Mentally Ill Homeless While Exploring Sustainable Community Solutions for Care*, 27 KAN. J.L. & PUB. POL’Y 103, 111 (2017); see also THE JUDICIARY & DEP’T OF HEALTH, S. OF HAW., *supra* note 13, at 9 (summarizing studies that “linked deinstitutionalization to the increasing number of mentally ill in jails and prisons”).

³² This Article argues for a recognition of two new classes of defendants, in addition to the low-income and higher-income divide framed in JOHN S. GOLDKAMP, *TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE* (1979).

³³ Cf. Amy C. Watson, Melisa Schaefer Morabito, Jeffrey Draine & Victor Ottati, *Improving Police Response to Persons with Mental Illness: A Multi-level Conceptualization of CIT*, 31 INT’L J.L. & PSYCHIATRY 359, 359 (2008) (observing that “options for . . . on-the-street decisions by police officers are to do nothing, to resolve a situation informally, to arrest, or to seek other formal resolution, such as psychiatric hospitalization” and that discretionary decisions by police determine mentally ill individuals’ “formal involvement in the justice system”).

³⁴ See, e.g., *infra* notes 219–221 and accompanying text.

Reducing the use of jails and prisons as makeshift mental health treatment centers and reporting statistics for mentally ill defendants will ideally shift the public's focus toward a more positive approach. As crimes by the unhoused have drawn more attention to the mental health issues that pervade U.S. society, the response has largely been to perpetuate or worsen the current cycle of incarceration of the mentally ill rather than implement meaningful change.³⁵

Part I of the Article briefly describes the negative consequences of money bail and pretrial detention.³⁶ It then explores efforts to improve pretrial justice and the threat to these reforms posed by public dissatisfaction with crime associated with the mentally ill and unhoused.³⁷ Part II analyzes the failure of the current U.S. pretrial systems to identify and track defendants for the purposes of providing treatment and making pretrial processes effective.³⁸ This Part also analyzes positive trends toward disaggregation in some jurisdictions—trends that inform the solutions proposed here.³⁹ Part III examines the negative impact of pretrial aggregation of traditional and mentally ill defendants on mentally ill individuals, society, and all criminal defendants.⁴⁰ Finally, Part IV offers solutions, such as legislative and court-based reforms that would encourage mental illness screening and treatment of individuals from the initial encounter with first responders through the pretrial stage; greater attention to treatment options for mentally ill defendants; and enhanced, more rigorous data collection.⁴¹

I. BAIL REFORM AND ITS DISCONTENTS

Bail reform, which limits or eliminates judges' abilities to hold defendants pretrial unless they can pay a cash bond or meet other burdensome conditions, has gained traction in recent years. Section A of this Part briefly reviews the now well-established problems with cash bail and pretrial detention and then explores the less-well studied issue of pretrial detention for mentally ill defendants.⁴² Then Section B documents recent bail reform successes⁴³ before

³⁵ See, e.g., THE JUDICIARY & DEP'T OF HEALTH, S. OF HAW., *supra* note 13, at 2 (describing how the bail system in Hawai'i serves to effectively criminalize mental illness).

³⁶ See *infra* Part I; see also, e.g., Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), <https://www.nytimes.com/2008/01/29/us/29bail.html> [<https://perma.cc/GUY3-4KMJ>] (noting that the United States and the Philippines are the only two nations in the world where cash bail is legal).

³⁷ See *infra* Part I.

³⁸ See *infra* Part II.

³⁹ See *infra* Part II.

⁴⁰ See *infra* Part III.

⁴¹ See *infra* Part IV.

⁴² See *infra* Part I.A.

⁴³ See *infra* Part I.B.

Section C analyzes growing opposition to them, identifying the failure of most bail reform efforts to address the role of pretrial detention as a de facto response to inadequate mental health services.⁴⁴

A. Known Problems of Cash Bail and Pretrial Detention

The statistics for U.S. pretrial criminal defendants are bleak and have been for some time. The numbers are scattered and not systematically reported, but they paint a stark picture of inequity and problematic (and costly) use of jails and prisons. In 2010, seventy-six percent of all federal criminal defendants (about whom we tend to have the most information) were jailed or imprisoned while awaiting trial.⁴⁵ Indeed, between 1970 and 2015, the total number of incarcerated detainees rose by 433 percent.⁴⁶

The picture appears equally problematic at the state and local levels. In 2016, seventy percent of all individuals in local jails were pretrial detainees.⁴⁷ In 2009, approximately nine out of ten detained pretrial defendants were detained because they could not afford the bail amount posted for their release.⁴⁸ Many of the individuals detained at both the federal and state levels are low-income, minority defendants, reflecting the inequalities that pervade all parts of the criminal justice system.⁴⁹

This dysfunctional bail system presents problems on many levels—to defendants, their families, and society. For criminal defendants—many of whom

⁴⁴ See *infra* Part I.C.

⁴⁵ THOMAS H. COHEN, U.S. DEP'T OF JUST., NCJ 239673, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010, at 1 (2013), <https://bjs.ojp.gov/content/pub/pdf/pmdfde9510.pdf> [<https://perma.cc/7VHR-5G XK>].

⁴⁶ Press Release, U.S. Comm'n on C.R., U.S. Commission on Civil Rights Releases Report: The Civil Rights Implications of Cash Bail (Jan. 20, 2022), <https://www.usccr.gov/news/2022/us-commission-civil-rights-releases-report-civil-rights-implications-cash-bail> [<https://perma.cc/RU6C-WBMP>].

⁴⁷ BERNADETTE RABUY & DANIEL KOPF, PRISON POL'Y INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 1 (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf> [<https://perma.cc/A4CH-7E6S>].

⁴⁸ BRIAN A. REAVES, U.S. DEP'T OF JUST., NCJ 243777, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 15 (2013), <https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/4MR3-24R6>].

⁴⁹ See, e.g., Mark F. Bernstein, *How New Jersey Made a Bail Breakthrough*, PRINCETON ALUMNI WKLY. (Nov. 2020), <https://paw.princeton.edu/article/how-new-jersey-made-bail-breakthrough> [<https://perma.cc/F5YC-D3QF>] (observing that in New Jersey, 71% of detained defendants were Hispanic or Black, and many were incarcerated for failure to pay bail amounts of \$2,500 or less); Frank McIntyre & Shima Baradaran, *Race, Prediction, and Pretrial Detention*, 10 J. EMPIRICAL LEGAL STUD. 741, 742 (2013); ELIZABETH TSAI BISHOP, BROOK HOPKINS, CHIJINDU OBIOFUMA & FELIX OWUSU, CRIM. JUST. POL'Y PROGRAM, HARVARD L. SCH., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL JUSTICE SYSTEM 25 (2020), <https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf> [<https://perma.cc/M7SY-CEJJ>] (“Black people are more likely than White people to face unfavorable pretrial outcomes.”).

cannot afford bail bond amounts of a few hundred or thousand dollars—the system removes them from the workforce, which severely impacts their financial, social, and emotional support for their families, and increases recidivism.⁵⁰ Detention also makes it more likely that the defendants, even if not guilty, will plead guilty or be convicted by a jury.⁵¹ Society suffers from reduced employment and tax revenues, and increased crime and expenditures on jails, prisons, and other inmate costs.⁵² Recognizing these problems, and prompted by both litigation and effective lobbying, a growing number of jurisdictions have enacted bail reforms.⁵³

B. The Promise of the Third Wave of Bail Reform

Although two earlier waves of bail reform produced only limited success, the “third wave,” beginning around 2010, has yielded promising results.⁵⁴ The pretrial process in place before this third wave (and still existing today in many places) involved extensive use of cash bail—often determined, at least initially, on offense-based charts that were blind to defendants’ ability to pay.⁵⁵ Defendants lacked a right to counsel at pretrial hearings, and judges could consider a broad range of factors in denying pretrial release or bail.⁵⁶

State legislatures and local governments have begun to turn substantially away from this system, eliminating or modifying the use of cash bail and changing the factors considered in making pretrial release determinations.⁵⁷ For example, more than twenty-one states and counties have adopted an evidence-based risk assessment tool developed by a bail reform foundation, lead-

⁵⁰ See *infra* Part I.

⁵¹ See *infra* Part I.

⁵² John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis*, 88 U. CHI. L. REV. 1285, 1288 (2021) (citing costs per detainee).

⁵³ See *infra* Part I.B.

⁵⁴ See SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 23–27 (2018) (describing the first two waves of bail reform in the 1960s and 1980s); Shima Baradaran Baughman & Alyssa J. Campbell, *Will the Third Wave of Bail Reform Also Fail?*, 37 CRIM. JUST. 15, 19 (2022) (describing the third wave of reform as commencing around 2010); Shima Baradaran Baughman, Lauren Boone & Nathan Jackson, *Reforming State Bail Reform*, 74 SMU L. REV. 447, 448 (2021) (same); PRETRIAL JUST. INST., *THE STATE OF PRETRIAL JUSTICE IN AMERICA* 3 (2017), https://www.prisonpolicy.org/scans/pji/the_state_of_pretrial_in_america_pji_2017.pdf [<https://perma.cc/N55Q-DXNF>] (describing meaningful reforms as commencing in the five years preceding a 2017 report).

⁵⁵ See Lauryn P. Gouldin, *Reforming Pretrial Decision-making*, 55 WAKE FOREST L. REV. 857, 877–81 (2020).

⁵⁶ BAUGHMAN, *supra* note 54, at 39, 41. But see Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 587–88 (2020) (noting how some line prosecutors, including those serving under elected prosecutors who ran for office touting progressive agendas, resist efforts to limit cash bail, even for minor offenses).

⁵⁷ Baughman et al., *supra* note 54, at 499.

ing to meaningful reductions in pretrial detentions in some jurisdictions.⁵⁸ Alaska, California, Illinois, Maryland, New Jersey, New Mexico, New York, and Utah, among other states and major cities, have moved partially or fully away from cash bail, although some have regressed.⁵⁹ A statement by the New Mexico courts highlights the strength of and broad support for this growing movement:

Every jurisdiction that has seriously studied the problem has concluded that meaningful reforms in the way we distinguish between arrestees we hold in jail pretrial and those we allow to remain free until their guilt is determined at trial can be accomplished only by moving from a money-based system to an evidence-of-risk-based system of release and detention.⁶⁰

In the wake of broad-based support for bail reform for reasons ranging from fundamental fairness to taxpayer savings, Illinois and New Jersey have enacted some of the most sweeping reforms.⁶¹ The Illinois Legislature enacted the Statewide Use of Force Standardization (SAFE-T) Act in 2021, which

⁵⁸ Press Release, Laura & John Arnold Found., 21 Cities, States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial (June 26, 2015), <https://www.arnoldventures.org/newsroom/more-than-20-cities-and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial> [<https://perma.cc/EXP4-9E3K>] (in 2015, noting that once “rollout” was complete, twenty-nine jurisdictions would have adopted the tool and observing that in one county in North Carolina, the number of pretrial detainees dropped by 20% in one year after implementing the assessment tool). The Laura and John Arnold Foundation developed the tool. Laura and John Arnold now have a philanthropic organization called Arnold Ventures that continues to provide access to the tool. *Who We Are*, ARNOLD VENTURES, <https://www.arnoldventures.org/about> [<https://perma.cc/6VQ3-NZMM>] (providing background on Arnold Ventures); *About the Public Safety Assessment*, ADVANCING PRETRIAL POL’Y & RSCH., <https://advancingpretrial.org/psa/about/> [<https://perma.cc/55TS-YWMM>] (describing how the Laura and John Arnold Foundation created the tool and stating that the Foundation is now called Arnold Ventures). For a description of the evidence-based tool, see GLENN A. GRANT, N.J. JUDICIARY, CRIMINAL JUSTICE REFORM ANNUAL REPORT TO THE GOVERNOR AND LEGISLATURE 3–4 (2016) (observing that “the risk assessment instrument has been validated by using data from over 500,000 cases from localities in the Northeast, Southwest, Midwest and two states with similar demographics to New Jersey” and was subjected to a “retrospective study” of performance).

⁵⁹ PRETRIAL JUST. INST., *supra* note 54, at 4–14 (describing state and local reforms); Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. ON POVERTY L. & POL’Y 451, 466–67 (2018) (summarizing recent bail reform efforts at the federal and state levels); Kenekukwu Okocha, *Nationwide Trend: Rethinking the Money Bail System*, 90 WIS. LAW. 30, 32 (2017) (listing recent progressive reform efforts and resistance to them); *see also* *Holland v. Rosen*, 895 F.3d 272, 300 (3d Cir. 2018) (affirming the constitutional validity of New Jersey’s prioritization of non-monetary bail).

⁶⁰ *Pretrial Release and Detention Reform*, N.M. CTS., <https://www.nmcourts.gov/court-administration/pretrial-release-and-detention-reform/> [<https://perma.cc/KLC3-RGZ6>].

⁶¹ For a description of this support, *see infra* notes 62–74.

eliminated cash bail.⁶² Prior to the 2021 amendment, the statute provided that “[t]here shall be a presumption that any conditions of release imposed shall be non-monetary in nature,” but the statute also allowed judges to set cash bail at an amount adequate to ensure the individual followed the bail conditions.⁶³ In contrast, the statute as amended in 2021 mandates that “[a]ll persons charged with an offense shall be eligible for pretrial release before conviction” and allows denial of pretrial release only when a defendant is charged with crimes such as, *inter alia*, a forcible felony offense with the potential for an imprisonment sentence.⁶⁴ The amended statute also allows denial of pretrial release after a hearing if there is a “high likelihood of willful flight” by the defendant.⁶⁵ Further, the statute modifies the factors that judges must consider when imposing pretrial release conditions, which largely reflect the factors in the federal Bail Reform Act, including “the eligible defendant’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past relating to drug or alcohol abuse, conduct, history [sic] criminal history, and record concerning appearance at court proceedings.”⁶⁶ Judges may also use a “regularly validated risk assessment tool to aid . . . determination” of conditions to be imposed during pretrial release, although these tools may not be the “sole basis” of denying pretrial release.⁶⁷

⁶² Code of Criminal Procedure of 1963, 725 ILL. COMP. STAT. 5/110 (as amended by An Act Concerning Criminal Law, Pub. Act 101-0652, 2020 Ill. Laws 2476) (2022), <https://www.ilga.gov/legislation/publicacts/101/101-0652.htm> [<https://perma.cc/3ZBJ-EH8M>]. The effective date of the Act was delayed due to litigation surrounding its constitutionality, with the Illinois Supreme Court placing the implementation of the Act on hold pending litigation. See Jonathan Bilyk, *Kankakee Judge: SAFE-T Act Elimination of Cash Bail Unconstitutionally Tramples Peoples’ Rights, Courts’ Authority*, COOK CNTY. REC. (Dec. 28, 2022), <https://cookcountyrecord.com/stories/638245673-kankakee-judge-safe-t-act-elimination-of-cash-bail-unconstitutionally-tramples-peoples-rights-courts-authority> [<https://perma.cc/HJA2-94JY>] (describing two State’s Attorneys’ successful arguments in favor of retaining cash bail, against the Attorney General’s defense of the Illinois legislature’s elimination of cash bail); Mitchell Armentrout & Matthew Hendrickson, *Illinois Supreme Court Halts Abolition of Cash Bail Hours Before Criminal Justice Reform Was to Take Effect*, CHI. SUN TIMES, (Dec. 31, 2022), <https://chicago.suntimes.com/politics/2022/12/31/23533866/illinois-cash-bail-safe-t-act-appeal-lawsuit-kwame-raoul-supreme-court> [<https://perma.cc/4VL5-NE29>] (describing the Illinois Supreme Court’s halting of the Act’s implementation and the Attorney General’s appeal). Ultimately, in the summer of 2023, the Illinois Supreme Court reversed a lower court ruling and upheld the statute, finding that “bail” need not be monetary in nature and that the law did not disturb the separation of powers or infringe upon victims’ rights. *Rowe v. Raoul*, 2023 IL 129248, ¶¶ 28–53.

⁶³ 2020 Ill. Laws at 2676 (showing language with strikethrough font at § 110-5(b)).

⁶⁴ *Id.* at 2672, 2689 (§ 110-5(b), 6.1). The burden of proof is on the State to show that the defendant poses a real and present threat to the victim. *Id.* at 2673 (§ 110-4(c)).

⁶⁵ *Id.* at 2672 (§ 110-4(a)).

⁶⁶ *Id.* at 2673–74 (§ 110-5(a)(3)(A)).

⁶⁷ *Id.* at 2680 (§ 110-5(d)).

Beyond eliminating cash bail and modifying pretrial release conditions, the amended Illinois statute guarantees pretrial defendants—including low-income defendants—counsel, who must be appointed prior to the defendants' first appearance before a judge.⁶⁸ It also endeavors to enhance meaningful consideration of pretrial factors by requiring judges to provide in-person rather than video hearings addressing pretrial release and mandating that defendants have "adequate opportunity to confer" with their attorneys prior to pretrial release and detention hearings.⁶⁹ Finally, like New Jersey, the amended statute establishes a data collection and analysis system for pretrial release statistics, requiring the formation of a Pretrial Practices Data and Oversight Board to "systematically collect and report data" and make the data publicly available.⁷⁰

New Jersey's older bail reforms are similar to those in Illinois, although they do not entirely eliminate cash bail.⁷¹ In 2017, New Jersey voters approved a constitutional amendment that made all defendants "eligible for pretrial release," but also specified that judges could deny pretrial release if no amount of cash bail or conditions would reasonably assure appearance at trial or "the safety of any other person or the community."⁷² Also, in 2014, Governor Christie signed the Criminal Justice Reform Act, which, among other measures, directed judges to use an objective pretrial risk assessment instrument to make pretrial release determinations and to complete the assessment within forty-eight hours after a defendant's commitment to jail.⁷³ Under the amendments, if the assessment—conducted by a newly formed Statewide Pretrial Services Program—and additional information show that pretrial release on an unsecured (non-monetary) appearance bond or a defendant's personal recognizance will assure safety and appearance, then the court "shall" order the pretrial release of all defendants.⁷⁴

As a next-best option, the amendments provide that if personal recognizance or a non-monetary appearance bond will not reasonably assure a defendant's appearance at trial or the safety of other persons and the community, courts must consider pretrial release combined with a number of other conditions, such as maintaining employment, actively seeking employment, or reporting regularly to a designated law enforcement officer.⁷⁵ And finally, if the

⁶⁸ *Id.* at 2681 (§ 110-5(f)).

⁶⁹ *Id.* at 2666 (§ 109 (f)–(g)).

⁷⁰ *Id.* at 2506 (§ 10-130).

⁷¹ N.J. CONST. art. I, § 11.

⁷² *Id.*; see *State v. Gaines*, No. A-1836-16T6, 2017 WL 795936, at *3 n.2 (N.J. Super. Ct. App. Div. Mar. 1, 2017) (noting that the amendment was effective January 1, 2017).

⁷³ N.J. STAT. ANN. § 2A:162-25 (2022). See generally S. 216-946, 1st Sess. (N.J. 2014).

⁷⁴ N.J. STAT. ANN. § 2A:162-17.a. This only applies to defendants eligible for the risk assessment. For the Pretrial Services Program, see *id.* § 2A:162.25.

⁷⁵ *Id.* § 2A:162-17.b.

court deems these conditions to be inadequate, it may impose monetary bail.⁷⁶ If the eligible defendant is unable to post monetary bail and is therefore detained, the defendant may not be detained for a period longer than the maximum incarceration time for the charge or charges or term of probation supervision.⁷⁷ Similar to Illinois, there is also a list of crimes, such as murder and domestic violence, for which pretrial release is not the presumptive approach.⁷⁸ But unlike Illinois, these crimes are not set for pretrial detention; rather, they require the posting of full cash, a surety bond, or a bail bond of a specific amount.⁷⁹

Although these reforms still allow monetary bail, the provision restricting the length of pretrial detention for failure to afford bail is important, as it reduces the incentives for plaintiffs to plead guilty simply to avoid pretrial detention that would exceed their sentenced incarceration time—a current plea practice in many states.⁸⁰

Beyond increasing pretrial release by requiring judges to consider the results of an evidence-based pretrial risks assessment tool, the New Jersey Legislature also mandated data collection, review, and continued consideration of bail reforms.⁸¹ It established a Pretrial Services Program Review Commission to review newly required annual reports from the Statewide Pretrial Service Commission, survey other states' pretrial release and detention programs, and make related recommendations for legislation.⁸²

These, and a slate of similar reforms, have made meaningful progress toward addressing the problems outlined in Section A of this Part.⁸³ From 2017—when New Jersey's reforms became effective—to 2018, pretrial release rates increased by twenty percent, while safety and appearance rates remained nearly identical to pre-reform rates.⁸⁴ From 2015—the year following New Jersey's initial reform efforts—to 2018, pretrial release increased by thirty-five percent.⁸⁵ Illinois has not had the chance to measure results, as the Illinois Supreme Court temporarily halted the implementation of reforms before finally allowing them to proceed in the fall of 2023.⁸⁶ But other local governments and states with similar reforms demonstrate progress similar to New Jersey's.

⁷⁶ An Act Concerning Court Administration, ch. 31, 2014 N.J. Laws 467.

⁷⁷ *Id.*

⁷⁸ N.J. STAT. ANN. § 2A:162-12.

⁷⁹ *Id.*

⁸⁰ Bibas, *supra* note 3, at 2491–93.

⁸¹ N.J. STAT. ANN. § 2A:162-26.f.

⁸² *Id.*

⁸³ *See supra* Part I.A.

⁸⁴ *Supra* note 20.

⁸⁵ *Supra* note 20.

⁸⁶ For the Illinois pause, see *supra* note 62.

In Washington, D.C., where approximately 92% of criminal defendants were released pretrial in 2017, 89% of those released were not re-arrested while awaiting trial.⁸⁷ Studies also suggest there are savings to taxpayers.⁸⁸ In Harris County, Texas, following a consent decree that modified the county's bail bond system, the county saved approximately \$1.4 million over four years by reducing the percentage of cases with bond hearings.⁸⁹ The county also saved an estimated \$22 million in jail costs over seven years.⁹⁰

These statistics stand in contrast with those in unreformed states such as Pennsylvania, where, according to an ACLU report building from statistics provided by University of Pennsylvania data science graduate students, cash bail was set in more than 40% of cases (with some counties exceeding 50% cash bail rates).⁹¹ The average amount of cash bail set by judges was \$38,433, and "more than half of people assigned cash bail did not post it" in 2016 and 2017.⁹² This resulted in 97,000 cases of pretrial detention for failure to pay bail during these two years.⁹³

The promise of the third wave of bail reform is apparent. In the jurisdictions that have enacted reforms, pretrial detention rates have declined without jeopardizing safety or defendants' appearance at trial, saving money and improving the lives of defendants and their families.⁹⁴ But this progress is in grave danger of slowing or even reversing, as analyzed in the following Section.

C. Threats to Progressive Bail Reforms

Despite progress, there is a growing threat to the maintenance and expansion of bail reform efforts. This is perhaps best illustrated by New York. In 2019, after rejecting proposals to wholly eliminate cash bail, New York's Legislature implemented a system that largely eliminated cash bail—mandating pretrial release without electronic monitoring for misdemeanor defendants and requiring consideration of non-monetary conditions for many other defendants, as defined by the charge that they faced.⁹⁵ This legislation maintained tradi-

⁸⁷ PRETRIAL JUST. INST., *supra* note 54, at 2.

⁸⁸ BRANDON L. GARRETT ET AL., MONITORING PRETRIAL REFORM IN HARRIS COUNTY: FOURTH REPORT OF THE COURT-APPOINTED MONITOR, at viii (2022).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ ACLU OF PA., *supra* note 2, at 9–11.

⁹² *Id.* at 8 (indicating \$38,433 as the average bail amount for Pennsylvania in 2017).

⁹³ *Id.*

⁹⁴ See *supra* note 20 (discussing analyses of data showing no discernable difference in recidivism outcomes and an increase in rates of court appearance, following a reduction in pretrial detention in New Jersey).

⁹⁵ William C. Donnino, Supplementary Practice Commentaries, McKinney's Consol. L. of N.Y., N.Y. CRIM. PROC. LAW § 500.10 (2023).

tional pretrial considerations (including the potential for money bail) for a limited list of “qualifying offenses.”⁹⁶ Following a public outcry, the Legislature pulled back some of these progressive reforms in 2020—expanding the list of qualifying offenses subject to traditional bail and other pretrial conditions, the types of non-monetary conditions that judges could impose on pretrial release, and exceptions to the elimination of cash bail.⁹⁷ In 2022, the Legislature further expanded qualifying offenses that pushed pretrial defendants back into traditional pretrial procedures (including money bail), and defined “any felony or class A misdemeanor involving harm to an identifiable person or property” as a qualifying offense.⁹⁸ Notably, the 2022 New York amendments also addressed pretrial defendants’ mental health, allowing the court to “order as a condition of release under supervision that the principal seek a voluntary psychiatric assessment”⁹⁹ or “immediate psychiatric assessment involuntarily” pending release, as explored in more detail below.¹⁰⁰ Further, as previously described, New York City’s Mayor is pushing for more regressive reform as part of a campaign to address crime rates, while simultaneously calling for the broader involuntary commitment of mentally ill individuals.¹⁰¹

This phenomenon is not limited to New York. In San Francisco in 2022, progressive District Attorney Chesa Boudin, who sought to end the use of cash bail among other reforms, lost a recall election by almost twenty percentage points.¹⁰² And in 2023, Wisconsin’s General Assembly voted to place a regressive bail reform constitutional amendment on the ballot, which would require judges to consider safety considerations—not just flight risk—in setting monetary bail and would reduce pretrial release.¹⁰³ Indeed, Professors Shima Baradaran Baughman and Alyssa Campbell worry that “the national downward trajectory of incarceration rates the nation has experienced over more than a decade is under threat.”¹⁰⁴

Bail reform has generally faced an uphill battle for a number of reasons. Politicians have been reluctant to appear “soft on crime,” and cash bail works

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ N.Y. CRIM. PROC. LAW § 500.10(3-c)(a) (McKinney 2023).

¹⁰⁰ *Id.* § 500.10(3-c)(b).

¹⁰¹ See *supra* notes 8–9 and accompanying text (discussing the New York City Mayor’s efforts to push for changes to recent bail reforms in New York).

¹⁰² Musadiq Bidar, *San Francisco Votes Overwhelmingly to Recall Progressive DA Chesa Boudin*, CBS NEWS (June 8, 2022), <https://www.cbsnews.com/news/chesa-boudin-san-francisco-da-recalled/> [https://perma.cc/CMJ8-YYE3].

¹⁰³ Harm Verhuizen, *Wisconsin Assembly Puts Bail Constitutional Amendment on April 2023 Ballot*, PBS WIS. (Jan. 19, 2023), <https://pbswisconsin.org/news-item/wisconsin-assembly-puts-bail-constitutional-amendment-on-april-2023-ballot/> [https://perma.cc/4M8S-6EGP].

¹⁰⁴ Baughman & Campbell, *supra* note 54, at 19.

in favor of wealthy defendants, who tend to be better represented in the political process.¹⁰⁵ The cash bail lobby, a well-organized interest group, has proven to be a formidable foe to the large, relatively diffuse group of activists, criminal defendants, defendants' families, and taxpayers on the other side of the issue.¹⁰⁶ Indeed, as more local governments and states have achieved progressive reforms, members of the cash bail lobby have taken to the courts and the bully pulpit, accusing bail reform foundations of removing citizens' constitutional rights to bail and suing states that have enacted reforms.¹⁰⁷

The third wave of bail reform has, to a perhaps surprising degree, overcome these roadblocks. The combination of a growing consensus against continued reliance on money bail, successful litigation challenging the constitutionality of detaining defendants who cannot afford bail, and legislatures increasingly concerned about the direct economic costs of jails and prisons has resulted in considerable success. But this progress is in jeopardy in the face of mounting challenges—particularly growing homelessness and mental health crises.

The public perception that mentally ill, unhoused individuals pose a disproportionate threat to safety lacks nuance, but high-profile incidents in rapid succession have further stoked public fears. For example, in 2022, just two days after a homeless man randomly stabbed and killed a nurse in Los Angeles, an unhoused, mentally ill man pushed a woman to her death on the New York City subway.¹⁰⁸

¹⁰⁵ Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 243–44 (2018).

¹⁰⁶ Wiseman, *supra* note 3, at 1397.

¹⁰⁷ See, e.g., *Arnold Foundation Admits the Truth: It Funded Lawsuits to End Money Bail in Houston and Elsewhere*, AM. BAIL COAL. (Apr. 27, 2018), <https://ambailcoalition.org/arnold-foundation-admits-truth-funded-lawsuits-end-money-bail-houston-elsewhere/> [<https://perma.cc/Y2G6-2QTV>] (“The Arnold Foundation has demonstrated an intent to deny the right to bail, and is therefore a co-conspirator in the attempt to trammel the constitutional right to bail for all Americans.”); *Holland v. Rosen*, 277 F. Supp. 3d 707, 713 (D.N.J. 2017) (noting that one of the plaintiffs challenging New Jersey’s Criminal Justice Reform Act (CJRA) was “a bail bond provider that alleges its business in New Jersey has essentially dried up since the CJRA took effect on January 1, 2017”), *aff’d*, 895 F.3d 272 (3d Cir. 2018); see also Bilyk, *supra* note 62 (describing two State’s Attorneys’ arguments that the legislature unconstitutionally abrogated the right to bail guaranteed by the state constitution). But see *supra* note 62 (discussing an Illinois Supreme Court decision that later rejected those arguments).

¹⁰⁸ Kiara Alfonseca, *As Incidents of Violent Crime by the Homeless Grab Headlines, Activists Urge Caution and Solutions*, ABC NEWS (Feb. 5, 2022), <https://abcnews.go.com/US/incidents-violent-crime-homeless-grab-headlines-activists-urge/story?id=82443787> [<https://perma.cc/T6QQ-Q7KE>] (describing the Los Angeles and New York incidents); Priscilla DeGregory, *Martial Simon Sent to Mental Facility Over Michelle Go’s Fatal Subway Shove*, N.Y. POST (Apr. 20, 2022), <https://nypost.com/2022/04/20/martial-simon-sent-to-mental-facility-over-michelle-gos-fatal-subway-shove/> [<https://perma.cc/N6W3-L752>] (explaining that the defendant in the 2022 fatal New York subway push was subsequently deemed unfit for trial and committed to a psychiatric facility).

Although public assumptions surrounding the dangerousness of unhoused, mentally ill individuals are overly broad—and often overlook the fact that these individuals are more likely to be the victims than the perpetrators of crimes—the combination of an unstable living situation, mental health issues, and inadequate treatment do contribute to criminal behavior within this group.¹⁰⁹ A 1995 study in New York City estimated that “[t]he overall rate of criminal offenses was 35 times higher in the homeless mentally ill population than in the domiciled mentally ill population.”¹¹⁰ And a systematic review of twenty-one studies addressing the unhoused and crime concluded that rates of criminal convictions over the lifetime of unhoused, severely mentally ill individuals showed that 52% to 80% of these individuals had been convicted of a crime at least once, compared to an estimated 15% lifetime rate for the general population.¹¹¹ The study also noted, however, that unhoused individuals with mental illness experienced higher rates of victimization than housed individuals with mental illness—noting “extreme levels” of victimization in this group, particularly for women.¹¹²

Other studies highlight that higher crime rates among unhoused individuals can largely be attributed to the fact that factors endemic to homelessness, such as vagrancy and trespassing, are classified as crimes in many jurisdictions.¹¹³

The American public—already highly risk-averse on the issue of crime—has reacted negatively to high-profile crimes committed by mentally ill, unhoused individuals and rising crime rates generally,¹¹⁴ and politicians have re-

¹⁰⁹ See Laurence Roy et al., *Criminal Behavior and Victimization Among Homeless Individuals with Severe Mental Illness: A Systematic Review*, 65 PSYCHIATRIC SERVS. 739, 746 (2014).

¹¹⁰ Martell et al., *supra* note 6, at 596.

¹¹¹ Roy et al., *supra* note 109, at 743. This range of lifetime conviction rates excludes one figure from one study—28.1% of unhoused mentally ill individuals convicted at least once during their lifetime for *felony* convictions only.

¹¹² *Id.* at 746.

¹¹³ Barbara Burton, David E. Pollio & Carol S. North, *A Longitudinal Study of Housing Status and Crime in a Homeless Population*, 30 ANNALS CLINICAL PSYCH. 280, 286 (2018).

¹¹⁴ After peaking in 1991, national violent crime rates generally declined through 2014. MATTHEW FRIEDMAN, AMES C. GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUST., CRIME TRENDS: 1990–2016, at 3 (2017). In 2015, conditions began to change. National violent crime rates rose by 3.9% over 2014, and again by 3.4% between 2015 and 2016. Press Release, FBI, FBI Releases 2015 Crime Statistics, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/resource-pages/2015-cius-summary_final [<https://perma.cc/8RZR-9GVP>]; Press Release, FBI, FBI Releases 2016 Crime Statistics (Sept. 25, 2017), <https://www.fbi.gov/news/press-releases/fbi-releases-2016-crime-statistics> [<https://perma.cc/EGQ9-ZXY5>]. Although these rates declined again over the next several years, they increased substantially—up 5.6% over 2019—with the rise of the COVID pandemic in 2020. Press Release, FBI, FBI Releases 2017 Crime Statistics (Sept. 24, 2018), <https://www.fbi.gov/news/press-releases/fbi-releases-2017-crime-statistics#:~:text=The%202017%20statistics%20show%20the,crime%20rate%20declined%203.6%20percent> [<https://perma.cc/BGD4-WRRG>] (showing a 0.9% drop in violent crime between 2016 and 2017); Press Release, FBI, FBI Releases 2018 Crime Statistics (Sept. 30,

sponded with promises to toughen up on bail. Regressive bail reform efforts in Wisconsin began after an individual—described by his family as mentally ill, and released on \$1,000 bail—drove his sport utility vehicle into a parade, killing six people.¹¹⁵

Mayor Eric Adams, who has repeatedly called for regressive bail reform to address rising crime in New York City, has proposed both stricter pretrial measures for defendants and more frequent involuntary commitment of the mentally ill.¹¹⁶ The public has also tended to support more general expansions of criminalization—including more aggressively policing existing laws against trespassing and panhandling, for example—in response to the growing number of mentally ill, unhoused people on the streets.¹¹⁷ More arrests lead to more pretrial detention, thus beginning (or continuing, for prior offenders) the cycle of detention, conviction, incarceration, and release without adequate treatment.

2019), <https://www.fbi.gov/news/press-releases/fbi-releases-2018-crime-statistics#:~:text=The%202018%20statistics%20show%20the,crime%20rate%20declined%206.9%20percent.> [https://perma.cc/8Z7V-SAER] (showing a 3.9% drop in violent crime between 2017 and 2018); Press Release, FBI, FBI Releases 2019 Crime Statistics (Sept. 28, 2020), <https://www.fbi.gov/news/press-releases/press-releases/fbi-releases-2019-crime-statistics> [https://perma.cc/X9XB-2GNW] (showing a 0.5% decrease in violent crime between 2018 and 2019, and noting that “[p]roperty crimes also dropped 4.1%, marking the 17th consecutive year the collective estimates for these offenses declined”); Press Release, FBI, FBI Releases 2020 Crime Statistics (Sept. 27, 2021), <https://www.fbi.gov/news/press-releases/fbi-releases-2020-crime-statistics> [https://perma.cc/B9PJ-GEPT] [hereinafter FBI 2020 Crime Statistics Press Release].

¹¹⁵ Todd Richmond, *Man Who Killed 6 in Christmas Parade Gets Life, No Release*, PBS NEWS HOUR (Nov. 16, 2022), <https://www.pbs.org/newshour/nation/man-who-killed-6-in-christmas-parade-gets-life-no-release> [https://perma.cc/BFQ9-3F6P] (noting that the family stated that Brooks has had bipolar disorder since he was twelve years old and that Brooks noted that he had periodically spent time in mental health facilities and taken medication, but that four psychologists diagnosed him with anti-social disorder, which is not classified as a mental illness); Press Release, Julian Bradley, Wisconsin State Senator & Chuck Wighers, Wisconsin State Representative, Sen. Bradley, Rep. Wighers: Unveil Legislation to Rein in Low Bail for Repeat Offenders (Jan. 5, 2022), <https://www.wispolitics.com/2022/sen-bradley-rep-wighers-unveil-legislation-to-rein-in-low-bail-for-repeat-offenders> [https://perma.cc/2WHZ-UEDW] (noting the release of a proposed bill to “set minimum bail amounts for criminals who have already been convicted of a felony or violent misdemeanor” that came “after Milwaukee District Attorney John Chisholm’s office let serial offender Darrell Brooks Jr. out on seriously low bail,” and arguing that “Wisconsin lives are in danger because of the low bail that soft-on-crime judges and DAs are currently setting”).

¹¹⁶ Ari Ephraim Feldman, *Adams Calls for Further Bail Law Changes After Subway Fight with Teen and Transit Cop*, SPECTRUM NEWS (July 26, 2022), <https://www.ny1.com/nyc/all-boroughs/news/2022/07/26/adams-calls-for-further-bail-law-changes-after-subway-fight-with-teen-and-transit-cop> [https://perma.cc/V5UC-T4MN]; *supra* note 9.

¹¹⁷ ALEX S. VITALE, CITY OF DISORDER: HOW THE QUALITY OF LIFE CAMPAIGN TRANSFORMED NEW YORK POLITICS 12 (2008) (describing the criminalization of mentally ill, unhoused people as a class); Masenthin, *supra* note 31, at 111 (describing the definition of new crimes for which to arrest the mentally ill and public calls for stricter enforcement of laws in response to an “influx” of mentally ill unhoused people as a result of deinstitutionalization, cuts in mental health treatment funding, and cuts in public housing support).

Locking up the mentally ill is unjust, expensive, and ineffective, but from the perspective of those affected by crime, it may appear better than doing nothing. Bail reforms that bar this approach without providing an alternative or, at a minimum, identifying the problem, are at risk of significant opposition. The following Part analyzes the failure of the current U.S. pretrial system to treat mentally ill and traditional defendants separately for the purposes of providing services and making pretrial release effective.¹¹⁸

II. THE PROBLEM OF AGGREGATING MENTALLY ILL AND TRADITIONAL DEFENDANTS

The current pretrial justice system—even in states that have enacted progressive reforms—largely fails to appropriately distinguish mentally ill from traditional defendants when setting conditions for pretrial release, providing treatment, or requiring detention when deemed necessary. By failing to recognize that these two classes of defendants respond quite differently to mandates and incentives and have different pretrial needs, courts and legislatures are doing a disservice to both classes (and society as a whole)—which threatens nearly a decade of progress on reforms.

Mental health has long been a factor in judicial consideration of pretrial defendants, but for the wrong reasons. As explored below, in many jurisdictions, mental health is listed as one factor among many others, but only to assess dangerousness and flight risk rather than to identify treatment options or effective pretrial conditions for that defendant.¹¹⁹ As a result, judges often set pretrial release conditions, such as periodic check-ins with law enforcement officers or electronic monitoring, that are unlikely to work as well for mentally ill defendants or for the many defendants who are both unhoused and mentally ill.¹²⁰ For example, a study in San Francisco—a city with a large unhoused, mentally ill population—notes how the traditional pretrial system functions poorly for unhoused, mentally ill defendants with “poor appearance records” and inadequately addresses “psycho-social needs.”¹²¹

The failure of the pretrial system to adequately address the needs of mentally ill defendants or to decouple the appearance and safety statistics of this class from traditional defendants tends to not only disserve mentally ill defendants, but also to reduce success rates for pretrial release on the whole—thus jeopardizing progressive reforms. Indeed, the lack of distinct pretrial

¹¹⁸ See *infra* Part II.

¹¹⁹ See *infra* Part II.B.

¹²⁰ See, e.g., WASH. CRIM. R. SUPER. CT. 3.2 (showing the range of pretrial release conditions judges may impose in Washington State).

¹²¹ Riker & Castellano, *supra* note 21, at 9.

measures for mentally ill defendants also keeps the pretrial system from fulfilling the root objectives of safety and appearance that pretrial conditions, such as bail, release on recognizance, or release with limitations, are designed to achieve.¹²² Perhaps more importantly, it covers up the massive societal problem of the lack of meaningful treatment options for many mentally ill individuals, and leads to deeply problematic outcomes for the many mentally ill defendants caught up in the criminal justice system.

This Part frames and analyzes this problem.¹²³ Section A explores the disproportionate representation of mentally ill defendants within the criminal justice system.¹²⁴ Section B then describes the current approaches to mental health in the pretrial context and the negative impacts of most of these approaches.¹²⁵

A. The Disproportionate Representation of Mentally Ill Defendants in the Criminal Justice System

Statistics on mental health in the U.S. criminal justice system are scattered and outdated, but the available numbers paint a dismal picture. The U.S. Department of Justice reports that by June 2005, 45% of federal prisoners, 56% of state prisoners, and 64% of local jail inmates “had a mental health problem.”¹²⁶ These inmates exhibiting mental health problems were twice as likely as traditional defendants to be unhoused, and approximately 75% of defendants with mental health problems in state prisons and local jails also had “substance dependence or abuse” challenges.¹²⁷

¹²² This is not to say that mentally ill defendants are more dangerous. See Bernice A. Pescosolido, Bianca Manago & John Monahan, *Evolving Public Views on the Likelihood of Violence from People with Mental Illness: Stigma and Its Consequences*, 38 HEALTH AFFS. 1735, 1735 (2019) (observing that the “link between violence and mental illness has been scientifically documented to be weak, at best, for at least three decades”). Rather, defendants with substance abuse disorders released without adequate treatment or support do have higher recidivism rates than traditional defendants and mentally ill defendants. Kristen M. Zgoba, Rusty Reeves, Anthony Tamburello & Lisa Debilio, *Criminal Recidivism in Inmates with Mental Illness and Substance Use Disorders*, 48 J. AM. ACAD. PSYCHIATRY & L. 209, 213 (2020) (noting that past research indicated that defendants with both mental illness and substance use disorders had the highest recidivism rates but finding in the 2020 study that only defendants with substance use disorders showed these higher rates).

¹²³ See *supra* Part II.

¹²⁴ See *infra* Part II.A.

¹²⁵ See *infra* Part II.B.

¹²⁶ JAMES & GLAZE, *supra* note 6, at 1. The researchers defined “mental health problem” as “a recent history [within 12 months prior to an interview] or symptoms of a mental health problem,” with symptoms of mental disorder defined by the Diagnostic and Statistical Manual of Mental Disorders. *Id.*

¹²⁷ *Id.*

Later statistics showed a similarly bleak pattern of mentally ill defendants in the U.S. criminal justice system. In 2009, two-thirds of juvenile inmates had at least one mental illness, and more than one million people with a mental illness were detained or on probation or parole on a typical day.¹²⁸ Thirty-seven percent of federal and state prisoners and forty-four percent of local jail inmates reported mental health problems in 2011 to 2012.¹²⁹ Moreover, a 2014 survey of numerous studies on mental illness in prisons and jails concluded that the percentage of mentally ill people in the criminal justice system tended to be higher than the percentage in the non-incarcerated population; therefore, “[p]eople with mental illnesses are overrepresented in the criminal justice system in the United States.”¹³⁰

County and city statistics provide further evidence of the nationwide problem of using incarceration to treat mental illness. Officials in Miami-Dade County noted that “there are 19 times as many people with mental illnesses in correctional facilities as there are in all civil state treatment facilities combined.”¹³¹ Further, they observed that Miami-Dade’s county jail “serves as the largest psychiatric institution in Florida and contains as many beds serving inmates with mental illnesses as all state civil and forensic mental health hospitals combined.”¹³² In Los Angeles County, one-third of the jail population is “classified with mental health issues,” and the Los Angeles County jail system, Rikers Island in New York, and Cook County, Illinois jail systems are the three largest “psychiatric facilities” in the United States.¹³³

The disturbingly widespread practice of using jails as default mental health centers is the result of, among other factors, deinstitutionalization and inadequate community treatment, which causes many mentally ill individuals

¹²⁸ Frank & McGuire, *supra* note 26, at 1.

¹²⁹ JENNIFER BRONSON & MARCUS BERZOFKY, U.S. DEP’T OF JUST., NCJ 250612, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011–12, at 1 (2017), <https://bjs.ojp.gov/content/pub/pdf/imhprpji1112.pdf> [<https://perma.cc/V3SK-UW4L>]. These individuals were “told in the past by a mental health professional that they had a mental disorder.” *Id.*

¹³⁰ Seth J. Prins, *Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 PSYCHIATRIC SERVS. 862, 862 (2014).

¹³¹ Steve Leifman & Tim Coffey, *Jail Diversion: The Miami Model*, 25 CNS SPECTRUMS 659, 659 (2020).

¹³² *Id.*

¹³³ Gale Holland, *L.A. County Agrees to New Policies to End the Jail-to-Skid Row Cycle for Mentally Ill People*, L.A. TIMES (Dec. 7, 2018), <https://www.latimes.com/local/lanow/la-me-ln-skid-row-jail-20181207-story.html> [<https://perma.cc/2V5D-NCB2>]; Eric Westervelt & Liz Baker, *America’s Mental Health Crisis Hidden Behind Bars*, NPR (Feb. 25, 2020), <https://www.npr.org/2020/02/25/805469776/americas-mental-health-crisis-hidden-behind-bars> [<https://perma.cc/RD9U-XAMQ>] (“Today the three biggest mental health centers in America are jails: LA County, Cook County, Ill. (Chicago) and New York City’s Rikers Island jail.”).

to live on the streets without adequate support networks.¹³⁴ This, in turn, leads to run-ins with the public and police, and often, entry into the criminal justice system.¹³⁵ This temporarily removes the defendant from the street, providing a short-term “solution,” but does nothing to address the root of the problem. Instead, inadequate treatment and a lack of structure or sufficient support upon release from the system starts the process over again, with re-arrest, re-bookings, and often, pretrial detention while awaiting a plea or trial. For example, in Los Angeles County, prior to a lawsuit forcing improved release measures for mentally ill defendants, “mentally ill inmates continued to be put out in the streets in the middle of the night without medication or a clear understanding of where to go for treatment.”¹³⁶ Arrest and pretrial detention, or pretrial release with conditions not tailored to mentally ill defendants, perpetuate this cycle, as explored in the following Section.¹³⁷

B. Judicial Pretrial Approaches to Mental Illness

Bail systems were originally designed solely to ensure the appearance of defendants at trial, and any specific factors applied by judges to assess defendants were aimed at predicting appearance.¹³⁸ Considerations of defendants’ dangerousness—akin to determining their guilt pretrial—began to creep into the system in the 1960s and have since expanded.¹³⁹ Beginning with the federal Bail Reform Act and continuing with a flurry of state legislation, legislatures directed judges to consider a broad range of defendant characteristics, including mental health, when determining whether to detain or release the defendant

¹³⁴ THE JUDICIARY & DEP’T OF HEALTH, S. OF HAW., *supra* note 13, at 7–9 (describing the history of deinstitutionalization, inadequate community treatment, and rising numbers of mentally ill individuals in prisons and jails); *supra* note 117 (describing the current and historic practice of criminalizing mentally ill unhoused people); *infra* note 209 (further describing the problematic combination of deinstitutionalization and inadequate community treatment programs for the mentally ill); ROSSMAN ET AL., *supra* note 15, at 1 (listing deinstitutionalization, “changes in civil commitment statutes” making involuntary hospitalization more difficult, “the evolution of psychotropic medications” that allow even individuals with severe mental illnesses to be treated as outpatients, and law enforcement strategies focused on low-level crimes as the factors pushing mentally ill individuals to the criminal justice system).

¹³⁵ See, e.g., Linda A. Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCH. 794, 796 (1984) (noting a higher rate of arrests for mentally ill people as compared to the general population); Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, NAT’L INST. JUST. J. 9, 9 (2000) (noting factors that have increased the likelihood of encounters between police and the mentally ill).

¹³⁶ Holland, *supra* note 133.

¹³⁷ See *infra* Part II.B.

¹³⁸ Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail*, 32 N. KY. L. REV. 1, 17 (2005).

¹³⁹ Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 502 (2018).

and which conditions of release to impose.¹⁴⁰ As discussed in this Section, most courts assess defendants' mental health primarily to determine their flight risk and likely dangerousness and (often) to impose pretrial conditions that do not work well for many mentally ill defendants.¹⁴¹ This Section explores this predominant approach, as well as three additional approaches: ignoring mental health altogether,¹⁴² assessing mental health and forcing hospitalization of mentally ill defendants,¹⁴³ and assessing mental health in order to place productive pretrial conditions on defendants and divert them to crisis or treatment centers.¹⁴⁴ These latter approaches appear to be the best strategies to both achieve the objectives of bail and assist mentally ill defendants.

1. Mental Health as a Determinant of Flight Risk, Dangerousness, or Competence to Stand Trial

Many statutes that judges must follow when determining whether to detain defendants, set bail (if cash bail is an option), or release them with conditions include mental health (including substance abuse) as one component among many factors designed to assess the flight and safety risks posed by a defendant.¹⁴⁵ But this mental health factor is not a separate consideration designed to assist the judge in determining what conditions would best ensure that a mentally ill defendant—who is likely to respond differently to incentives—will appear at trial or remain “safe,” both with respect to themselves and the community. Rather, mental health issues, baked into the overall formula for safety and flight risk, tend to tilt the scale toward an assumption that the defendant is dangerous or unlikely to appear at trial, leading to detention, a high bail amount, or relatively stringent release conditions. Although these statutes do not mandate the detention of mentally ill individuals, in the absence of effective alternatives, they facilitate the use of pretrial detention as a way of dealing with defendants with mental health issues. A few examples of this problematic use of mental illness solely to project dangerousness and flight risk help to paint the general picture.

The federal Bail Reform Act specifically directs judicial officers to “hold a hearing to determine whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required and the safety

¹⁴⁰ Baradaran & McIntyre, *supra* note 3, at 499.

¹⁴¹ See *infra* Part II.B.1.

¹⁴² See *infra* Part II.B.2.

¹⁴³ See *infra* Part II.B.3.

¹⁴⁴ See *infra* Part II.B.4.

¹⁴⁵ See, e.g., WASH. CRIM. R. SUPER. CT. 3.2.

of any other person and the community.”¹⁴⁶ To assess the likelihood of appearance and the maintenance of safety, the Act directs courts to consider a variety of personal traits, including “the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings,” in addition to other factors, such as the weight of the evidence against the person.¹⁴⁷

Many states have similar requirements for assessing dangerousness and flight risk.¹⁴⁸ For example, Illinois directs judges to consider “the defendant’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past relating to drug or alcohol abuse, conduct, history criminal history, and record concerning appearance at court proceedings,” among other factors.¹⁴⁹ Florida requires judges to consider “[t]he circumstances of the accused’s family, employment, financial resources, character, mental condition, and length of residence in the community,” among other factors, before allowing judges to release a person “under the supervision of a pretrial release service.”¹⁵⁰ South Dakota has a similar list of factors for assessing likely appearance including, *inter alia*, the defendant’s “character and mental condition, [and] the results of any mental health assessment.”¹⁵¹ Washington State, too, directs judges to consider, among other factors, a defendant’s “reputation, character and mental condition” for assessing both the likelihood of future appearance at court proceedings and of causing substantial danger.¹⁵²

Beyond considering mental health to assess (but not effectively address) dangerousness or the likelihood of flight, many states evaluate defendants’ mental health to assess competence (fitness) to proceed with trial.¹⁵³ As with the use of mental health as a predictor of a defendant’s behavior when making a bail determination, this approach fails to divert pretrial defendants to treatment and programs, or to apply conditions to their release that will best help

¹⁴⁶ 18 U.S.C. § 3142(f), *declared unconstitutional* by *United States v. Karper*, 847 F. Supp. 2d 350 (N.D.N.Y. 2011).

¹⁴⁷ *Id.* § 3142(g).

¹⁴⁸ *See, e.g.*, 725 ILL. COMP. STAT. 5/110-5 (2023) (directing Illinois judges on what factors they should consider); FLA. STAT. § 907.041 (2023) (instructing Florida judges on the factors to assess dangerousness and flight risk).

¹⁴⁹ 725 ILL. COMP. STAT. 5/110-5.

¹⁵⁰ FLA. STAT. § 907.041.

¹⁵¹ S.D. CODIFIED LAWS § 23A-43-4 (2023).

¹⁵² *See, e.g.*, WASH. CRIM. R. SUPER. CT. 3.2.

¹⁵³ *See, e.g.*, WASH. REV. CODE § 10.77.065 (2022) (outlining the procedure for conducting a “competency evaluation” to determine whether a mentally ill defendant is fit to stand trial).

defendants and society.¹⁵⁴ As a second (or third-best) solution, however, in jurisdictions where there are not specific mental health screenings for diversion from the criminal justice system to treatment and support services, judges can “make a diversion referral based on information contained in the pretrial risk assessment information or any other indicia that a behavioral health condition may exist.”¹⁵⁵

2. Ignoring Defendants’ Mental Health

Other formulas that judges must follow in some jurisdictions do not take mental health into account. For example, the Laura and James Arnold Foundation’s Public Safety Assessment—adopted by a growing number of states and local governments—includes risk factors such as the defendant’s age, the nature of the alleged offense, whether the defendant has other pending charges, prior convictions, or failures to appear pretrial.¹⁵⁶

None of these approaches—treating mental health solely as a factor to determine flight risk and dangerousness, ignoring defendants’ mental health altogether, or assessing mental health solely for the purpose of determining a defendant’s fitness for trial and pretrial proceedings—serve defendants or the system well. Using mental health as a risk factor tends to subject mentally ill defendants to harsher pretrial conditions if judges assume that such defendants are dangerous or unlikely to appear. The imposed conditions are often not specifically tailored to mentally ill defendants’ needs.

The Arnold Foundation’s formula helps to avoid over-detention of mentally ill defendants pretrial, which can occur when judges use mental illness as a factor to predict flight risks and dangerousness. But ignoring mental health issues altogether again fails to recognize that many mentally ill defendants, particularly those who are unhoused, *may* in fact pose safety or flight risks when released if, once again, a judge fails to impose conditions that will bene-

¹⁵⁴ See THE JUDICIARY & DEP’T OF HEALTH, S. OF HAW., *supra* note 13, at 15–16 (noting that the committee researching mental health and the criminal justice system “was able to find very few states that have adopted a comprehensive and consistent process of de-linking the competency determination process from the adjudication of misdemeanors that involve people with serious mental illness” but noting several programs that do this de-linking and successfully divert misdemeanor defendants with mental illnesses to crisis stabilization units, civil rather than forensic state hospitals or acute care hospitals, or other treatment programs).

¹⁵⁵ NAT’L JUD. TASK FORCE TO EXAMINE STATE CTS.’ RESPONSE TO MENTAL ILLNESS, JUDGES’ GUIDE TO MENTAL HEALTH DIVERSION 10 (2022), https://www.ncsc.org/_data/assets/pdf_file/0031/85189/Judges-Guide-to-Mental-Health-Diversion.pdf [<https://perma.cc/XP5P-BPHL>].

¹⁵⁶ LAURA & JAMES ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 2, <http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/PSA-Risk-Factors-and-Formula.pdf> [<https://perma.cc/44M2-CBG6>]. See generally *Public Safety Assessment: New Jersey Risk Factor Definitions—December 2018*, N.J. CTS., <https://www.njcourts.gov/sites/default/files/psriskfactor.pdf> [<https://perma.cc/DU9F-JZU5>].

fit both the defendant and society. Assessing a defendant's competence for pretrial and trial proceedings is also a significantly different question than an assessment of a defendant's mental health for the purposes of identifying effective pretrial conditions.

A third approach—examining pretrial defendants' mental health to assess their immediate dangerousness to themselves and others—begins to address the problem of detaining defendants pretrial or imposing harsh conditions on them. But diversion of mentally ill defendants to hospitals in lieu of jail is a narrow approach that ignores the opportunity to more comprehensively address the needs of pretrial defendants and of society.

3. Identifying Mental Health Issues for the Purpose of Diversion to Hospitals

New York is a primary example of a state that assesses a defendant's mental health not for predicting dangerousness or flight risk pretrial but to more directly address immediate safety concerns and divert defendants to hospitals, where needed.¹⁵⁷ As introduced in Section C of Part I, 2019 legislation from New York State requires judges to specifically consider a defendant's mental health in terms of immediate safety for the defendant and others:

When a principal appearing before the court appears, by clear and convincing evidence, to be mentally ill at the present moment such that if left unattended their conduct may result in immediate serious harm to himself or herself or others, the court may order as a condition of release under supervision that the principal be taken by an entity, including but not limited to, pretrial services agencies, or another qualified provider, to a local hospital for immediate psychiatric assessment involuntarily . . . if the principal is conducting himself or herself before the court, in such a manner which in a person who is not mentally ill would be deemed disorderly conduct which is likely to result in immediate serious harm to himself or herself or others.¹⁵⁸

New York also provides for the transportation of a defendant who appears to be mentally ill to a "hospital maintaining adequate staff and facilities for the observation, examination, care, and treatment of persons alleged to be mentally ill."¹⁵⁹ Further, if a defendant is transported to one of these hospitals, the direc-

¹⁵⁷ N.Y. CRIM. PROC. LAW § 500.10(3-c)(b) (McKinney 2023).

¹⁵⁸ *Id.*; see *supra* Part I.C.

¹⁵⁹ N.Y. MENTAL HYG. LAW § 9.39(a) (McKinney 2023).

tor of the hospital may determine, under New York's mental hygiene law, whether the defendant should be detained within the hospital.¹⁶⁰

Tennessee has a similar statutory framework, providing that the court may recommend defendants who are reasonably believed to pose a "substantial likelihood of serious harm" to themselves or others for an evaluation "to determine if the defendant is subject to admission to a hospital or treatment resource"¹⁶¹ If the defendant does not qualify for admission but is still deemed dangerous, the presiding magistrate or official in the pretrial hearing shall "set bail and admit the defendant to bail, when appropriate."¹⁶²

This approach is an improvement, but it applies only to the small subset of defendants who pose a significant risk of serious harm to themselves or others. Moreover, it is a stop-gap measure involving hospitalization until the defendant is deemed adequately safe to participate in a typical pretrial proceeding—one without conditions tailored separately to mentally ill and traditional defendants. The following Subsection explores more complete solutions that some jurisdictions have begun to follow.

4. More Comprehensive Approaches to Pretrial Mental Health

A handful of states and local governments have implemented programs that extend far beyond diverting mentally ill defendants to hospitals to address concerns about immediate danger.¹⁶³ These programs reduce pretrial detention and the release of mentally ill defendants with inadequate conditions by diverting defendants away from the criminal justice system before they are arrested, booked into jail, or charged, as well as after booking/arrest—at the pretrial hearing stage.¹⁶⁴

These programs formally or informally follow the Sequential Intercept Model (SIM) supported by courts, state legislatures, and a federal agency, and implemented by some local governments.¹⁶⁵ This model identifies six points at

¹⁶⁰ *Id.*

¹⁶¹ TENN. CODE ANN. § 40-11-150(l)(1)(A) (2022).

¹⁶² *Id.* § 40-11-150(l)(1)(C).

¹⁶³ *See, e.g.,* L.A. CNTY. ALTS. TO INCARCERATION OFF., INAUGURAL ATI IMPACT REPORT 2020–2021, at 4, <https://ceo.lacounty.gov/ati/inaugural-ati-impact-report/> [<https://perma.cc/D2ZZ-V389>] (describing a novel pretrial diversion program that links defendants with mental health services instead of initiating them into the criminal justice system).

¹⁶⁴ *See* Kenneth J. Gill & Ann A. Murphy, *Jail Diversion for Persons with Serious Mental Illness Coordinated by a Prosecutor's Office*, BIOMED. RSCH. INT'L, Dec. 2017, at 2 ("Prebooking diversion redirects the individual to treatment services at the point of initial contact with law enforcement, prior to the laying of charges. . . . Postbooking diversion models redirect the individual after arrest and booking of charges. Diversion in postbooking programs can occur in place of prosecution or as a condition of a reduced sentence or charge.").

¹⁶⁵ THE JUDICIARY & DEP'T OF HEALTH, S. OF HAW., *supra* note 13, at 12; 34 U.S.C. § 10651(k) (establishing Sequential Intercept grants).

which mentally ill individuals can be intercepted and diverted away from the criminal justice system; two of these points arise pretrial, including pre-arrest crisis response by the police or mental health professionals before any entry into the criminal justice system and diversion during “post-arrest and initial court hearing.”¹⁶⁶ This Subsection explores pretrial approaches to mental illness that help to reduce the number of mentally ill defendants that enter or repeatedly cycle in and out of the criminal justice system.

a. Diversion Prior to Arrest, Booking in Jail, and Charges

A growing number of programs address the problem of pretrial detention of mentally ill defendants at the point of arrest or prior to booking defendants into jail and charging them. Reducing the number of mentally ill defendants arrested, booked, or charged by diverting these individuals to treatment decreases the number of mentally ill defendants jailed pretrial, and in the criminal justice system as a whole.¹⁶⁷ These programs tend to accomplish this through communication with, training of, and support for police officers.¹⁶⁸ Officers learn to de-escalate high-stress encounters with unhoused, mentally ill individuals and send them to crisis centers or other treatment in lieu of arresting them.¹⁶⁹ Special hotlines for crises involving mentally ill individuals can also help to avoid arrest of mentally ill defendants and prevent a vicious cycle of detention and release. For example, Los Angeles County, among other places, rolled out Alternative Crisis Response—a 911 alternative to address mental health crises, specifically.¹⁷⁰ Los Angeles County also followed the SIM six-point diversion model when establishing policies and programs for Alternatives to Incarceration, including for mentally ill defendants.¹⁷¹ Further, the county implemented a prefiling diversion program that connects “eligible individuals with mental health, substance use, or housing needs to services” instead of filing charges against them.¹⁷²

Miami-Dade County’s Criminal Mental Health Project, administered by the Eleventh Judicial Circuit, diverts individuals with serious mental illness,

¹⁶⁶ THE JUDICIARY & DEP’T OF HEALTH, S. OF HAW., *supra* note 13, at 12; JANEEN BUCK WILLISON ET AL., URB. INST., USING THE SEQUENTIAL INTERCEPT MODEL TO GUIDE LOCAL REFORM: AN INNOVATION FUND CASE STUDY 2 (2018), https://www.urban.org/sites/default/files/publication/99169/using_the_sim_to_guide_local_reform_0.pdf [<https://perma.cc/Z6KZ-38VU>].

¹⁶⁷ THE JUDICIARY & DEP’T OF HEALTH, S. OF HAW., *supra* note 13, at 6 (noting that training for de-escalation at the point of arrest could reduce officer shootings of mentally ill defendants and “decrease the pretrial jail population”).

¹⁶⁸ *Id.* at 13.

¹⁶⁹ *Id.*

¹⁷⁰ L.A. CNTY. ALTS. TO INCARCERATION OFF., *supra* note 163, at 4.

¹⁷¹ *Id.* at 2.

¹⁷² *Id.* at 6.

substance use disorders, or a combination of the two away from the initial booking of defendants in to jail by police.¹⁷³ It does this by training law enforcement officers in crisis intervention.¹⁷⁴ In Hawai‘i, a pilot project took a more comprehensive approach at the pre-arrest stage. Under the Law Enforcement Assisted Diversion (LEAD) program—based on the original, successful LEAD program in Seattle—“law enforcement officers connect low-level, non-violent offenders or individuals at high risk of arrest with social service providers in lieu of arrest.”¹⁷⁵ Police officers work with community support services to direct eligible individuals to a case manager and to housing, treatment, and other services.¹⁷⁶

Although pre-arrest diversion programs do much to prevent mentally ill individuals from entering the criminal justice system, many individuals fall through the cracks or are ineligible for these programs, in which case diversion at the post-booking, pretrial stage is important.

b. Diversion at the Pretrial Stage

Diversion away from the criminal justice system can occur after arrest and booking, during pretrial hearings. The Eleventh Judicial Circuit of Miami-Dade County, in addition to supporting pre-booking diversion, administers “jail diversion serving individuals booked into the county jail and awaiting adjudication.”¹⁷⁷

In San Francisco, a pilot project specifically identified the pretrial conditions that fail to assist mentally ill defendants (or society) without the infusion of additional resources.¹⁷⁸ For example, periodic check-ins by police officers or court officers—a relatively common pretrial release condition—do not work well for unhoused, mentally ill defendants without an address. Recognizing these types of challenges, the pilot created more comprehensive pretrial services that allowed for the release of unhoused defendants—85% of whom had a substance abuse disorder, and 50% of whom had a “co-occurring mental illness”—and helped to ensure their appearance at trial and community safety.¹⁷⁹

¹⁷³ *Criminal Mental Health Project*, ELEVENTH JUD. CIR. OF FLA., <https://www.jud11.flcourts.org/Criminal-Mental-Health-Project> [<https://perma.cc/7XFY-YZ5C>].

¹⁷⁴ *Id.*

¹⁷⁵ SOPHIE GRALAPP, MARK WILLINGHAM, ANNA PRUITT & JOHN P. BARILE, UNIV. HAWAI‘I, LAW ENFORCEMENT ASSISTED DIVERSION HONOLULU: 1-YEAR PROGRAM EVALUATION REPORT 6 (2019), <https://homelessness.hawaii.gov/wp-content/uploads/2019/10/191030-LEAD-Honolulu-Evaluation-FINAL-USE-THIS-ONE-2.pdf> [<https://perma.cc/V2BC-ZKFX>].

¹⁷⁶ *Id.* at 2.

¹⁷⁷ *Criminal Mental Health Project*, *supra* note 173.

¹⁷⁸ Riker & Castellano, *supra* note 21, at 10–12.

¹⁷⁹ *Id.*

Through the “Homeless Release Project” pilot in San Francisco, staff members in a pretrial release program specifically identified unhoused defendants eligible for potential release and assigned a case worker to each defendant.¹⁸⁰ The case worker determined the needs of the defendant and created a “care plan . . . providing oral or written progress reports that [were] distributed to the judge, district attorney, and public defender.”¹⁸¹ The specialized types of pretrial release conditions needed for unhoused, mentally ill defendants were scrupulously applied within this system. Staff from the project accompanied “clients to all court dates” and developed a plan to help keep them stable while awaiting trial, such as obtaining housing and “scheduling medical appointments.”¹⁸² The project’s office provided released unhoused defendants with other basic commodities and services (such as phones) needed to comply with release conditions.¹⁸³ This project did not progress beyond the pilot stage, however, and San Francisco has since experienced regressive reforms.¹⁸⁴

c. Diversion from Traditional Courts

For mentally ill defendants who remain in the criminal justice system from arrest through the pretrial stage, some jurisdictions offer another off ramp: specialty mental health courts that provide reduced punishment or alternatives to it.¹⁸⁵ In Honolulu, Hawai‘i, for example, courts specifically evaluate defendants for mental illness and divert them to a mental health court when eligible.¹⁸⁶ The court “is a specialty court that redirects offenders from jail to community-based treatment with intensive supervision to deal with public safety issues and support the recovery of defendants diagnosed with severe mental illness.”¹⁸⁷ Defendants who are eighteen years or older and have a “serious and persistent mental illness” are eligible to appear before this court, and, if deemed eligible, “community treatment providers offer specialized care for participants requiring psycho-social rehabilitation, psychiatric treatment, substance abuse recovery, and other individualized treatment.”¹⁸⁸

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 10.

¹⁸² *Id.* at 10–11.

¹⁸³ *Id.* at 10.

¹⁸⁴ See *supra* note 102 (describing the recall of “progressive prosecutor[]” Chesa Boudin in San Francisco).

¹⁸⁵ ROSSMAN ET AL., *supra* note 15, at 8–9.

¹⁸⁶ *Mental Health Court (Circuit Court—First Circuit, Honolulu)*, HAW. ST. JUDICIARY, https://www.courts.state.hi.us/special_projects/mental_health_court_oahu [<https://perma.cc/KE9P-N6P3>].

¹⁸⁷ *Id.*

¹⁸⁸ *Mental Health Court Eligibility Criteria*, HAW. ST. JUDICIARY, https://www.courts.state.hi.us/special_projects/mental_health_court_eligibility [<https://perma.cc/8UDK-33D5>]; *Mental Health Court (Circuit Court—First Circuit, Honolulu)*, *supra* note 186.

Mental health courts in Bronx and Brooklyn take a similar approach. In the Bronx, prosecutors employ a questionnaire for misdemeanor and felony defendants to determine whether defendants may be eligible for the court, and the judge issues sentencing and treatment determinations.¹⁸⁹ A separate clinical team assesses defendants' needs and eligibility for treatment and maintains a post-placement protocol, in which defendants are matched with treatment providers and meet weekly with a post-placement case manager.¹⁹⁰ Brooklyn's mental health court is a post-indictment court, primarily for felony offenders, that "sentences" offenders with serious mental illness to long-term treatment instead of incarceration.¹⁹¹

Along similar lines, Seattle Municipal Court's Mental Health Court takes referrals of mentally ill defendants from judges, defense attorneys, prosecutors, jail staff, or other individuals.¹⁹² Individuals facing charges who are referred to the Court "voluntarily agree to two years of probation, combined with specialized treatment."¹⁹³ They are assigned a "clinical mental health expert" who assists with a treatment plan, "probation counselors individually meet with clients on a regular basis," and the Mental Health Court "judge holds review hearings to monitor progress."¹⁹⁴

Local jurisdictions' use of diversion programs at various stages of the pre-trial process appears to be expanding. For example, two hundred communities had participated in SIM "mapping" workshops as of 2018.¹⁹⁵ Through these workshops, communities identify "the various pathways by which people with behavioral health issues encounter the justice system and the range of responses—both inside and outside the justice system—applied to these people."¹⁹⁶ This mapping exercise did not always lead to substantive reforms, and it is not clear how many communities adopted diversion programs following the mapping.¹⁹⁷ Some communities, however, have used lessons learned from the mapping to reduce the numbers of mentally ill in jails or to "prioritize funding for diversion and treatment."¹⁹⁸

¹⁸⁹ ROSSMAN ET AL., *supra* note 15, at 33.

¹⁹⁰ *Id.* at 35.

¹⁹¹ *Id.* at 57.

¹⁹² *Mental Health Court*, SEATTLE MUN. CT., <https://www.seattle.gov/courts/programs-and-services/specialized-courts/mental-health-court> [<https://perma.cc/XU8J-7D3M>].

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ WILLISON ET AL., *supra* note 166, at 4 (noting the number of workshops but observing that "[i]t is unclear how many communities have officially or unofficially . . . undertaken SIM mapping").

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

A national survey of municipal and county law enforcement units in 2015 yielded 395 agency responses indicating a formal police-led diversion program.¹⁹⁹ Forty-one percent of these programs were for mentally ill individuals.²⁰⁰ Many respondents with diversion programs were from larger police units, with particularly positive case studies for diversion of mentally ill individuals identified in Houston, Texas; Madison, Wisconsin; and Arlington, Virginia.²⁰¹

In summary, although a growing number of jurisdictions have implemented facets of the disaggregated pretrial approach recommended in this Article, the majority still follow a system that is blind to the differences between mentally ill and traditional defendants, or that acknowledges this difference only for the wrong reasons. The following Part explores the consequences of this approach.²⁰²

III. HARMS TO MENTALLY ILL DEFENDANTS, TRADITIONAL DEFENDANTS, AND SOCIETY

Although there are important examples of pretrial systems and diversion programs that place mentally ill and unhoused individuals on a separate track and administer conditions tailored specifically to their needs, these systems are the exception to the norm. Most bail systems, which treat mental health primarily as a factor in predicting defendants' dangerousness and flight risk, ignore mental health, or evaluate mental health solely for the purpose of hospitalization due to immediate safety concerns, are problematic on multiple fronts. The most direct impacts fall on mentally ill defendants who are more likely to be detained pretrial in a facility with inadequate treatment and support and who, following release, quickly cycle back into the criminal justice system as a result of these inadequacies. But the failure to distinctly identify traditional versus mentally ill defendants in terms of providing services such as mental health care and housing support, imposing conditions to ensure safety and trial appearance, collecting data, and reporting outcomes for these groups also harms traditional defendants and society, as explored in this Part. Section A discusses the impacts of the current system on mentally ill defendants²⁰³ and

¹⁹⁹ JENNIFER A. TALLON, MELISSA LABRIOLA & JOSEPH SPADAFORÉ, CTR. CT. INNOVATION, CREATING OFF-RAMPS: A NATIONAL REVIEW OF POLICE-LED DIVERSION PROGRAMS, at vi (2016), <https://www.innovatingjustice.org/sites/default/files/documents/Creating%20Off-Ramps%20A%20National%20Review%20of%20Police-Led%20Diversion%20Programs.pdf> [https://perma.cc/X8CY-73SR].

²⁰⁰ *Id.*

²⁰¹ *Id.* at vi–ix.

²⁰² See *infra* Part III.

²⁰³ See *infra* Part III.A.

Section B explores the boarder societal costs.²⁰⁴ Finally, Section C identifies and discusses the political economic ramifications.²⁰⁵

A. Impacts on Mentally Ill Defendants

The many systems that lack diversion programs for mentally ill defendants or, at minimum, separately identify conditions that would best ensure these defendants' presence at trial and safety, perpetuate the current broken system. Observations from those administering the criminal justice system best emphasize the degree and depth of this problem. The Hawai'i Mental Health Core Steering Committee, comprised of representatives from the judiciary and Department of Health, emphasized the cycle of mentally ill unhoused individuals on streets corners receiving inadequate treatment and services and cycling through jail.²⁰⁶

Pretrial detention of mentally ill defendants reduces the likelihood of their receiving needed treatment. As the Hawai'i Legislature noted in 2005, when recommending reforms to pretrial treatment of the mentally ill, many defendants suspected by the court to be mentally ill and potentially unfit for trial "remain in prison for weeks or months without appropriate mental health treatment" while awaiting examination.²⁰⁷ Data from 2011 through 2012 indicate that 54% of prisoners exhibiting "serious psychological distress" (SPD) upon admittance "received mental health treatment" after admission, whereas 35% of jail inmates with SPD received treatment.²⁰⁸

Beyond receiving inadequate treatment in many pretrial detention settings, mentally ill defendants tend to be detained longer pretrial than traditional defendants are—sometimes because they are deemed incompetent to stand trial.²⁰⁹ They also tend to receive longer sentences than traditional defendants, are costlier to detain, and are "at higher risk for repeat incarcerations and return to prison more quickly than those without a mental illness."²¹⁰

The causes of this problem are widely accepted as the deinstitutionalization of mental health services coupled with inadequate community support for

²⁰⁴ See *infra* Part III.B.

²⁰⁵ See *infra* Part III.C.

²⁰⁶ THE JUDICIARY & DEP'T OF HEALTH, S. OF HAW., *supra* note 13, at 2.

²⁰⁷ H.R. Con. Res. 104, 23d Leg. (Haw. 2005), https://www.capitol.hawaii.gov/sessions/session2005/bills/HCR104_.htm [<https://perma.cc/GR2D-XB9G>].

²⁰⁸ BRONSON & BERZOFSKY, *supra* note 129, at 8.

²⁰⁹ THE JUDICIARY & DEP'T OF HEALTH, S. OF HAW., *supra* note 13, at 11 ("Due to a shortage of beds at state mental hospitals, pretrial detainees who suffer from a mental illness [and are awaiting 'competency restoration'] have extended waiting periods in jails for beds to become available. A large number of these mentally ill defendants are on pretrial holds for low-level offenses.").

²¹⁰ Gill & Murphy, *supra* note 164, at 1.

mentally ill individuals.²¹¹ The result is that “most people in the United States with serious mental illnesses, including substance use disorders, do not receive treatment.”²¹² The lack of treatment can lead to criminal activity, encounters with the criminal justice system, and, after release, mentally ill defendants often lack access to the public support services they need to effectively integrate with society.²¹³

*B. Societal Impacts: Masking of Inadequate Mental Health
Treatment and Higher Treatment Costs*

The impacts of inadequate pretrial systems for mentally ill defendants have ripple effects that extend well beyond the individual defendants and their families. Jailing mentally ill defendants instead of adequately treating and supporting them masks the current dysfunctional U.S. mental health system.²¹⁴ Moreover, costs to taxpayers increase because treating mentally ill defendants in correctional facilities is far more expensive than treating them through coordinated community services.²¹⁵

1. Masking the Problem

For mayors and police chiefs faced with mental health and housing crises, and lacking meaningful alternatives in the short term, putting and keeping a mentally ill individual exhibiting criminal behavior behind bars while the defendant awaits trial may well appear to be the most expedient way to avoid further encounters between the individual and the public. But this approach is at best a temporary solution, although exacerbating the problem in the long run.²¹⁶ In addition to worsening outcomes for mentally ill defendants, as described in Section A of this Part, jailing masks the larger problem by removing the defendant from society.²¹⁷ The public is appeased, at least until the defendant is eventually released, and the cycle begins again. This reduces the likelihood of galvaniz-

²¹¹ Riker & Castellano, *supra* note 21, at 9 (“The effects of de-institutionalization of state mental health hospitals in the 1960s and 1970s [are] well documented, particularly the burden it placed on jails due to increased arrests and incarcerations of mentally ill persons.”).

²¹² Prins, *supra* note 130, at 868.

²¹³ *Id.* at 869–70.

²¹⁴ See *infra* Part III.B.1.

²¹⁵ See *infra* Part III.B.2.

²¹⁶ See e.g., STATE JUST. INST., IMPROVING THE JUSTICE SYSTEM RESPONSE TO MENTAL ILLNESS 3 (2020), https://www.ncsc.org/_data/assets/pdf_file/0017/38024/MH_and_Criminal_Justice_Fact_Sheet.pdf [<https://perma.cc/K8QY-XFP4>] (discussing a variety of costs of incarceration and emphasizing the problem of mentally ill people repeatedly cycling through the system).

²¹⁷ See *supra* Part III.A.

ing public support for a more comprehensive, effective solution to treating and providing ongoing support for mentally ill and unhoused individuals.

2. Costs

Beyond problematically hiding societal problems, enlisting our jails as the “de facto” mental health treatment system is costly.²¹⁸ There are few direct comparisons of the cost of jailing mentally ill inmates as opposed to directing them to community treatment, a network of support services such as housing, or hospitals.²¹⁹ To some degree, relying less on jails and more on treatment services to provide medication and counseling will simply shift costs from one system to another. But there are indicators that treating mentally ill individuals in jails and prisons rather than through programs designed to address the needs of mentally ill individuals is a more costly approach.

The practice of arresting, jailing, and imprisoning mentally ill individuals has extensive direct and indirect costs to society.²²⁰ Individuals evaluating Honolulu’s pre-arrest diversion program estimated that in the first year of the pilot, the 40% drop in emergency room visits and 55% decrease in cited encounters (and thus avoided court and jail costs) alone likely showed financial benefits that outweighed program costs.²²¹ Similarly, Seattle’s Mental Health Court staff estimate that the court “has saved thousands of jail days, thousands of hospital bed days, and hundreds of thousands of dollars in jail costs to the City of Seattle.”²²²

Indirectly, detaining or imprisoning mentally ill individuals often results in inadequate treatment; this can lead to worse behavior and longer jail or prison stays (and thus more costs) and more problematic behavior upon release—

²¹⁸ HANKE HEUN-JOHNSON, MICHAEL MENCHINE, DANA GOLDMAN & SETH SEABURY, *THE COST OF MENTAL ILLNESS: PENNSYLVANIA FACTS AND FIGURES 4* (USC Schaeffer 2017) (citing an annual cost of \$140 million for incarcerating people with serious mental illness in Pennsylvania); cf. WILLISON ET AL., *supra* note 166, at 1 (discussing the American criminal justice system’s role as the “de facto behavioral health treatment provider in many communities”).

²¹⁹ See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., *FEDERAL PRISONS: INFORMATION ON INMATES WITH SERIOUS MENTAL ILLNESS AND STRATEGIES TO REDUCE RECIDIVISM* (2018), <https://www.gao.gov/assets/gao-18-182.pdf> [<https://perma.cc/A95C-VD79>] (noting that the Bureau of Prisons “does not track costs for inmates with serious mental illness in part because it does not track costs for individual inmates due to resource restrictions and the administrative burden such tracking would require”); *id.* at 21 n.32 (noting that six states estimate costs or average costs for mentally ill inmates but that the GAO did not “report dollar figures because the data varied so widely among states”).

²²⁰ See, e.g., Joseph Vanable, *The Cost of Criminalizing Serious Mental Illness*, NAT’L ALL. ON MENTAL ILLNESS (Mar. 24, 2021), <https://www.nami.org/Blogs/NAMI-Blog/March-2021/The-Cost-of-Criminalizing-Serious-Mental-Illness> [<https://perma.cc/E9KP-2HSE>] (noting that, in 2018, the average cost per year to incarcerate someone in federal detention was \$37,449).

²²¹ GRALAPP ET AL., *supra* note 175, at 30.

²²² *Mental Health Court*, *supra* note 192.

thus restarting the cycle and leading to repeated (and costly) detention.²²³ In a 2011 opinion piece, the Chief of the Houston Police Department and the Harris County Sheriff—serving Houston and surrounding areas—explained:

[M]any individuals with untreated mental illness who lack access to care end up cycling through the criminal justice system at a cost that is significantly higher to taxpayers than that of providing ongoing, community-based treatment and services.

A prime example of cost shifting has occurred within the Harris County Jail, now the largest mental health facility in Texas. The Harris County Jail treats more individuals with mental health issues on a daily basis than our state's 10 psychiatric hospitals combined. This is especially worrisome given that the United States Department of Justice reports that it costs 60 percent more to incarcerate inmates with serious mental illnesses than it costs to house typical inmates.²²⁴

Although much cost-shifting would occur if the criminal justice system were improved to avoid using jails as temporary holding centers for mentally ill individuals—medications would be administered by community treatment centers rather than jail staff—the costs savings of this approach would likely be substantial. This is largely due to the many external costs that jailing, inadequately treating, and releasing defendants without medication or a structured environment (such as housing) create.²²⁵ And perhaps most importantly, providing adequate services has the potential to be a long-term, rather than temporary, solution.

C. Political Economic Impacts: Regressive Policies

Beyond negatively impacting mentally ill defendants and generating higher direct and indirect costs for society, the current pretrial system also harms those defendants who do not suffer from mental illness. It does so by casting a negative light on the entire pretrial system and leading to public re-

²²³ See, e.g., Venable, *supra* note 220 (noting that “without proper treatment, illnesses can worsen and behavior can deteriorate—therefore, time off for good behavior is unlikely to happen”).

²²⁴ Adrian Garcia & Charles McClelland, Opinion, *Harris County Jail Not the Place to Treat Mental Illness*, HOUS. CHRON. (Jan. 2, 2011), <https://www.chron.com/opinion/outlook/article/Harris-County-jail-not-the-place-to-treat-mental-1689586.php> [<https://perma.cc/2RA5-EM4E>].

²²⁵ See, e.g., DAVID CLOUD & CHELSEA DAVIS, VERA INST. JUST., TREATMENT ALTERNATIVES TO INCARCERATION FOR PEOPLE WITH MENTAL HEALTH NEEDS IN THE CRIMINAL JUSTICE SYSTEM: THE COST-SAVINGS IMPLICATIONS 1–3 (2013), <https://www.vera.org/downloads/publications/treatment-alternatives-to-incarceration.pdf> [<https://perma.cc/EQ7P-P76T>] (discussing the potential cost saving implications of programs diverting individuals with mental health needs away from incarceration).

sistance to progressive reforms. Any statistics (or, indeed, anecdotes) that suggest that bail reform is leading to more defendants committing crimes while awaiting trial or failing to appear will fuel opposition to future reform or even revert current reforms. Indeed, even though not always empirically supported, a chorus of voices already argue that bail reforms generate higher crime rates.²²⁶

The majority of reports assessing crime rates following bail reform suggest that crime remained the same or increased only slightly after reform.²²⁷ A recent empirical analysis suggests less positive results, however. Referring to Cook County, Illinois, Paul Cassell and Richard Fowles argue that although community *safety* rates remained stable following bail reforms, with more defendants released, crime would necessarily rise.²²⁸ Furthermore, they estimate that “the number of released defendants charged with committing new crimes increased by about 45%” following progressive bail reforms in Illinois.²²⁹

Beyond the numbers, public perceptions are an influential factor in the political economy of bail reform. And a confluence of recent events has pushed public perceptions toward tougher bail measures.²³⁰ The number of unhoused Americans, many of whom suffer from mental illness, has remained relatively steady since 2012, ranging from 621,553 unhoused individuals in 2012 to 582,462 in 2022.²³¹ But some cities, such as New York, have experienced a marked rise in homelessness, with one New York City Council Member declar-

²²⁶ See, e.g., Ben Chapman & Katie Honan, *New York City Police Commissioner Blames New Bail Law for Rising Crime*, WALL ST. J. (Feb. 4, 2020), <https://www.wsj.com/articles/new-york-city-police-commissioner-blames-new-bail-law-for-rising-crime-11580855914> [<https://perma.cc/UGE4-CBVT>].

²²⁷ See, e.g., OFFICE OF THE CHIEF JUDGE, ST. OF ILL. CIR. CT. OF COOK CNTY., *BAIL REFORM IN COOK COUNTY: AN EXAMINATION OF GENERAL ORDER 18.8A AND BAIL IN FELONY CASES I* (2019), <https://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20%20Published%2005.9.19.pdf> [<https://perma.cc/Q3H2-5R7L>]; Ames Grawert & Noah Kim, *The Facts on Bail Reform and Crime Rates in New York State*, BRENNAN CTR. FOR JUST. (2023), <https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-and-crime-rates-new-york-state> [<https://perma.cc/YH9A-KW7J>].

²²⁸ Paul G. Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, 55 WAKE FOREST L. REV. 933, 937–39 (2020).

²²⁹ *Id.*

²³⁰ See *supra* note 108.

²³¹ *Homelessness in America 2023: Statistics, Analysis, & Trends*, SECURITY.ORG (Jan. 25, 2023), <https://www.security.org/resources/homeless-statistics/#:~:text=582%2C462%20individuals%20are%20experiencing%20homelessness,experiencing%20chronic%20patterns%20of%20homelessness> [<https://perma.cc/QN8R-7YW6>]. As with perceptions and misperceptions of mental illness causing crime, there are also misperceptions relating to the percentage of unhoused individuals who are mentally ill. Deborah K. Padgett, *Homelessness, Housing Instability and Mental Health: Making the Connections*, 44 BJPSYCH BULL. 197, 197 (2020). Approximately 25% to 30% of unhoused people “have a severe mental illness such as schizophrenia,” although being unhoused can cause mental illness, with homeless people experiencing “depression and suicidal thoughts,” trauma, and substance abuse at a higher rate than housed individuals. *Id.*

ing a “homelessness crisis” as total homelessness rose from 72,650 unhoused individuals in January 2014 to 83,277 unhoused individuals in January 2019.²³² The Coalition for the Homeless reports that the number of individuals sleeping in shelters in New York City has risen by thirty-nine percent over just one decade.²³³

As homelessness in cities such as New York has risen, so, too, has violent crime post-COVID, although 2021 finally saw a slight decline.²³⁴ As explored in Part II, some studies show higher crime rates for mentally ill, unhoused individuals compared to the general population.²³⁵ Additionally, homelessness and *violent* crime are correlated according to some studies, although in a complex manner.²³⁶

The numbers are not nuanced enough to show whether released defendants are the primary cause of this purported crime wave following bail reform, and specifically whether mentally ill released defendants contribute to the problem. There is, however, documentation showing that crimes committed by mentally ill defendants increase after these defendants are released.²³⁷ And individuals with mental illness are at higher risk of developing substance use disorders and becoming unhoused—two factors that “increase[] their visibility

²³² COREY JOHNSON, N.Y.C. COUNCIL, OUR HOMELESSNESS CRISIS: THE CASE FOR CHANGE 14 (2020), <https://council.nyc.gov/data/wp-content/uploads/sites/73/2020/01/FINAL-PAPER.pdf> [<https://perma.cc/8ATD-N6MJ>].

²³³ *Basic Facts About Homelessness: New York City*, COAL. FOR HOMELESS (Aug. 2023), <https://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/> [<https://perma.cc/8XMT-RTRL>]. Part of this increase can be attributed, in part, to the arrival of significant numbers of asylum seekers after arriving at the southern border of the United States. See Hurubie Meko, *What to Know About the Migrant Crisis in New York City*, N.Y. TIMES (Sept. 28, 2023), https://www.nytimes.com/article/nyc-migrant-crisis-explained.html?action=click&pgtype=Article&state=default&module=styl-n-y-migrants&variant=show®ion=BELOW_MAIN_CONTENT&block=storyline_flex_guide_recirc [<https://perma.cc/J83G-UB8U>] (detailing the recent arrival of more than 118,000 asylum seekers in New York City, with significant numbers of these staying in city homeless shelters).

²³⁴ See FBI 2020 Crime Statistics Press Release, *supra* note 114 (releasing data showing an increase in the estimated number of violence crimes nationally between 2019 and 2020); *Crime Data: 2021 Nationwide Crime Statistics*, FBI L. ENF’T BULL. (Dec. 7, 2022), <https://leb.fbi.gov/bulletin-highlights/additional-highlights/crime-data-2021-nationwide-crime-statistics> [<https://perma.cc/BR6C-JGC2>] (detailing a slight overall decrease in the nationwide “aggregated estimated violent crime volume” between 2020 and 2021).

²³⁵ See *supra* notes 110–113 and accompanying text (discussing studies showing the higher levels of criminal offending among mentally ill, unhoused individuals compared with members of the general population).

²³⁶ ROSSMAN ET AL., *supra* note 15, at 6 (“Findings have been mixed on whether individuals with mental illness (or certain diagnoses) have higher rates of violence, although it appears that substance abuse may explain higher rates of violence when they are found.”); see also Padgett, *supra* note 231, at 197.

²³⁷ ROSSMAN ET AL., *supra* note 15, at 6.

to law enforcement” and tend to lead to the cycle of arrest, pretrial detention, release, and re-arrest.²³⁸

The confluence of more visible interactions with unhoused, often mentally ill individuals; rising crime rates, including high-profile incidents of crimes committed by individuals released on bail; and bail reform has led a growing number of organizations and voters to point specifically to progressive bail reform as the cause of current problems.²³⁹ The perception that a large number of unstable, violent individuals are being released from jail pretrial and committing crimes appears to be contributing to the overall movement to toughen up regressive bail laws.²⁴⁰ In New York City, the calls to the city’s 311 line regarding public disorder—often associated with the unhoused—increased substantially in 2020 and 2021, particularly regarding complaints about encampments.²⁴¹ This public concern is likely a significant driver of Mayor Adams’s recent efforts to both backtrack on progressive bail reforms and expand the ability to involuntarily commit the mentally ill.²⁴²

IV. REFORMING THE PRETRIAL SYSTEM

In most jurisdictions, the criminal justice system fails to adequately identify or treat individuals suffering from mental illness. This is true at the point of contact with a first responder, who is generally a police officer, and post-arrest, where individuals exhibiting unstable behavior for mental health reasons are typically charged with a crime and booked. It is true in the pretrial process, too, where few judges are directed to consider defendants’ mental illness, or lack thereof, in crafting effective conditions for pretrial release or other options pending a plea or trial.

Better screening and separation of mentally ill defendants would benefit mentally ill individuals—likely resulting in better treatment options, more al-

²³⁸ *Id.* at 5.

²³⁹ See *supra* note 115.

²⁴⁰ See, e.g., Grawert & Kim, *supra* note 227 (noting that “[m]any have argued that bail reform is responsible for rising crime in New York State, both in and out of New York City”); Lehman, *supra* note 19 (arguing that a “shift toward less-restrictive pretrial detention conditions on average seems to have driven up the risk of rearrest following release”); JIM QUINN, MANHATTAN INST., MORE CRIMINALS, MORE CRIME: MEASURING THE PUBLIC SAFETY IMPACT OF NEW YORK’S 2019 BAIL LAW 2 (2022), <https://media4.manhattan-institute.org/sites/default/files/Measuring-the-Public-Safety-Impact-of-New-Yorks-2019-Bail-Law.pdf> [<https://perma.cc/2TH3-HKZY>] (“In just two years of the new bail laws and other progressive reforms, index crimes in New York City rose 36.6%.”).

²⁴¹ STEPHEN EIDE, MANHATTAN INST., CRIME AND MENTAL ILLNESS IN NEW YORK CITY: FRAMING THE CHALLENGE FOR THE NEW MAYOR 12 (2022), <https://media4.manhattan-institute.org/sites/default/files/MI-Eide-Report-Crime-and-Mental-Illness-in-New-York-City-Framing-The-Challenge-for-the-New-Mayor-v3.pdf> [<https://perma.cc/8BEW-V3PS>].

²⁴² See *supra* notes 8–9 (discussing New York City Mayor Eric Adams’s calls for changes to bail laws and increased use of involuntary commitment for individuals with mental health difficulties).

ternatives to the criminal justice system, and ultimately improved long-term outcomes. It would also benefit society by releasing fewer inadequately treated individuals back onto the streets to begin the cycle of incarceration anew, as well as reducing short- and long-term costs. And finally, disaggregation could help traditional defendants by removing a source of opposition to bail reform, which is expanding as the public in some large cities reacts to a wave of rising violent crime, homelessness, and high-profile crimes committed by mentally ill individuals and those released pretrial. Better public mental health treatment, diversion, and housing systems could prevent the entry of mentally ill individuals into the criminal justice system in the first place.

In addition, or as a second-best solution, better recordkeeping and reporting could show different pretrial crime and failure to appear rates within the two groups, allowing targeted reforms rather than indiscriminate jailing. This Part explores some of the primary components of a more effective, disaggregated pretrial system for mentally ill and traditional defendants. Specifically, the federal government, states, and local governments should: 1) divert mentally ill defendants at the arrest stage to crisis centers, treatment programs, or other support,²⁴³ 2) identify defendants' mental illness as a factor to inform judges as to which conditions and treatment would best aid the defendant and meet the bail system's objectives,²⁴⁴ and 3) separately collect and report statistics on outcomes for mentally ill and traditional defendants.²⁴⁵

A. Early Diversion to Avoid the Criminal Justice System

The best solution to the problem of mass pretrial detention of the mentally ill is to avoid criminalizing mental illness in the first place, to the extent possible.²⁴⁶ Many of the problems described in Part III stem from police, treatment providers, and judges "repeatedly serving the same individuals with seemingly little that [can] be done to break the cycles of crises, homelessness, recidivism, and despair."²⁴⁷ And, again, the defendants' entry into the criminal justice system—in which they are often detained without adequate treatment and sometimes subjected to violence, or released with conditions that fail to protect defendants or society—only serves to perpetuate the underlying problems.²⁴⁸

²⁴³ See *infra* Part IV.A.

²⁴⁴ See *infra* Part IV.B.

²⁴⁵ See *infra* Part IV.C.

²⁴⁶ See, e.g., AM. BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH, Standard § 7-1.2(b)(i) (4th ed. 2016) ("When appropriate, services should be configured to divert people with mental disorders from arrest and criminal prosecution into treatment . . .").

²⁴⁷ Leifman & Coffey, *supra* note 131, at 661; see *supra* Part III.

²⁴⁸ See *supra* note 28 and accompanying text.

To avert pretrial encounters altogether, pre-booking diversion programs require the police to consider options such as diverting individuals to mental health treatment or crisis centers and doing “nothing at all.”²⁴⁹ These programs, used in places such as Miami-Dade County, Florida; Oakland County, Michigan; and Seattle, Washington either involve police who are trained to better understand mental illness issues or “joint police and mental health teams” that evaluate individuals when they encounter the police and may be subject to arrest.²⁵⁰

Experts in the field often cite Memphis, Tennessee’s Crisis Intervention Team (CIT) model as a successful example of pre-booking diversion.²⁵¹ Through this program, “Memphis provided specialized training for a select cadre of patrol officers, as well as police dispatchers, and established a therapeutic treatment site as an alternative to booking.”²⁵² Other jurisdictions’ variations on Memphis’s CIT—such as Houston’s program—use “co-response units” of police and mental health professionals who respond to service calls as a team.²⁵³ Houston also gives all police cadets forty hours of training in response approaches to mental illness problems, as does Arlington County, Virginia, that “trains law enforcement officers to recognize the symptoms of mental illness and work safely and effectively with people in crisis.”²⁵⁴ Madison, Wisconsin provides sixty hours of crisis training to police and engages mental health officers to assist police with crisis calls and to directly support “known mental health consumers.”²⁵⁵

The approaches of keeping mentally ill individuals out of the criminal justice system wholly avoid the vicious cycle of jail, release, arrest, and jail again.

B. Diversion from Pretrial Processes

For the defendants who are arrested despite pre-booking diversion programs—or in the absence thereof—diversion from the pretrial process can still be effective if judges evaluate defendants’ mental health and send them to community treatment programs or similar non-criminal services rather than jail.

In pretrial hearings, judges, or staff members trained in mental health screening should determine whether each defendant is mentally ill. As proposed by the National Judicial Task Force of State Judges:

²⁴⁹ THE JUDICIARY & DEP’T OF HEALTH, S. OF HAW., *supra* note 13, at 12.

²⁵⁰ *Id.* at 12–13.

²⁵¹ TALLON ET AL., *supra* note 199, at viii.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at ix.

²⁵⁵ *Id.*

Ideally, universal jail screening is in place and rules or a written protocol is established that automatically or presumptively identifies categories of screen results that lead to direct referral to the appropriate diversion track. For example, a low-risk, high-need profile would direct that individual to a dismissal with a referral to a treatment track; a high-risk, high-need profile would presumptively send that individual to a treatment court intake process.

Another option is to create a standing review team within the prosecutor's office that routinely reviews all defendants whose screen results indicate a behavioral health need and tracks those defendants to an option with the appropriate level of treatment and supervision.²⁵⁶

The assessment of mental illness, needs, and risk—whether completed through a protocol or a team—should not be used to project dangerousness or flight risk but rather to identify the conditions and incentives that would best protect the defendant and society and ensure presence at trial. These conditions would include the panoply of creative solutions explored or previously piloted in areas such as Honolulu, Miami-Dade County, and San Francisco.²⁵⁷ These solutions generally rely upon close attention to the treatment and support services that will help to maintain the defendant's stability, ensure presence at trial, and protect the individual's and community's safety.²⁵⁸

One study of these types of post-booking diversion programs in two large urban areas found that defendant's mental health status improved regardless of whether they were diverted or not, but that in comparing diverted individuals and those prosecuted and jailed, diverted individuals were not more likely to

²⁵⁶ NAT'L JUD. TASK FORCE TO EXAMINE STATE CTS.' RESPONSE TO MENTAL ILLNESS, *supra* note 155, at 9.

²⁵⁷ See *supra* notes 174, 175, 178 and accompanying text (discussing examples of pretrial and pre-arrest diversion programs aiming to reduce contacts with the criminal justice systems for individuals with serious mental health illnesses and/or substance use disorders).

²⁵⁸ The data are not universally positive, but some suggest that diversion programs can be effective.

A structured review of 21 published jail diversion outcomes studies found that there was very little evidence for a reduction in criminal activity or the rate of recidivism, but solid evidence that the amount of jail time served was reduced as a result of diversion. Another review of 11 jail-based diversion programs came to somewhat different conclusions, finding that there was a high degree of effectiveness in reducing recidivism and moderate effectiveness in reducing the number of days incarcerated.

See Gill & Murphy, *supra* note 164, at 2.

be re-arrested or to engage in additional criminal behavior.²⁵⁹ The study concluded that diversion is therefore a “safe and reasonable alternative” to jail.²⁶⁰ Review studies examining the broader diversion literature suggest more positive results of diversion, concluding that “postbooking diversion programs benefit enrolled clients by reducing criminal justice contacts, such as number of arrests and the frequency and length of incarcerations.”²⁶¹ Further, these programs “appear to reduce the number of psychiatric hospitalizations for a client over the longer term,” although they sometimes increase short-term psychiatric hospitalizations.²⁶²

In terms of the system to which mentally ill defendants are diverted, one relatively low-cost way of improving the overall social support system for mentally ill individuals is to better coordinate existing services. As the Miami-Dade County judiciary noted, part of the problem arises from the fact that all the groups responsible for assisting mentally ill individuals lacked a regular communication structure:

Many participants were shocked to find that a single person with mental illness was accessing the services of almost everybody in the room including law enforcement, emergency medical services, mental health crisis units, emergency rooms, hospitals, homeless shelters, jails, and the courts. Furthermore, this was occurring over and over as individuals revolved between a criminal justice system that was never intended to handle overwhelming numbers of people with serious mental illness and a community mental health system that was ill-equipped to provide the necessary services to those most in need. . . .

. . . Part of the problem was that stakeholders were largely disconnected from one another and no mechanisms were in place to coordinate resources or services.²⁶³

If states and local governments take reductions in pretrial detention seriously, more individuals with mental illnesses will be released and will need a network of support for reforms to work effectively for these individuals and society.

²⁵⁹ Michael S. Shafer, Brian Arthur & Michael J. Franczak, *An Analysis of Post-booking Jail Diversion Programming for Persons with Co-occurring Disorders*, 22 BEHAV. SCIS. & L. 771, 783 (2004).

²⁶⁰ *Id.*

²⁶¹ Steve Ryan, Chris K. Brown & Shinobu Watanabe-Galloway, *Toward Successful Postbooking Diversion: What Are the Next Steps?*, 61 PSYCHIATRIC SERVS. 469, 472 (2010).

²⁶² *Id.*

²⁶³ Leifman & Coffey, *supra* note 131, at 660–61.

C. Separate Data Collection and Reporting

In addition to the solutions proposed above—or to help build support for them in their absence—improved data collection and reporting of outcomes for traditional and mentally ill defendants is also important. Collection and reporting of separate data on release, appearance, and crime rates for mentally ill and traditional defendants would help to demonstrate weak points where they exist.

In the first place, getting a clear picture of the nature and extent of the problem will help efforts to adequately address it. For example, if in a particular jurisdiction mentally ill defendants were in fact committing more crimes when released, this would point to the need for improved mental health services while also demonstrating the relative effectiveness of the pretrial process for traditional defendants.²⁶⁴ This could benefit mentally ill defendants by building the case for better treatment and support services.²⁶⁵ At the same time, traditional defendants would have a powerful rebuttal to regressive bail proposals.

Screening, data collection, and reporting for mentally ill individuals in the pretrial process should be sufficiently detailed to both isolate differences from traditional defendants and to identify the pretrial approaches that are most effective for defendants (in terms of treatment) and society (in terms of flight and safety risks). Indeed, the SIM, described above,²⁶⁶ also recommends data collection at each intercept point within the pre- and post-booking process to determine whether diversions are effective with respect to “reducing justice system involvement” and developing the best forms of treatment.²⁶⁷ This system emphasizes the importance of collecting baseline and ongoing data as well as separate data for individuals with mental health disorders, substance use disorders, and co-occurring mental health and substance use disorders.²⁶⁸

A comprehensive approach to addressing the “jail as psychiatric facility” problem involves, ideally, preventing the arrest of mentally ill defendants for low-level crimes in the first place—instead channeling these individuals toward more effective treatment and a supportive community network. As a second-best solution, individuals can be diverted from pretrial processes after being jailed and charged. At the bare minimum, where mentally ill defendants

²⁶⁴ See *supra* note 122 (showing higher recidivism rates only for released defendants with substance use disorders, not for those with mental illness or a combination of a mental illness and substance use disorder).

²⁶⁵ See *infra* notes 271–272 and accompanying text (describing data collection and new programs that resulted from this collection).

²⁶⁶ *Supra* notes 165–166 and accompanying text.

²⁶⁷ SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., DATA COLLECTION ACROSS THE SEQUENTIAL INTERCEPT MODEL: ESSENTIAL MEASURES 1 (2019), <https://store.samhsa.gov/sites/default/files/d7/priv/pep19-sim-data.pdf> [<https://perma.cc/U3YC-6ZXE>].

²⁶⁸ *Id.* at 2–3.

remain in jail while awaiting trial, solutions such as the formation of special mental health pods within jails can address the inadequate treatment and violence encountered by mentally ill defendants.²⁶⁹

For all of these approaches, screening, data collection, and reporting will be essential both to isolate problems and identify effective solutions.²⁷⁰ Data showing higher recidivism by mentally ill defendants as compared to traditional defendants and more effective treatment of mentally ill defendants through tailored pretrial conditions could achieve two goals. First, it could draw attention to the need for alternative, more effective pretrial approaches for the large population of mentally ill defendants in the criminal justice system. For example, Adams County, Colorado's "justice-health dashboard" for data collection, sharing, and analysis "revealed that jail rebooking rates and average lengths of stay for people with serious mental illness were substantially higher (48[%] as compared with 29[%]) and longer (40 days compared with 31 days) than for the general jail population."²⁷¹ This resulted in the formation of a crisis intervention training program to reduce arrests and detention of the mentally ill.²⁷² Secondly, where justified, these data could reduce opposition to progressive bail reform across the board.

No degree of data collection and reporting or modified pretrial practices will wholly appease a crime-wary public skeptical of further bail reform. But an assurance that mentally ill individuals are being assessed and released with conditions tailored toward their illness is likely to substantially help and will most certainly benefit the mentally ill population.

CONCLUSION

There is a widely acknowledged mental health crisis in the United States. Seemingly unrelatedly, in much of the country the pretrial process is deeply unfair: jailing, monitoring, and/or squeezing money from even low-risk defendants. As argued above, these two phenomena are in fact connected. Although it is customary to think of the mental health and criminal justice systems as separate entities, in fact, for a large segment of the U.S. population, they are functionally deeply entwined. Jails serve as a *de facto* mental health system of last (and often first) resort. The routine and widespread jailing of mentally ill

²⁶⁹ See ROSSMAN ET AL., *supra* note 15, at 6–7.

²⁷⁰ See, e.g., NAT'L JUD. TASK FORCE TO EXAMINE STATE CTS.' RESPONSE TO MENTAL ILLNESS, *supra* note 155, at 8 (noting that the pre-booking stage is an "appropriate time to gather other relevant system data about the defendant" such as "[p]rior screen and assessment results, current and past treatment engagement and history information, and supportive resource information," all of which may "be helpful in determining an appropriate diversion plan").

²⁷¹ WILLISON ET AL., *supra* note 166, at 6.

²⁷² *Id.*

individuals serve as a deeply dysfunctional band-aid for a problem created, in part, by inadequate public mental health treatment. This practice results in overly crowded jails, inadequate societal attention to the need for an alternative to jails as mental health treatment centers, and thousands of mentally ill defendants with subpar treatment and support options.

To address the problematic connection between mental health issues and the pretrial system, there needs to be better alternatives to the criminal justice system for dealing with individuals suffering mental health crises, improved pretrial screening and treatment, more nuanced determinations of pretrial release and conditions for release, and superior data collection and reporting. Bail reformers should be sensitive to this dynamic and call for increased mental health funding to accompany reductions in pretrial detention. Creating better structures may require a variety of support services that federal laws have begun to enhance, including, for example, housing, evidence-based community mental health treatment called “Assertive Community Treatment” and “Forensic Assertive Community Treatment,” assisted outpatient treatment, more psychiatric beds, and psychiatric medication.²⁷³

This will be expensive, but the status quo is almost certainly more so—its costs hidden in reduced income and in law enforcement and jail budgets. A disaggregated approach that separately identifies and addresses mental health issues from the pre-booking stage through pretrial processes and beyond will help to produce a more just system for all. It will also make a substantial move toward ending the cycling of mentally ill defendants through the U.S. criminal justice system.

²⁷³ *21st Century Cures Act*, TREATMENT ADVOC. CTR., <https://www.treatmentadvocacycenter.org/fixing-the-system/rethinking-mental-health-policy/3713> [<https://perma.cc/E7UR-FN5T>] (describing the 21st Century Cures Act); 21st Century Cures Act of 2016, Pub. L. No. 114-255, 130 Stat. 1033 (codified as amended in scattered sections of 42 U.S.C.).