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BEYOND BAIL

Jenny E. Carroll*

ABSTRACT

From the proliferation of community bail funds to the implementation of new risk assessment tools to the limitation and even eradication of money bail, reform movements have altered the landscape of pretrial detention. Yet little attention has been paid to the emerging reality of a post-money bail world. With monetary bail an unavailable or disfavored option, courts have come to rely increasingly on non-monetary conditions of release. These non-monetary conditions can be problematic for many of the same reasons that money bail is problematic and can inject additional bias into the pretrial system.

In theory, non-monetary conditions offer increased opportunities for release over monetary bail and can be narrowly tailored to accomplish specific goals. Yet the proposition that such non-monetary conditions accomplish their purported goals is untested and unsettled. Pretrial release conditions are often imposed at the conclusion of a remarkably brief pretrial hearing and in a near rote fashion, with little or no evidence that the condition is necessary to avoid the risk or risks that fuel them. Defendants – many of whom are unrepresented at these hearings – may be ill-equipped financially or otherwise to comply with such conditions. Non-compliance may place defendants at risk of either additional criminal charges or future pretrial detention.

This Article argues that the reduction or eradication of money bail alone has not and will not ensure a fair and unbiased system of pretrial detention, nor will it ensure that poor and marginal defendants will benefit from pretrial release. Rather, these reforms have shifted the burden of release from paying money bail to paying fees for a laundry list of pretrial release conditions. If pretrial detention reform is to achieve meaningful results, it must address not just the most apparent barrier to release – the fee charged in the form of bail – but all barriers that promote pretrial incarceration and impose unjustified burdens on defendants awaiting trial.

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INTRODUCTION

In the last five decades, few criminal justice reform movements have enjoyed the level of success of pretrial detention reform movements.¹ From early efforts in the 1960s by the Vera Institute for Justice² to modern community bail movements,³ reform efforts have succeeded in calling attention to the regressive bail system,⁴ limiting or eradicating money bail,⁵ and utilizing risk assessment tools

¹ I use the term pretrial detention reform movements to encompass a variety of movements including bail reform movements.

² See WAYNE H. THOMAS, JR., *BAIL REFORM IN AMERICA* 11 (1976). One of the Vera Institutes early vehicles for bail reform was the Manhattan Bail Project which sought to decrease pretrial detention and the use of bail as a means of release. The Project interviewed defendants and made predictions about probability of flight based on factors including ties to the community, job stability, and prior criminal history. The Project proved incredibly accurate at predicting flight risk and served as a catalyst for early bail reform. For a description of the Vera Institute's original Manhattan Bail Project, see MARION C. KATZIVE, VERA INSTITUTE FOR JUSTICE, *NEW AREAS FOR BAIL REFORM: A REPORT ON THE MANHATTAN BAIL REEVALUATION PROJECT (June 1966 - August 1967)* (1968), <http://www.vera.org/sites/default/files/resources/downloads/1497.pdf>; Bernard Botien, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Process*, 43 TEX. L. REV. 319, 322-23 (1964); Charles Ares, et al., *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67, 76-86 (1963).

³ The community-based bail movement is one of many community-based criminal justice reform movements that have focused on the issue of pretrial detention. For an excellent description of such movements, see Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599-606 (2017).

⁴ See Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235 (2018); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713-14 (2017).

⁵ California, New York, New Jersey, the District of Columbia and Philadelphia – to name a few – have all done away with some or all monetary bail. See Cal. Penal Code §1320.10 (West) (effective Oct. 1, 2019); *New York Bail Reform Law: Summary of Major Components*, Center for Court Innovation (Apr. 1, 2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_Summary.pdf; N.J. CONST. ART. 1, ¶ 11; NEW JERSEY JUDICIARY, 2017 REPORT TO THE GOVERNOR AND THE LEGISLATURE, <https://njcourts.gov/courts/assets/criminal/2017cjrannual.pdf>; Josie Duffy Rice, *New Jersey passes new bail reform law, changing lives of poor defendants*, DAILY KOS (Jan. 3, 2017), <https://www.dailykos.com/stories/2017/1/3/1616714/-New-Jersey-passes-new-bail-reform-law-changing-lives-of-poor-defendants>; Molly

to determine probability of flight or danger to the community.⁶ In the wake of such reform movements, much work has been done to highlight potential bias embedded

O'Brien, *New Bail and Speedy Trial Laws Take Effect in New Jersey*, NEW BRUNSWICK TODAY, <http://newbrunswicktoday.com/article/new-bail-and-speedy-trial-laws-take-effect-new-jersey>; Ann E. Marimow, *When it comes to pretrial release, few other jurisdictions do it D.C.'s way*, WASH. POST (July 4, 2016), https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.2a5b8a415f53; Samantha Melahmed, *Philly DA Larry Krasner stopped seeking bail for low-level crime. Here's what happened next*. THE PHILADELPHIA INQUIRER, (Feb. 19, 2019), <https://www.inquirer.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform-incarceration-20190219.html>.

While it is beyond the scope of this Article, it is worth noting, that even as bail reform movements have succeeded in furthering legislation and internal prosecutorial policies that limit or eradicate monetary bail, recent critique of such reforms has met with allegations that prosecutors and judges often impose bail despite these policies. See Bryce Covert, *Progressive Philly D.A. Larry Krasner's Bail Reform Plans Seem Stalled, Advocates Say*, THE APPEAL, June 25, 2019, available at: <https://theappeal.org/progressive-philly-d-a-larry-krasners-bail-reform-plans-seem-stalled-advocates-say/>. In addition, such reforms in New York State have met significant opposition and arguably limited success. See, e.g. Bernadette Hogan and Carl Campanile, *Jay Jacobs, Chair of New York State Democratic Party, urges changes to bail reform*, N.Y. POST, Feb. 4, 2020, available at: <https://nypost.com/2020/02/04/jay-jacobs-chair-of-new-york-state-democratic-party-urges-changes-to-bail-reforms/>; Jesse McKinley, et al., *Why Abolishing Bail for Some Crimes Has Law Enforcement on Edge*, N.Y. TIMES, Dec. 31, 2019, available at: <https://www.nytimes.com/2019/12/31/nyregion/cash-bail-reform-new-york.html>.

Finally, despite early allegiance to bail reform California ultimately abandoned its bail reform provisions. See, e.g. Dan Walters, *A Strange Bedfellows Alliance on Bail Reform*, OC REGISTER, Feb. 20, 2020 <https://www.oregister.com/2020/02/20/a-strange-bedfellows-alliance-on-bail-reform-repeal-in-california/>; Julia Wick, *Essential California: The Future of Cash Bail in California*, LA TIMES, Jan. 24, 2020 <https://www.latimes.com/california/story/2020-01-24/cash-bail-boudin-san-francisco-newsletter>, *California's Historic Overhaul of Cash Bail is Now on Hold Pending 2020 Referendum*, LA TIMES, Jan. 16, 2019, <https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html>.

⁶ See Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2122 (2019); Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 344 (2018); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 509 (2018); Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 61 (2017).

in risk assessment tools⁷ – whether in their construction or in the data they rely on – but little attention has been paid to the emerging reality of a post-money bail world. With monetary bail an unavailable or disfavored option, courts not only refuse to release some defendants altogether, but rely increasingly on non-monetary conditions of release to mitigate whatever perceived risks a defendant poses.⁸ These non-monetary conditions of release can be problematic for many of the same reasons that money bail is problematic and can inject additional bias into the pretrial system.⁹ Yet, the proposition that such non-monetary conditions accomplish their purported goals is an untested and unsettled.¹⁰

Non-monetary conditions of release can include requirements of court attendance, no new law violations, drug or alcohol testing, no-contact orders, electronic home monitoring (or EHM), work release, substance or mental health treatment and maintenance of employment or school to name a few.¹¹ Such requirements are frequently imposed as a matter of course on defendants (including those in no-bail jurisdictions), and they range in terms of the obligation they entail and the collateral consequences they threaten.¹² Some conditions carry few additional obligations for a defendant. Others impose heavy burdens or are criminogenic – they may generate new criminal charges if violated.¹³ All curtail the defendant’s liberty in some way, all carry collateral consequences, and all rely heavily on the discretion of pretrial services officers,¹⁴ who monitor the defendant’s compliance with conditions of release.

⁷ See, e.g., Mayson, *Bias In, Bias Out*, supra note 6.

⁸ See Malahmed, supra note 5 (describing use of conditions of release in Philadelphia); Interview with Philadelphia Public Defender, March 7, 2019, notes on file with author; Peggy M. Tobolowsky & James F. Quinn, *Pretrial Release in the 1990s: Texas Takes Another Look at Non-Financial Conditions*, 19 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 267, 289-90 (1993).

⁹ Ironically, such non-financial conditions of release were originally developed during earlier waves of bail reform in an effort to reduce pretrial detention. See Tobolowsky & Quinn, supra note 8, at 289; 18 U.S.C. § 3142(c) (permitting a judge to impose a variety of conditions).

¹⁰ Prof. Russell Gold has suggested reconceptualizing pre-trial detention completely, as a kind of de facto injunctive order that denies liberty, in order to reign in its use. See Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501 (2019).

¹¹ See *infra* Part III A.

¹² *Id.*

¹³ See Robert J. Prince, *A Line in the Sand: Implementing Scene of the Crime Stay Away Orders as a Condition of Pretrial Release in Community Prosecution*, 92 VA. L. REV. 1899, 1919-23 (2006).

¹⁴ I use the term “pretrial services” or “pretrial services officer” throughout this article to denote the administrative agency and its employees who provide information to the court about the defendant prior to trial. Not every jurisdiction refers to this agency or its employees as pretrial services. Although different

In theory, conditions of release not only offer increased opportunities for release over monetary bail but can be tailored to address the twin concerns identified by modern bail statutes – risk of flight and danger to the community.¹⁵ For example, a defendant whose alleged crime is driven by a substance abuse problem may pose a reduced risk of flight or a danger to the community if she is required to participate in substance abuse treatment as a term of pretrial release. Further, court-ordered efforts to address a defendant’s underlying life conditions that may increase the likelihood of future crimes – in this hypothetical, substance abuse – may place her in a better position to negotiate an alternative disposition to her case or dismissal of the charge altogether. In comparison to money bail or pretrial detention, such conditions should both increase the probability of pretrial release and decrease future incarceration.¹⁶ From the court’s perspective, tailored conditions of release carry an assurance that a defendant can both enjoy pretrial liberty and be depended upon to return for future court dates and to live as a law-abiding and productive member of the community.¹⁷

All of this in theory makes sense. All of this in theory imagines a pretrial release system that is measured, precise and just. But the world of pretrial release operates outside of theory. Pretrial release conditions are often imposed at the conclusion of a remarkably brief pretrial hearing on unrepresented defendants.¹⁸ Judges impose conditions of release in a near rote fashion – some utilizing a checklist¹⁹ – often with little or no evidence that the condition is necessary to avoid the risk or risks that fuel them.²⁰ For their part, defendants may be ill-equipped financially or otherwise to comply with such conditions. For the defendant described above, while she may in fact benefit from drug treatment, she may be unable to comply with the court’s order because she lacks the funds to pay for treatment and free treatment facilities are hard to come by. Non-compliance may place such a defendant at risk of either additional criminal charges or future pretrial detention.²¹

Even as bail reform movements have enjoyed terrific success and scholars have done tremendous work to uncover bias in the assessment of pretrial risk and imposition of pretrial detention, little work has been done to address the reality of non-monetary pretrial release conditions. Put simply, it is a harm that hides in plain

jurisdictions may use a different moniker, every jurisdiction seems to have some form of this agency.

¹⁵ See Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1330 (2012).

¹⁶ See Wiseman, *supra* note 4 and Heaton, et al, *supra* note 4.

¹⁷ See Appleman, *supra* note 15.

¹⁸ See EMILY BAZELON, CHARGED 37 (2019) (noting that pretrial detention decisions are “often made in a few minutes or less, based on scant information presented early on at an arraignment hearing.”).

¹⁹ Examples of such checklists on file with author.

²⁰ See BAZELON, *supra* note 18, at 37.

²¹ See *infra* Part III.

sight for poor and marginalized defendants – one that not only may prevent pretrial release but may carry devastating long-term consequences for defendants and their communities. Such conditions are akin to imposing probation prior to conviction. Yet, such conditions are often touted as a benign alternative to monetary bail or pretrial detention. This Article asserts that this perception is a mistake. In reality, conditions of release often fail to serve as a benevolent compromise that offers both the court some assurance of reappearances and reduced risk and the defendant an opportunity for release. In reality, the very people bail reform movements sought to serve are many of the same people struggling under imposed conditions of release.

The reduction or eradication of money bail alone has not and will not ensure a fair and unbiased system of pretrial detention, nor will it ensure that poor and marginalized defendants will benefit from pretrial release.²² Rather, bail reform movements have largely shifted the burden of release from money bail to fees for EHM, requirements of meetings with pretrial services officers and counselors, submission to random drug testing, compliance with no contact orders and a myriad of other imposed conditions.²³ For some, the burden of such pretrial conditions is no less insurmountable than monetary bail. For others, conditions of release render a more devastating toll – generating new criminal charges upon violation and new periods of detention.²⁴ To add insult to injury, there is precious little research into the utility of such conditions.

The fee charged in the form of bail may be the most apparent barrier to release, but it is not the only one. To shift the pretrial paradigm away from detention therefore requires addressing not only the most apparent barrier but all barriers that promote pretrial incarceration and impose unjustified burdens on defendants awaiting trial, including non-monetary conditions of release that promote detention and for some re-arrest. This is not to say that courts may never set conditions of release or should disregard all risk factors or concerns at the pretrial stage. It is to say that the current pretrial detention regime is problematic because carries too much risk of bias and arbitrariness, despite a lack of evidence linking the conditions imposed to the mitigation of perceived risks.

The argument unfolds in three parts. Part I considers the framework of the pretrial release system – both as a constitutional and statutory matter. Both construct a system premised on the notion that pretrial release should be the norm and that detention or conditions of release – monetary or otherwise – are appropriate only when they promote a compelling and articulated state interest.²⁵ Part II turns to the question of how modern courts determine when or if pretrial conditions or detention are necessary. Charging decisions, risk assessment tools and institutional discretion all drive such determinations, and each raise real bias concerns. Finally,

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Modern bail statutes describe these as prevention of flight and danger to the community.

Part III considers the realities of pretrial release, including the most common conditions of release, the collateral consequences they carry both for compliance and non-compliance, the role of pretrial services officers' discretion in determining compliance and the route forward for reform.

Despite tremendous work and reform in the pretrial detention arena, relatively little attention has been paid to the reality that courts impose criminogenic and burdensome conditions on defendants with little to no demonstration that such conditions accomplish the state's articulated goals. This is puzzling. Not only does the imposition of such conditions depend on systems and individuals that are plagued with potential bias, but the lack of evidence that such conditions either increase release rates or affect articulated risks raises questions about their conformity with constitutional and statutory mandates or indeed their basic utility. The on-the-ground reality of such conditions is often a series of devastating impacts on defendants and their communities²⁶ – impacts that undermine pretrial reform efforts and deserve attention.

I. THE CONSTITUTIONAL AND STATUTORY FRAMEWORK OF BAIL

Constitutional and statutory mandates govern pretrial conditions of release. Both rely on the notion that, prior to conviction, a defendant is entitled to release absent some evidence that she poses a risk that cannot be mitigated. Uniformly, modern statutes define relevant risks as flight and danger to the community. As a constitutional matter, pretrial conditions have been challenged under the excessive bail clause, due process clauses and as an equal protection violation. Despite these challenges, the Supreme Court has set few limitations on pretrial conditions – monetary or otherwise.

Pretrial conditions may not act as punishment.²⁷ Determining if pretrial conditions are punitive, requires examining the link between the proposed condition and the state's articulated interests as identified by bail statutes.²⁸ Pretrial

²⁶ This Article focuses on the impacts of non-monetary conditions on defendants and their communities. Other impacts are borne by the State, particularly if defendants cannot comply with conditions and are either never released from pretrial custody or are detained upon violation of a condition of release. When this occurs, the State bears the monetary cost of this incarceration. Such detention also raises well-founded concerns regarding over-incarceration of defendants pretrial. The decision not to focus on such costs in this Article does not reflect a normative judgement regarding such costs, but rather reflects the reality that other scholars have documented this phenomenon well in the context of monetary bail. *See, e.g.,* Heaton, et al., *supra* note 4.

²⁷ *See* Salerno, 481 U.S. at 755; *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (holding that pretrial detention may not be punitive).

²⁸ *See* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470 (2015) (“[I]f the condition of confinement being challenged ‘is not reasonably related to a legitimate goal—if

conditions that are not necessary to promote the state's interest or, more accurately, that exceed what is necessary to guard against the risk the state has identified, are deemed excessive and may violate the defendant's substantive due process rights.²⁹ Whatever procedural due process exists in the pretrial setting seems to be constitutionally sufficient so long as it permits the lower court to determine that a nexus is in fact established between the state's compelling interests and the restrictions on the accused's liberty.³⁰

This overlapping analysis between what is excessive under the Eighth Amendment's Bail Clause, and what process is required to impose a condition under procedural and substantive Due Process requirements has left a limited due process standard for pretrial detention hearings in its wake. Procedurally, the Court has declined to require many trial-based safeguards, holding that the pretrial process is sufficient so long it establishes the required nexus between the state's compelling interests and the pretrial condition. And lower courts have been reluctant to revive the substantive due process analysis the Court utilized in *Salerno* even as they conclude that compelling liberty interests are at stake.³¹ Equal protection challenges to pretrial detention and conditions have largely met a similar response, with lower courts concluding that even with a protected class established, a constitutional violation occurs only if the condition imposed exceeds that necessary to maintain the state's interest.³²

As limited and circular as this constitutional framework may appear, understanding it is critical to an analysis of the pretrial detention system. The bail reform movement has used this framework to argue against money bail, both as biased against poor and minority defendants and as lacking a critical link with the State's articulated goals of reappearance and safety. As will be discussed below, similar assertions can be made for non-monetary conditions of release.

A. *The Excessive Bail Clause, Due Process and Equal Protection*

it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment.”).

²⁹ See, e.g., *United States v. Salerno*, 481 U.S. 739, 754 (1987) (“The only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil.”).

³⁰ See, *id.*

³¹ See also Jenny E. Carroll, *Due Process of Bail*, WAKE FOREST L. REV. (forthcoming 2021).

³² See e.g., *O’Donnell v. Harris Co. Texas*, 251 F. Supp 3d 1052 (S.D. TX. 2017). In *O’Donnell* the court recognized an Equal Protection claim based on economic class, but nonetheless engaged in a due process analysis with regard to the constitutional violation, again linking the violation to the process bail hearings afforded in establishing conditions linked to the state’s articulated goals as opposed to the class characteristics. *Id.* at 1135. See also Jenny E. Carroll, *Due Process of Bail*, WAKE FOREST L. REV. (forthcoming 2021).

The Constitution mentions bail only once³³ and does not mention pretrial conditions of release at all – though nonmonetary conditions of release were common at the time of the Founding and beyond.³⁴ The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”³⁵ Even at the time of its adoption, the Excessive Bail Clause carried an imprecise meaning. One delegate in the House of Representatives commented, “[t]he clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning, I do not think it is necessary. What is meant by the term excessive bail? Who are to be the judges?”³⁶ As Professor Samuel Wiseman has noted, the Excessive Bail Clause’s “complex and obscure history . . . has made consensus over the precise function of the constitutional prohibition against excessive bail elusive.”³⁷

³³ The constitutional focus on trial versus pretrial rights is likely a product of the pretrial release system at the time of the founding – one grounded in an English common law and constitutional system that required bail determinations to be made in a timely fashion, in open court and based on evidentiary record. *See* Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 966 (1965); William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALA. L. REV. 33, 34-66 (1977); NOTE, *Bail: An Ancient Practice Reexamined*, 70 YALE L. J. 966 (1961). Even before the founding, colonial bail systems disfavored pretrial detention and bail. *See* Foote, 113 U. PA. L. REV. at 968, (describing the 1641 practice in Massachusetts rendering all non-capital casesailable and limiting “capital” crimes”); June Carbone *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 531 (1983) (describing the colonial Pennsylvania constitution that presumed bail and provided process rights pretrial); Mathew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920 (2013). Finally, the Judicial Act of 1789 followed colonial practice, permitting bail in all non-capital charges and allowing pretrial detention only in the absence of a suitable alternative condition of release. 1 Stat. 91.

³⁴ *See*, Timothy R. Schancke, *A Brief History of Bail*, 57 JUDGES’ J. 4, 6 (2018) (describing historical reliance on nonfinancial conditions of release in lieu of monetary bail to assure the defendant’s presence).

³⁵ U.S. CONST. amend. viii.

³⁶ 1 ANNALS OF CONG. 754 (1789) (JOSEPH GATES AND WILLIAM SEATON, EDs. 1834) (statement of Rep. Samuel Livermore). Part of the reluctance to include such a clause may have stemmed from the well-established principle surrounding pretrial release dating back to the Magna Carte and present in colonial America. *See supra* note **Error! Bookmark not defined.**

³⁷ Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URBAN L.J. 121, 130 (2009).

For its part, the Supreme Court has devoted precious little attention to the Excessive Bail Clause – entangling the evaluation of excessiveness in due process³⁸ and equal protection³⁹ analyses. Early cases defined excessiveness in terms of the underlying function of bail – the assurance of the defendant’s reappearance before the court – and the court’s ability to tailor conditions of release to that goal.⁴⁰ In this, the constitutional requirement – that bail not be excessive – was met by a sort of circular logic. Bail was not excessive provided a court could determine that whatever condition was imposed promoted the purpose articulated by the State. In turn, whatever process might be due a defendant during a pretrial detention hearing was limited to that necessary to establish the nexus between the state’s interests and pretrial release conditions.⁴¹ Equal protection claims suffer a similarly retrospective (and circular) analysis, with courts concluding that equal protection concerns are satisfied provided that the deprivation of liberty is tailored to address the state’s articulated concerns.⁴²

Modern cases have maintained this interdependent construct of state interests and due process and equal protection. In *Stack v. Boyle*, the Court drew an historical arc between modern bail and the historic basis of bail.⁴³ It wrote that “the deposit of a sum of money subjected to forfeiture serves as additional assurance of the presence of the accused.”⁴⁴ The Court continued, “[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is ‘excessive’ under the Eighth Amendment.”⁴⁵ In this the Court defined excessiveness not in terms of whether or not a defendant could afford the bail, but in its ability to accomplish the state’s goals. This in turn tied the calculation of excessiveness to the process due a defendant.⁴⁶ While the *Stack* Court offered little insight into the precise parameters of either pretrial flight risk or sufficient process, the Court concluded that *some*

³⁸ U.S. CONST. amend. v.

³⁹ U.S. CONST. amend. xiv.

⁴⁰ See *Ex Parte Milburn*, 34 U.S. 704 (1835) (noting that bail should be set in a manner to accomplish its purpose to “compel[] the party to submit to punishment); *Hudson v. Parker*, 156 U.S. 277, 285 (1895) (holding that prior to conviction a defendant should be released or granted bail sufficient to ensure his return to court). These holdings are both consistent with the post-Colonial perception of bail both a default position (as opposed to detention) and as a mere means to prevent flight, as well as the Judiciary Act of 1789 which indicated “bail should be admitted, except where punishment is death.” 1 Stat. 73, § 33.

⁴¹ See *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *United States v. Salerno*, 481 U.S. 739, 750 (1987); *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990).

⁴² See, e.g., *Pugh v. Rainwater*, 572 F. 2d 1053, 1057 (5th Cir. 1978) (en banc).

⁴³ 342 U.S. 1 (1951).

⁴⁴ *Id.* at 5.

⁴⁵ *Id.*

⁴⁶ *Id.* at 4 (linking determination of eligibility for bail to the defendant’s due process rights).

process was necessary to prevent bail from becoming “punishment before trial.”⁴⁷ The Court concluded that whatever form that process took must be sufficient to link the deprivation of liberty in question to the risk articulated by the State.⁴⁸ In *Stack*, the bail was not excessive and the process was sufficient because the court had determined, and the Supreme Court affirmed, that the bail set served to reduce the risk that the defendant would fail to appear at trial.⁴⁹

Thirty-six years later, in *United States v. Salerno*, the Court returned to the question of the constitutionality of pretrial detention, this time in the context of the Bail Reform Act of 1984.⁵⁰ Salerno, a reputed crime boss, brought a facial challenge to the preventive detention provisions of the Act.⁵¹ The Court, in upholding the Act, again relied on an entwined analysis of the Excessive Bail and the Due Process Clauses – this time in the context of substantive due process.⁵² Finding that the novel detention provisions of the Act were both regulatory and reasonable, as they furthered the Government’s legitimate interest in the safety of the community,⁵³ the Court again linked the meaning of “excessive” to the underlying function of bail itself – this time in terms of dangerousness as opposed to flight risk. Rehnquist wrote, “[t]he only arguable substantive limitation of the Bail Clause is that the Government’s proposed conditions of release or detention not be ‘excessive’ in light of the perceived evil. ... [T]o determine whether the Government’s response is excessive, we must compare the response against the interest that the Government seeks to protect by means of that response.”⁵⁴ As it had in *Stack*, the Court held that defendants were only entitled to sufficient process to demonstrate that the deprivation of liberty could survive the Eighth Amendment’s prohibition against excessive bail.⁵⁵ The Court in *Salerno* was clear – the imposition of bail or, in Salerno’s case, pretrial detention, requires proof “by clear and convincing evidence that an arrestee presents an identified and articulable threat.”⁵⁶ Without such proof, any effort to curtail the defendant’s liberty pretrial not only is excessive but also violates the level of process required by the Fifth Amendment.⁵⁷

In both cases, as it has at times in other Eighth Amendment arenas,⁵⁸ the Court declined to provide either a clear definition of excessive or the precise

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 481 U.S. 739 (1987).

⁵¹ *Id.* at 746-49.

⁵² *Id.*

⁵³ *Id.* at 750-52.

⁵⁴ *Id.* at 754.

⁵⁵ *Id.* at 750-51.

⁵⁶ *Id.*

⁵⁷ *Id.* at 746-55.

⁵⁸ Consider, for example, the Court’s interpretation of “cruel and unusual punishment” Clause of the Eighth Amendment, in which bright-line rules have

procedural mechanisms due a defendant in a pretrial detention consideration. Instead the Court reiterated the position it had staked out in *Stack*, relying on the Due Process Clause to hold that the calculation of excessiveness was an individualized analysis based on the defendant's own characteristics – whether as to flight risk in *Stack* or dangerousness in *Salerno* – and the interests the government sought to protect.⁵⁹ Bail was rendered excessive when it exceeded what was necessary to achieve legitimate state interests. As Professor Lauryn Gouldin has noted in the context of monetary bail, “[r]ead together, these decisions support the claim that pretrial restrictions on liberty that are not tailored to the specific risk an arrestee presents are unconstitutionally ‘excessive’.”⁶⁰

The Court's failure to draw a bright-line rule regarding “excessive bail” and the corresponding process may be a product of the nature of pretrial detention itself – or at least the Court's vision of it. First, the Court's construction of the process due a defendant pretrial rests on an embedded understanding that the purpose of pretrial detention is limited to achieving articulated state goals of reappearance for trial and safety through imposed conditions. While such concerns are certainly important, focus on these twin risks is also problematic. It seems to ignore the well-documented impact of pretrial detention decisions on defendants and the larger community.⁶¹ This in turn raises questions regarding how these risks are defined and who should define them. As will be discussed in the context of risk assessment tools, the calculation of safety or even flight risk are, by their nature, fraught with the potential for perspective bias. The decision to detain a defendant pretrial, or to impose restrictive conditions, may appear to a court or pretrial assessment officer necessary to ensure safety but may run contrary to community notions of safety.

emerged only for the most extreme sentences. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the execution of individuals with diminished intellectual abilities); *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting the execution of juvenile offenders); *Graham v. Florida*, 560 U.S. 48 (2010) (prohibiting life without parole sentences for non-homicide juvenile offenders).

⁵⁹ *See Salerno*, 481 U.S. at 754-55 (citing *Stack v. Boyle*) (“Thus when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designated to ensure that goal, and no more. We believe that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.”); *Stack*, 432 U.S. at 5 (“Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”).

⁶⁰ *See* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 699-700 (2018).

⁶¹ *See* Will Dobie, et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 224-26 (2018); Heaton, et al., *supra* note 4, at 741-759; CHRISTOPHER LOWENKAMP, ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COST OF PRETRIAL DETENTION (2013).

To the people who know and depend on the defendant in all sorts of ways, pretrial detention or pretrial release conditions may create gaps in social, familial and economic networks. Scholars and community groups alike have highlighted and lamented the downstream consequences of pretrial detention,⁶² but questions about how risks are defined has been less vigorously explored.⁶³

Beyond this, the pursuit of these State articulated pretrial goals seems an odd justification for the Court's failure to attach procedural protections to pretrial hearings, particularly in light of the Court's requirement of such protections in other pretrial contexts.⁶⁴ It is difficult to imagine that the benefits and necessity of counsel for a defendant in a probable cause hearing, for example, are any less urgent or required in a pretrial detention hearing.⁶⁵ Certainly, the Court's conclusion that such procedural safeguards are not required in pretrial detention hearings because any resulting deprivation of liberty is regulatory and not punitive⁶⁶ may feel like a mere semantic distinction to defendants sitting in jail awaiting trial or subject to other restrictions.

Second, the Court has noted that pretrial detention, because it serves these limited goals, is distinct from punishments meted out after conviction and so requires a distinct procedure.⁶⁷ As will be discussed in more detail below, this distinction presents in several ways. For the Court's constitutional analysis, however, the most significant is that pretrial conditions – monetary or otherwise – are limited to the pretrial period. The Court seems to accept that this period is shorter than periods of punishment – a contested proposition to be sure. Other distinctions – that pretrial conditions are imposed early in the criminal process or that the deprivations of liberty in question, particularly in cases of release on

⁶² See, e.g., *Wiseman*, *supra* note 4; *Heaton, et al*, *supra* note 4.

⁶³ See *Simonson*, *supra* note 3.

⁶⁴ See, e.g., *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008) (requiring appointment of counsel in all critical phases of the criminal justice process); *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977) (requiring appoint of counsel at the defendant's first judicial hearing in which he is formally informed of charges against him); *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (holding that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention"); *County of Riverside v. McLaughlin*, 500 U.S. 44, 58-59 (1991) (interpreting *Gerstein's* requirement of a "prompt" judicial determination of probable cause to be 48 hours).

⁶⁵ See *Rothgery*, 554 U.S. at 213; *Gerstein*, 420 U.S. at 126.

⁶⁶ See *Bell v. Wolfish*, 441 U.S. 520 (1979) (holding that conditions of pretrial release were not punitive as they promoted legitimate state interests for finite periods of time).

⁶⁷ See *Salerno*, 481 U.S. at 742 (noting that pretrial detention is distinct from punishment and therefore some procedural protections available at trial were not required).

conditions or bail, are less significant and therefore require less rigorous procedural protections – both seem to overlook the significant impact of pretrial conditions.⁶⁸

In the end, pretrial decisions are, by their very nature, efforts to predict some future occurrence based on limited data. An individual defendant may present particular risks or may be a particularly safe bet in ways that are not readily apparent. Unlike sentencing, which carries its own predictive burdens, pretrial release conditions are not punitive. They therefore cannot be justified based on a desire to punish a defendant prior to conviction. In this, the Court's allegiance to a process based on an individualized analysis of the defendant in comparison to the State's articulated goals may be grounded in the recognition that courts must have some flexibility to make early decisions with limited information. Faced with little guidance as to precisely what process is necessary in the pretrial detention arena, states have increasingly constructed their own bright-line rules – usually dictated by the charged offense, the defendant's criminal history and/or information that suggests a likelihood to succumb to the identified risks of flight or future danger. In the alternative, states have gravitated toward risk assessment tools that diminish discretionary decision-making and, in some cases, eliminate a defendant interview.⁶⁹ Even in cases where no bright-line rule is applied, pretrial conditions of release, monetary and otherwise, are often imposed routinely or based on set schedules.⁷⁰

For their part, equal protection challenges have focused on the unaffordability of bail, arguing that bail amounts have a disparate impact on poor and minority defendants. Like their due process counterparts, these challenges claim that unaffordable bail violates the Equal Protection Clause absent some demonstration that the bail is the least restrictive means to satisfy the compelling state interest.⁷¹

Despite the limited process standards articulated by the courts, reform efforts have succeeded in shifting the modern pretrial release system increasingly away from monetary conditions toward non-monetary conditions.⁷² They have often done so with the blessing and help of elected prosecutors. These non-monetary conditions, however, may create equal if not greater burdens for the very populations such reforms sought to protect.⁷³ The price of release for defendants, particularly those charged with minor offenses who appear to present a low pretrial release risk, may no longer be a financial bail, but instead agreed-upon conditions of release that may have little to do with any risk the defendant may pose or any

⁶⁸ See *infra* Part III.

⁶⁹ See *infra* Section I.B.

⁷⁰ *Id.*

⁷¹ See *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978); *O'Donnell v. Harris City*, 892 F.3d 147, 162 (5th Cir. 2018); *Brangan v. Commonwealth*, 80 N.E.3d 949, 959 (Mass. 2017); *Lee v. Lawson*, 375 So. 2d 1019, 1023 (Miss. 1979).

⁷² See *supra* note 5.

⁷³ See *infra* Section III.B.

compelling State interest.⁷⁴ Such conditions may not only carry a financial burden but may impose far-reaching consequences for defendants, their families and their community.⁷⁵

B. Statutory Regulation of Release

The constitutional ideals embodied in the Eighth, Fifth and Fourteenth Amendments and articulated by the Court take tangible form in state and federal rules and statutes regulating pretrial release. In federal court, the Bail Reform Act of 1984 sets pretrial release as a “default” unless the judge “determines that such release will not reasonably assure the appearance of the person as required or endanger the safety of other persons in the community.”⁷⁶ While there is statutory variance among states and between state and the federal systems, the twin concerns of flight risk and future dangerousness are consistent.⁷⁷ Likewise, the process requirements that the court first determine the level of risk the defendant poses and second craft conditions of release – monetary or otherwise – that answer those concerns are constants among such statutes, whether state or federal.⁷⁸

Under the Bail Reform Act, if the government or the court seeks to hold a defendant prior to trial, the court must conduct a hearing to determine the defendant’s level of risk and the conditions, if any, that will ameliorate that risk.⁷⁹ States have followed suit.⁸⁰ Scholars and activists, however, have criticized such pretrial detention hearings as being notoriously cursory or, with increased use of risk assessment tools and some bail reform, non-existent.⁸¹ In addition, while state

⁷⁴ See *infra* Section III.A.

⁷⁵ *Id.*

⁷⁶ 18 U.S.C. § 3142(b). While 18 U.S.C. § 3142 and § 3144 govern release prior to trial, FED. R. CRIM. PRO. 46(b) permits a judge to add additional conditions of release during trial.

⁷⁷ See SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 1-15 (2018); Gouldin, *supra* note 60, at 701.

⁷⁸ See *id.*; 18 U.S.C. § 3142. Admittedly these labels may be deceptive and may at times flow into one another – with dangerousness judged in terms of flight risk and flight risk in terms of dangerousness. Gouldin, *supra* note 60, at 701. However, these are the distinct interests identified by the statutes.

⁷⁹ 18 U.S.C. § 3142(e)(1).

⁸⁰ See BAUGHMAN, *supra* note 77; Patrick Liu, Ryan Nunn & Jay Shambough, *The Economics of Bail and Pretrial Detention*, TECHNICAL REPORT, THE HAMILTON PROJECT, December 2018 (providing an overview of state pretrial detention processes).

⁸¹ See Mayson, *Dangerous Defendants*, *supra* note 6, at 509 (describing the streamlining of pretrial detention hearings through the use of risk assessment tools producing cursory hearings, or in some cases, no hearings); Eaglin, *supra* note 6, at 61-64. In jurisdictions such as Philadelphia or New Jersey, both of which have

statutes may still require or permit some level of judicial discretion with regard to pretrial release, that discretion appears increasingly formulaic at best and capable of producing inconsistent and biased results at worst.⁸²

While these critiques of pretrial hearings raise significant concerns, as discussed above, limitations in process may be a product of the nature of the pretrial inquiry itself.⁸³ Pretrial detention hearings are by their nature predictive and often occur very early in a case before the defense has enjoyed a meaningful opportunity to investigate or challenge the prosecution's case.⁸⁴ In state courts, they may occur before counsel is even appointed.⁸⁵ Therefore, such hearings often cannot, as a practical matter, result in any meaningful refutation of the allegations.⁸⁶ This is not to say that defendants cannot or do not challenge the existence of probable cause.⁸⁷

implemented bail reforms eradicating monetary bail in all or some cases, some pretrial review hearings have vanished altogether as defendants are either released on agreements signed by the prosecutor and the defendant or the court holds a minimal uncontested hearing. *See supra* note 5.

⁸² *See* Stevenson, *supra* note 6, at 344.

⁸³ *See* United States v. Hurtado, 779 F.2d 1467, 1479 (11th Cir. 1985) (pretrial hearings are not designed to “rehash . . . probable cause” but to allow the defendant to demonstrate that he poses no flight risk or danger to the community); United States v. Williams, 798 F. Supp. 34, 36 (D.D.C. 1992) (noting that to require full litigation of the pending case at a pretrial hearing would be not only complicate the hearing and would be “out of proportion to the liberty interest at stake – viz. the interest in remaining free until trial, for what is by statute a period of limited duration”).

⁸⁴ 18 U.S.C. § 3142(f)(2), for example, requires a pretrial detention hearing immediately following a defendant's first appearance, but also permits a 3 day delay of the hearing on motion of the government's attorney or the defendant can request a 5 day delay for good cause. Often the hearing is delayed to allow the defendant to acquire counsel. Once the hearing occurs, however, § 3142(f)(2) does not permit either the government nor the defendant to reopen the detention question unless new evidence that was not known at the time of the initial hearing becomes available. *See also* BAZELON, *supra* note 18, at 37.

⁸⁵ *See* Pamela R. Metzger & Janet C. Hoeffel, *(Dis)Appearance of Counsel*, unpublished draft cited with permission, on file with author.

⁸⁶ *See* BAZELON, *supra* note 18, at 37; Appleman, *supra* note 15, at 1330.

⁸⁷ *Gerstein v. Pugh* held that a probable cause hearing must occur after the defendant is arrested and charged by information (as opposed to by indictment). 420 U.S. 103 (1975). *County of Riverside v. McLaughlin* held that this probable cause hearing must occur within 48 hours of the defendant's arrest. 500 U.S. 44 (1991). It is not unusual to hold the pretrial detention hearing immediately following the probable cause hearing – assuming probable cause is found. Even if the state charges the defendant by indictment, a defendant may challenge the probable cause of the indictment, though may not chose to do so at a pretrial detention hearing.

But such a challenge is even more of an uphill battle for the defense pretrial than at trial.⁸⁸ The prosecutor is heavily advantaged at this stage of the case and at times uses that advantage to urge pretrial detention – asking courts to consider the weight of evidence against the defendant as a reason to “hold” the defendant or to impose strict conditions of release pretrial.⁸⁹ Judges themselves are risk adverse with regard to release, often erring towards detention or conditions rather than risk bad publicity.⁹⁰

Beyond this, the sheer volume of cases that arraignment courts must process on a daily basis, coupled with the promulgation of increasingly sophisticated assessment tools and strong pretrial detention reform movements (fueled in no small part by a growing distrust of judicial discretion), counsel toward limited or, in some cases, nonexistent pretrial detention hearings.⁹¹ In response, states have implemented risk assessment tools,⁹² altered factors for considering bail or conditions of release,⁹³ and, in some cases, eliminated monetary bail.⁹⁴ Each of these have streamlined the pretrial detention process – reducing hearings or

⁸⁸ See BAZELON, *supra* note 18, at 37; Appleman, *supra* note 15, at 1330.

⁸⁹ *Id.* Federal Rule of Criminal Procedure 46 permits consideration of the facts alleged in the case and section 3142(g) of the Bail Reform Act allow consideration of the crime alleged in determining flight risk and/or danger to the community and/or the appropriate conditions of release.

⁹⁰ See Gouldin, *supra* note 60, at 714-15. Recent proposed bail statutes underscore this aversion as state legislators contract bail considerations. See, e.g. Ala. H.B. 81 (Feb. 2020 Legislative Session) (both seeking to expand the ability of courts to make “no bail” findings).

⁹¹ Some practitioners I spoke to reported that first appearance or arraignment judges and prosecutors in their jurisdictions “determine” terms of pretrial release prior to the “hearing.” Defendants, often appearing without appointed counsel, are “told” whether or not they will be released pretrial and under what terms. Thus while a hearing “technically” occurs, it is a non-substantive one. Notes from conversations with defense counsel on file with author.

⁹² See Mayson, *Dangerous Defendants*, *supra* note 6, at 492-97 (describing variety of risk assessment tools adopted in the wake of the bail reform movement); Eaglin, *supra* note 6, at 61 (describing widespread use of risk assessment algorithm tools in pretrial detention hearings).

⁹³ See BAUGHMAN, *supra* note 77, at 1-17 (describing the adoption of different bail factors in new and proposed state legislation).

⁹⁴ See, e.g., Cal. Penal Code §1320.10 (2019); 2017 New Mexico Court Order 0006 (C.O. 0006); 2017 Arizona Court Order No. 2014-12; Melahmed, *supra* note 5 (describing the decision of Philadelphia DA Larry Krasner to forgo monetary bail for low level and non-violent offenses). It is worth noting that Krasner has come under criticism recently for failing to adhere to his own bail reform policies – citing concerns about safety to the community to justify requests for bail and detention for low level and non-violent offenses. See Covert, *supra* note 5.

eliminating them altogether and curtailing already limited pretrial procedural protections.

Regardless of the length of the hearing, or if it occurs at all, defendants generally face a limited universe of outcomes following a charge. Like its state analogs, the Bail Reform Act provides “that upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall make a determination regarding the bail status of the defendant, and shall enter an order designating a defendant’s custodial status”⁹⁵ as one of four categories:

1. released on a personal recognizance or on an unsecured bond;⁹⁶
2. released on a condition or conditions;⁹⁷
3. temporarily detained to accommodate revocation of conditional release, deportation, or exclusion;⁹⁸ or
4. detained.⁹⁹

Jurisdictions that have eliminated monetary bail requirements may forgo the pretrial detention hearing – permitting a defendant to be released upon agreement of the parties without ever appearing before a judge.¹⁰⁰ If a hearing is conducted, the court may rely on information gathered by pretrial services and, in jurisdictions with risk assessment tools, risk scores generated by such tools.¹⁰¹

Setting aside the category of defendants who are detained so that a prior release may be revoked or modified or so that they may be deported or excluded (category 3 above) – who are beyond the scope of this Article – the court considers a limited range of information in determining whether to release a defendant and how that release should present. For example, section 3142(g) requires the judicial officer to consider the nature and circumstances of the crime;¹⁰² the weight of the evidence; the nature and seriousness of danger the release the defendant presents; and the criminal and social history of the defendant.¹⁰³ This last category, the defendant’s criminal and social history, is by far the broadest. This category permits the judge to consider the defendant’s criminal history (including past arrests, convictions and whether the defendant was on probation, parole or other release

⁹⁵ 18 U.S.C. § 3142(a).

⁹⁶ 18 U.S.C. § 3142(b).

⁹⁷ 18 U.S.C. § 3142(c).

⁹⁸ 18 U.S.C. § 3142(d).

⁹⁹ 18 U.S.C. § 3142(e).

¹⁰⁰ This occurs, for example, in Philadelphia. *See* Melahmed, *supra* note 5.

¹⁰¹ 18 U.S.C. § 3154(1) allows pretrial services to collect information and make recommendations to the court regarding release, detention and any appropriate conditions in between. Section 3141(a) grants the court, or other judicial officers, the authority to release or detain defendants. For a state court example, *see* Stevenson, *supra* note 6.

¹⁰² This may include whether crime was violent or had an aggravating factor such as narcotics, a weapon, involved racial animus or the defendant had a domestic relationship with the alleged victim.

¹⁰³ 18 U.S.C. § 3142(g).

pending trial, sentencing, appeal or completion of sentence for an offense) and social history (including the defendant's mental and physical condition, family ties, employment, education, financial resources, ties to the community, drug or alcohol abuse and record of past court appearances).¹⁰⁴ In theory, risk assessment tools take these factors into account in generating a risk score.¹⁰⁵ Even in jurisdictions in which risk assessment tools are used, the court may still rely on pretrial services to generate a report and make recommendations regarding pretrial release or detention.¹⁰⁶

As noted previously, the presumption under modern bail statutes is that in all but a very limited number of circumstances the defendant should be released either on her own recognizance, on monetary bail or on some condition or conditions of release. For bail or conditions of release the court must impose *only* those conditions necessary to mitigate whatever risk the defendant poses.¹⁰⁷ The prosecution must demonstrate that such conditions are necessary by articulating a theory of risk – flight and/or danger to the community – before the court will even consider holding a defendant or imposing some conditions on his liberty.¹⁰⁸ Despite this requirement, there has been few (in fact I can't find any) studies on what effects any particular condition have on either the defendant's probability of appearance or her risk of future dangerousness. Instead, it appears, that the Court's requirement that pretrial conditions be linked to state goals is met when the state articulates its concern and requests a condition be imposed. Little to no consideration of the condition's probability of success in mitigating the risk it purports to address is constitutionally necessary in reality.

As a result, despite the default position of release and the required demonstration of necessity to trigger pretrial conditions of release, both conditions and pretrial detention remain common, even as bail requirements recede. Even a defendant released on her own recognizance is required to agree to attend all future court proceedings and to not commit any new offenses in any jurisdiction as a condition of the release (conditions, incidentally, a defendant is already required to comply with under other sections of the criminal code). Like bail, conditions of release can carry far-reaching consequences for the defendant and her community.¹⁰⁹ Yet such conditions are routinely imposed either by agreement or as a result of a cursory hearing with little attention paid to their impact or to whether they accomplish their purported goals. Defendants released on conditions are

¹⁰⁴ *Id.*

¹⁰⁵ *See supra* Part II.

¹⁰⁶ *See* Stevenson, *supra* note 6.

¹⁰⁷ *See* 18 U.S.C. § 3142(f); *Salerno*, 481 U.S. at 755 (“In our society liberty is the norm, and detention prior to trial or without trial is a carefully limited exception.”).

¹⁰⁸ *See* 18 U.S.C. § 3142(f); *United States v. Butler*, 165 F.R.D. 69, 71 (N.D. Ohio 1996) (stating “[w]hen there exists one or more grounds for holding a hearing . . . the government may proceed on the theory of risk of flight and/or danger to the community or any other person.”).

¹⁰⁹ *See infra* Part III.

routinely characterized as being set free – as opposed to detained or released on bail. However, such conditions may do as much or sometimes more to restrict the defendant’s current and future liberty as monetary bail.

C. The Takeaway

Before turning to other aspects of pretrial release conditions, it is worth noting a significant commonality in both the constitutional and statutory aspects of pretrial release. For as little as the Supreme Court has weighed in on the constitutionality of pretrial release, it has maintained that imposition of a condition of release may not be arbitrary.¹¹⁰ The Excessive Bail, Due Process and Equal Protection Clauses require that there must be some underlying risk that the State seeks to mitigate through the infringement of liberty it seeks to impose – whether that be preventive detention in the case of Tony Salerno, monetary bail in the case of Loretta Stack, or something in between.¹¹¹

State and federal statutes echo this constitutional requirement, using pretrial release as a baseline that can be altered only upon a finding that some condition is necessary to protect the twin interests of reappearance and community safety.¹¹² Risk assessment tools and pretrial detention reform movements both purport a desire to get this balance “right” – to ensure that defendants are released absent some demonstration that concerns of flight risk or safety exist and restrained in some way if such concerns are present.¹¹³ Put another way, they seek to fulfill the function of the pretrial release process – to ensure the defendant’s liberty while protecting both the judicial process and the community at large.

The difficulty, however, is that they only get this balance half right. As will be discussed in the next Part, risk assessment tools may remove much judicially initiated bias, and reform movements have shed light on the regressive practices of pretrial detention – particularly in the context of monetary bail and bias. Yet each have done little to demand the fulfillment of the second half of the constitutional equation articulated by the Court – the demonstration that conditions *actually* serve some articulated purpose and are not imposed arbitrarily or merely for the sake of curtailing the defendant’s liberty as she awaits trial. As a result, even as prosecutors and courts have backed away from the imposition of monetary bail in low-level cases, they continue to impose non-monetary conditions, which can have an equally devastating effect on the defendant and her community and have even greater criminogenic consequences.¹¹⁴

II. DETERMINING PRETRIAL DETENTION

¹¹⁰ See *supra* notes 44-59 and accompanying text.

¹¹¹ See *Salerno*, 481 U.S. at 755.

¹¹² See *supra* notes 95-108 and accompanying text.

¹¹³ See *infra* Part II.

¹¹⁴ See *infra* Part III.A.

Pretrial detention reform movements have worked within and pushed against the constitutional and statutory framework described above. In doing so, these movements have argued that current pretrial procedures reflect two entwined norms: first, that unacceptable bias has permeated pretrial detention procedures, just as it has other aspects of the criminal process; and second that while some defendants may pose either a risk of flight or danger to the community, pretrial detention procedures and the impositions on liberty they produce must be limited to those necessary to accomplish the State's articulated interests.¹¹⁵

Pretrial detention reform is hardly a new phenomenon. For the last four decades, waves of pretrial reforms have significantly altered the landscape of pretrial detention. From the Vera Institute's efforts in the late 1960s to encourage judges to weigh particular factors in making pretrial decisions,¹¹⁶ to implementation of risk assessment tools¹¹⁷ and the abandonment of monetary bail,¹¹⁸ "[t]here are few issues in criminal law with greater momentum than bail reform."¹¹⁹ Such reforms have not only created widespread statutory and prosecutorial policy changes, but have also tapped into and fueled a larger conversation about criminal procedure's unequal treatment of marginalized communities and the function of such procedure.¹²⁰

The lack of transparency in the pretrial detention process,¹²¹ coupled with its apparent bias towards poor, minority and marginalized defendants¹²² and the long-term consequences of pretrial incarceration on defendants and

¹¹⁵ I do not mean to suggest that the forces behind bail and pretrial detention reform are monolithic or only bound to the norms described. These norms, however, do appear central throughout the movements.

¹¹⁶ See KATZIVE, *supra* note 2; THOMAS, *supra* note 2, at 11; Botien, *supra* note 2, at 322-23; Ares, et al., *supra* note 2, at 76-86.

¹¹⁷ See Stevenson, *supra* note 6.

¹¹⁸ See *supra* note 5 and accompanying text.

¹¹⁹ See Shima Baradaran Baughman, *Dividing Bail Reform*, 104 IOWA L. REV. ____ at ____ (forthcoming 2020). For a succinct history of bail reform, see Mayson, *Dangerous Defendants*, *supra* note 6, at 506-09. In addition to its success in bringing about change, few topics have garnered as much scholarly attention as quickly. See, e.g., Mayson, *Bias In, Bias Out*, *supra* note 6; Gouldin, *supra* note 60; Beth Colgan, *The Excessive Fines Clause*, 65 UCLA L. REV. 2 (2018); Mayson, *Dangerous Defendants*, *supra* note 6; Simonson, *supra* note 3; Heaton, et al., *supra* note 4. It is not my goal to repeat the work of those scholars who have so ably covered this topic before me, but it is my goal to use their work to highlight both the lack of attention that has been paid to pretrial release conditions and the significant hazards such conditions pose.

¹²⁰ See Simonson, *supra* note 3.

¹²¹ *Id.*; Appleman, *supra* note 15.

¹²² See Mayson, *Bias In, Bias Out*, *supra* note 6; Gouldin, *supra* note 60; Colgan, *supra* note 119.

communities,¹²³ has driven these reform movements.¹²⁴ To date, pretrial detention reform has generated two changes critical to this Article: the proliferation of machine-generated pretrial risk assessments and, most recently, the abolition of monetary bail. Risk assessment tools, which were designed to reduce bias by removing aspects of pretrial and sentencing discretion, have nonetheless garnered accusations of bias even within reform movements.¹²⁵ Elimination of monetary bail, which has earned well-deserved praise for reducing bias in pretrial detention by removing one of the primary impediments to release for marginalized defendants,¹²⁶ nonetheless carries problematic and underexplored consequences.¹²⁷ This Part examines both these products of pretrial detention reform movements.

Before continuing in the critique of risk assessment tools and the anti-bail movement, it worth noting that this Article is not meant to undermine the real and significant work that pretrial detention reform movements have accomplished – and, hopefully, will continue to accomplish – through these reforms and others. This Article does, however, seek to push the conception of pretrial detention reform movements toward a more nuanced understanding of the reality of the battle occurring daily in courtrooms and in the lives of poor and minority defendants and to encourage yet another wave of reform.

A. Risk Assessment Tools

Heralded by proponents as a mechanism for reducing arbitrary or inaccurate calibration of the risk any particular defendant poses, actuarial risk assessment tools have become a major component of the third wave of pretrial detention reform.¹²⁸ Such tools purport to predict the likelihood of future behavior – in the context of pretrial detention, to predict the probability that a defendant either will fail to appear

¹²³ See Heaton, et al., *supra* note 4.

¹²⁴ See Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 276 (2019).

¹²⁵ See, e.g., Mayson, *Bias In, Bias Out*, *supra* note 6; Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231 (2015); Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT. R. 237 (2015); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043 (2019); John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725 (2018); Anne Milgram et al., *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*, 27 FED. SENT’G REP. 216 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014).

¹²⁶ See Mayson, *Dangerous Defendants*, *supra* note 6 at 494, 507-09.

¹²⁷ See *infra*, Part II C and Part III.

¹²⁸ See Gouldin, *supra* note 60, at 713.

or will commit or be arrested for a new offense.¹²⁹ These predictions are helpful in that they focus the court's inquiry at the pretrial detention stage and offer a "risk assessment" score that the court (or legislators) can use to set criteria for release, reducing opportunities for discretionary bias.¹³⁰ Put another way, a defendant who receives a "low" risk score from a risk assessment tool is deemed unlikely to reoffend or to abscond while her case is pending, and therefore is a good candidate for release.¹³¹ Alternatively, a candidate who receives a "high" risk score should be released only under limited conditions or not at all.¹³² Others have provided a much more in-depth analysis of the mechanics of such tools, but at their core, they utilize an algorithm to analyze a set of variables based on a dataset to produce the defendant's risk score.¹³³

Despite their promise of precise and unbiased results, such tools are not without their critics. In 2016 ProPublica published an exposé regarding one such tool, COMPAS, and declared that the software was "biased against [B]lacks."¹³⁴ Unsurprisingly, the software's creator hit back with its own data challenging ProPublica's conclusions.¹³⁵

Regardless of where you fall on the COMPAS bias debate, as Professor Sandra Mayson points out, even if the software lacks a bias construct, it relies on

¹²⁹ See Mayson, *Bias In, Bias Out*, *supra* note 6, at 2228 (describing risk assessment tools as "an actuarial assessment of the likelihood of some future event, usually arrest for a crime."); Eaglin, *supra* note 6, at 61 (describing risk assessment tools in the context of sentencing).

¹³⁰ *Id.*

¹³¹ See Mayson, *Dangerous Defendants*, *supra* note 6, at 494-95.

¹³² *Id.*

¹³³ See *Public Safety Assessment: Risk Factors and Formulas*, (2016) <https://www.psapretrial.org/about/factors> (describing the PSA tool and the data base it relies upon); *Public Safety Assessment* (Laura and John Arnold Foundation), <https://www.psapretrial.org/about>. For a description of its application in Kentucky, see JAMES AUSTIN, ET AL. JFA INST., KENTUCKY PRETRIAL RISK ASSESSMENT INSTRUMENT VALIDATION 13 tbl. 11 (2010), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=60b06cf8-f956-d6f1-d07f-a426f0465846&forceDialog=0>; PRETRIAL REFORM IN KENTUCKY, KENTUCKY PRETRIAL SERVICES 2013 <https://university.pretrial.org/viewdocument/pretrial-reform-in-k>.

¹³⁴ Julia Angwin et al., *Machine Bias*, PROPUBLICA, May 23, 2016, <http://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

¹³⁵ See William Dieterich et al., COMPAS RISK SCALES: DEMONSTRATING ACCURACY EQUITY AND PREDICTIVE PARITY 1, 2-3, 8-13 (Technical Report, Northpointe Inc. July 2016), <http://university.pretrial.org/viewdocument/compas-risk-scales-demonstrating-a> (claiming, contrary to ProPublica claims, that COMPAS was race neutral).

biased inputs to produce the risk score.¹³⁶ Such inputs, ranging from socio-economic dependent data such as stability of housing or employment to criminal focused data such as prior arrests, are subject to and the products of racial and economic disparity.¹³⁷ Beyond this, such data may have limited value in assessing the actual risk any given defendant poses pretrial.¹³⁸

Data regarding the number of times a defendant has been arrested may signal career criminality, or it may signal residence in a highly policed neighborhood or racial, gender, or socioeconomic profiling by the police. Nevertheless, actuarial risk assessment tools rely on this arrest data not because it is the best data to assess risk, but because it is the cheapest and most readily available.¹³⁹ In addition, the risk score itself may create a secondary form of bias. Judges may treat the same score differently depending as much on their own assessment of the defendant as the significance of the number generated by the risk assessment tool.¹⁴⁰ To paraphrase *Annie Hall*, a defendant with a risk score of 3 may commit crimes constantly or hardly ever.¹⁴¹

The critique of bias in actuarial risk assessment tools is hardly new or singular. The Department of Justice,¹⁴² scholars,¹⁴³ advocacy organizations and the

¹³⁶ See Mayson, *supra* note 6, at 2228.

¹³⁷ *Id.*

¹³⁸ *Id.* at 2228-29.

¹³⁹ Eaglin, *supra* note 6, at 101.

¹⁴⁰ *Id.* at 102-103.

¹⁴¹ In Woody Allen's film *ANNIE HALL* (1977), the title character and her partner Alfie are asked by their respective therapists if they have sex anymore. Alfie responds "[h]ardly ever, maybe three times a week." Annie responds "[c]onstantly ... three times a week."

¹⁴² See, e.g., Letter from Jonathan Wroblewski, Director of the Office of Policy Legislation to Hon. Patti Saris, Chair of the U.S. Sentencing Comm'n 1-8 (July 29, 2014)(noting that "the use of risk assessment at sentencing raises constitutional questions because of the use of group-based classifications and suspect characteristics in the analytics.") and Eric Holder, United States Attorney General, Remarks at the National Association of Criminal Defense Lawyers 57th Annual Meeting (Aug. 1, 2014), www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-associations-criminal-defense-lawyers-57th (warning that risk assessment tools will "exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system in our society").

¹⁴³ See, e.g., Koepke & Robinson, *supra* note 125; Eaglin, *supra* note 6, at 61; Harcourt, *supra* note 125, at 237 (warning that risk assessment tool's reliance on criminal history "will unquestionably aggravate the already intolerable racial imbalance in our prison population"); Hamilton, *supra* note 125; Anne Milgram et al., *supra* note 125; and Sonja B. Starr, *Sentencing by Numbers*, N.Y. TIMES, Aug. 10, 2014, <https://www.nytimes.com/2014/08/11/opinion/sentencing-by-the-numbers.html>.

media¹⁴⁴ all warned of the possibility of bias in such tools. In the context of sentencing, such assessments are valued for their predictive “accuracy,” not their fairness, creating a perverse incentive to maintain bias so long as it produces “accurate” results.¹⁴⁵ Even this claim of accuracy may be problematic as the presence of a conviction may create a self-fulfilling prophecy with regard to some predicted results. Beyond these critiques, it is questionable that these tools do the job they claim to. Given the type of data they rely on to generate risk scores, their output reflects the historical reality of the criminal justice system as much as a prediction of any given defendant’s future behavior.¹⁴⁶

Reliance on such tools to determine eligibility for pretrial release is problematic on other levels. First, such tools are often used to support the imposition of particular conditions of release. Such a use clearly exceeds the intended purpose of these tools to assess risk alone (as opposed to making a normative suggestion about conditions that might mitigate that risk). Second, such tools may fundamentally miscalculate the value of the defendant to her community. In 1994, Professor Paul Butler made an analogous argument in the context of jury nullification.¹⁴⁷ He noted that a Black community may place greater value on the acquittal of defendants accused of drug possession than on their conviction, even if there was evidence to support the conviction.¹⁴⁸ Professor Butler argued that the devastating effect of the war on drugs on poor Black men and their communities, coupled with the lack of power within those communities to challenge police and prosecutorial policies, rendered nullification a powerful tool to alter the bias effect of such policies and, in the process, to promote and empower community values.¹⁴⁹ Community bail funds have made a similar argument with regard to pretrial detention – noting that communities, not just defendants, benefit when a person makes bail.¹⁵⁰

In the context of actuarial risk assessment tools, a similar argument might be made. An assessment tool might consider a defendant who is likely either to fail to appear or to be arrested for a new offense a poor candidate for pretrial release. Members of her community, however, might recognize the economic and practical challenges of court appearances or the high probability of arrest – regardless of activity – and might prioritize her continued presence in the community over any risk of flight or perceived dangerousness. Or a community may simply value having its members remain within the community more than it fears any risk they may

¹⁴⁴ See, e.g., Angwin, et al., *supra* note 134.

¹⁴⁵ See Eaglin, *supra* note 6, at 96-97.

¹⁴⁶ See Mayson, *supra* note 6, at 2228.

¹⁴⁷ See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 705 (1995).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See National Bailout, <https://nationalbailout.org/>; Bail Fund Network, <https://www.communityjusticeexchange.org/national-bail-fund-network>.

present. In this, the risk assessment tool might mischaracterize the community's concerns and desires and so undermine faith in its fairness or even accuracy.

Whether discussing potential bias in the tool (either as a matter of input or output) or the failure of the tool to accurately account for community values, one underlying concern is ever present – the lack of information available about how the tool functions.¹⁵¹ Lack of transparency about the dataset itself and the algorithm used to analyze the information requires a sort of blind faith, not only on the part of judges who rely on the scores but on the part of the defendants and members of the community who suffer the consequences of such scores. Lack of transparency may also create obstacles to challenging actuarial risk assessment tools. Unlike allegations of discrimination by police, prosecutors or judges – challenging claims to make in and of themselves – the algorithms such tools rely on to generate risk scores are the well-guarded secrets of the corporations who developed and marketed them.¹⁵² Even if the code for the algorithm is publicly available, there is insufficient and competing data on their effect on poor and minority defendants.¹⁵³ This lack of information may make a defendant's burden to demonstrate either bias or inaccuracy difficult to accomplish.¹⁵⁴ In short, defendants may suffer bias as a result of the actuarial risk assessment tool but lack sufficient information to prove such bias to a court or other government agency.¹⁵⁵ Far from infusing the pretrial detention process with certainty and consistency, such tools may therefore promote obscurity and distrust.

Despite this myriad of concerns, jurisdictions across the country continue to adopt such tools. Kentucky was one of the early adopters of an actuarial risk assessment tool,¹⁵⁶ and as the tools have become more widely accepted and more economical, more jurisdictions have followed suit.¹⁵⁷ Kentucky adopted a tool

¹⁵¹ See Susan Turner & Julie Gerlinger, *Risk Assessment and Realignment*, 53 SANTA CLARA L. REV. 1039, 1045 (2013); Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 167 (2014).

¹⁵² *Id.*

¹⁵³ See Heaton, et al., *supra* note 4.

¹⁵⁴ The hurdle of lack of transparency is not confined to risk assessment tools. An analogous challenge exists for defendants seeking to challenge charging decisions. Because such decisions are made entirely within a prosecutor's office, a defendant lacks information regarding charging and dismissal patterns. However, a defendant is not entitled to discovery to mount such a challenge unless he can first demonstrate a discriminatory pattern, which he cannot do unless he has access to discovery. See *United States v. Armstrong*, 517 U.S. 456 (1996).

¹⁵⁵ See Tonry, *supra* note 151.

¹⁵⁶ See KY. REV. STAT. ANN. §431.066(2) (West 2018).

¹⁵⁷ See *FACT SHEET: Launching the Data-Driven Justice Initiative: Disrupting the Cycle of Incarceration* (White House Office of the Press Secretary, June 30, 2016) <http://perma.cc/QKE5-PJVH> (announcing the Obama administration's Data-Driven Justice Initiative to promoted, among other reforms, the use of risk assessment tools as means to identify low-risk defendants who could be release

known as the Public Safety Assessment or PSA.¹⁵⁸ Developed by the Laura & John Arnold Foundation, the PSA relies on a representative dataset to predict the defendant's future dangerousness and flight probability while on pretrial release.¹⁵⁹ Like other tools, the PSA analyzes a set of variables to determine a defendant's risk score.¹⁶⁰ Unlike other tools, it does not require a defendant interview, though it appears in Kentucky such interviews did take place.¹⁶¹ PSA's lack of an interview requirement is not only a significant deviation from other actuarial risk assessment tools, but it is a significant change from former pretrial services assessments that relied on defendant interviews, among other things, to assess risk.¹⁶² According to

while their trials were pending); Shalia Dewan, *Judges Replacing Conjecture with Formula for Bail*, NEW YORK TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html>. The Laura and John Arnold Foundation report that 40 states have adopted their Public Safety Assessment Tool, see Arnold Ventures, *Pretrial Risk Assessment Available to All Interested Jurisdictions; Research Advisory Board Announced*, July 10, 2018, <https://www.arnoldventures.org/newsroom/laura-and-john-arnold-foundation-makes-pretrial-risk-assessment-available-to-all-jurisdictions-announces-expert-panel-to-serve-as-pretrial-research-advisory-board/>.

¹⁵⁸ See Kentucky Court of Justice Virtual Tour of Kentucky Pretrial Services, , <https://courts.ky.gov/courtprograms/pretrialservices/Pages/virtualltour.aspx>; Jason Tashea, *Kentucky Tests New Assessment Tool to Determine Whether to Keep Defendants Behind Bars*, ABA JOURNAL, April 1, 2015, http://www.abajournal.com/magazine/article/kentucky_tests_new_assessment_tool_to_determine_whether_to_keep_defendants.

¹⁵⁹ See *Public Safety Assessment: Risk Factors and Formulas*, *supra* note 133 (describing the PSA tool and the data base it relies upon). For a description of its application in Kentucky, see AUSTIN, ET AL, *supra* note 133 at 13, tbl. 11; PRETRIAL REFORM IN KENTUCKY, *supra* note 133.

¹⁶⁰ See *Public Safety Assessment* (Laura and John Arnold Foundation), *supra* note 133.

¹⁶¹ See Stevenson, *supra* note 6 at 345-46 (describing the function of the PSA). The PSA weights its assessment based on criminal history and prior failures to appear. See AUSTIN, ET AL. *supra* note 133, at 13, tbl. 11. In addition, it considers other factors such as the defendant's employment, housing, and the presence of a reference willing to attend court or co-sign an imposed bond. *Id.* at 9 tbl. 6.

¹⁶² For example, the Indiana Risk Assessment System's Community Supervision Intake Assessment relies on a structured interview. UNIV. OF CINCINNATI, INDIANA RISK ASSESSMENT, 2-3, 2-8 (2010) <https://www.ncsc.org/~media/Microsites/Files/PJCC/Indiana%20Risk%20Assessment%20System%20April%202010.ashx>. The COMPAS system relies on the collection of offender data and the defendant's self-reporting. *COMPAS Risk & Need Assessment System: Selected Questions Posed by Inquiring Agencies*, NORTHPOINTE, INC. (2012),

the PSA's developers, by considering a closed universe of data, the tool is able to predict the defendant's risk, recommend appropriate conditions of release and avoid potential bias.¹⁶³ Like other risk assessment tools, PSA's developers argue that no hearing is necessary given the completeness of the tool's risk assessment.¹⁶⁴

Kentucky, in its adoption of the PSA, did not completely eliminate pretrial hearings and the judicial discretion that accompany them.¹⁶⁵ This remnant of discretion is not without its hazards. Implementation of the pretrial assessment program in Kentucky produced uneven results depending on the judge conducting the hearing.¹⁶⁶ In this sense, even *if* the assessment tool itself was not biased – a contested proposition to be sure – the judge's interpretation of the risk score produced by the tool was inevitably subject to the judge's bias.¹⁶⁷ Concerns over bias embedded in discretionary decisions is hardly new. Before pretrial detention reform movements, sentencing reformers argued that judicial discretion was a minefield of bias and inequity.¹⁶⁸

Yet in discretion also lies semblances of humanity and the opportunity for community values to emerge. The same judge that might prevent the pretrial release of a defendant based on prejudice might also be the judge who recognizes that a rote calculation generated by an algorithm and based on preordained factors might overlook the reality of a defendant and the need for release. In the end, despite Kentucky's adoption of assessment tools, judges within the state continue to exercise broad discretion during pretrial detention hearings.¹⁶⁹

B. No Money Bail

In addition to use of actuarial risk assessment tools, some jurisdictions – most notably California, New York, New Jersey, and Philadelphia – have adopted policies that permit release of particular defendants without a hearing and without

http://www.northpointeinc.com/files/technical_documents/Selected_Compas_Questions_Posed_by_Inquiring_Agencies.pdf

¹⁶³ See *Public Safety Assessment: Risk Factors and Formulas*, *supra* note 133.

¹⁶⁴ *Id.*

¹⁶⁵ For a description of the Kentucky system, see Stevenson, *supra* note 6, at 309.

¹⁶⁶ *Id.* at 309 - 311 and 346-48 (noting that judges in rural and predominately white counties treated risk scores differently than judges in urban, predominately Black counties).

¹⁶⁷ *Id.*

¹⁶⁸ See U.S. Sentencing Commission, *Intra-City Differences in Federal Sentencing Practices, Federal District Judges in 30 Cities, 2005-2017*, Jan. 2019 https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190108_Intra-City-Report.pdf#page=9 (noting that discretion in sentencing has long served to produce unequal results).

¹⁶⁹ See Stevenson, *supra* note 6 at 346-48.

a requirement of monetary bail.¹⁷⁰ Eligibility for such release is a product of the defendant's charge and her assessed risk.¹⁷¹ Defendants charged with relatively low-level offenses such as minor property, drug possession, or non-violent felony offenses with no or little prior criminal history may be released without monetary bail and no or few other conditions of release.¹⁷²

Admittedly, such reforms are imperfect. They may still rely on actuarial risk assessment tools that carry their own bias, and many are limited in scope and dependent entirely on prosecutorial discretion with regard to charge.¹⁷³ A defendant in possession of narcotics, for example, may enjoy pretrial release without bail in Philadelphia if she is charged with possession of narcotics but may not if she is charged with possession with intent to deliver.¹⁷⁴ Likewise, a defendant accused of beating up his girlfriend may enjoy pretrial release without bail if he is charged with a low-level assault without a domestic violence enhancement but may not if he is charged either with a higher level of assault or if the assault is charged as domestic violence.¹⁷⁵ Such decisions regarding charging are entirely at the discretion of the prosecutor, allowing both bias and potential manipulation to come

¹⁷⁰ See Vanessa Romo, *California Becomes the First State to End Cash Bail*, August 28, 2018, NPR, <https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail>; Jesse McKinley and Ashley Southall, *Kalief Browder's Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal.*, NEW YORK TIMES, March 29, 2019, <https://www.nytimes.com/2019/03/29/nyregion/kalief-browder-cash-bail-reform.html>; Lisa W. Foderaro, *New Jersey Alters Its Bail System and Upends Legal Landscape*, NEW YORK TIMES, February 6, 2017, <https://www.nytimes.com/2019/03/29/nyregion/kalief-browder-cash-bail-reform.html>; Melahmed, *supra* note 5; Katie Honan and Ben Chapman, *New York City's Latest Bail Reform Aims to Keep More Teens Out of Jail*, THE WALL STREET JOURNAL, March 28, 2019, <https://www.wsj.com/articles/new-york-citys-latest-bail-reform-aims-to-keep-more-teens-out-of-jail-11559083485>.

¹⁷¹ In Philadelphia for instance, the district attorney, “[Larry] Krasner announced that his office would not seek monetary if the lead charge was among a set of 25 low-level offenses.” Aurelie Ouss and Megan Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138. In New York, the no bail reform would eliminate bail for misdemeanors and for non-violent felonies. See McKinley & Southall, *supra* note 170.

¹⁷² See Ouss & Stevenson, *supra* note 171.

¹⁷³ This is certainly the case in Philadelphia where defendants only enjoy no bail when charged with specified offenses. See Ouss & Stevenson, *supra* note 171.

¹⁷⁴ See Claire Sasko, *DA Krasner Will Drop Cash Bail for Most Non-Violent Crimes*, PHILADELPHIA MAGAZINE, February 21, 2018, <https://www.phillymag.com/news/2018/02/21/krasner-cash-bail-reform/>.

¹⁷⁵ *Id.*

into play even as the district attorney claims that he is abandoning bail policies that discriminate against poor and predominately minority defendants.¹⁷⁶

Despite these imperfections, such reforms are significant for several reasons. First, they signal a willingness by the State to permit release during the pendency of trial. Whether out of a recognition of the deleterious collateral effects of pretrial detention or out of some less progressive ulterior motive or motives, the result has been the same – a defendant who might previously have remained in jail while her case wound its way through court can now be released.¹⁷⁷

As a former public defender, I know first-hand what scholars and community bail reformers assert¹⁷⁸ – a defendant who is not in custody is better able to maintain her personal dignity and identity by remaining in her community. She is better able to fight the charges against her because she is in a better position to assist in her defense outside of jail than inside. Outside she can help track down witnesses or prepare to testify. Outside she can maintain her ties to her family, community, job or school. Outside she can utilize available community resources, including mental health treatment and substance abuse treatment. Outside she is less likely to take a plea deal out of desperation. Outside she is in a better position to see her case dismissed or funneled to an alternative resolution such as a pretrial diversion or deferral of prosecution.¹⁷⁹ Outside she is more likely to receive a favorable plea deal or sentence.

As countless studies over the last forty-plus years have demonstrated, even a seemingly small fine, fee, or bail amount may impose an insurmountable financial burden for a defendant and/or her family.¹⁸⁰ Put plainly, a defendant may linger in jail pretrial even with a small bail amount.¹⁸¹ In such cases, the incentive to resolve the case may be especially high and the bargaining position of the defendant

¹⁷⁶ Recent critique of Philadelphia's bail policies suggest that such manipulation is in fact occurring. See Covert, *supra* note 5.

¹⁷⁷ See Emily Bazelon & Miriam Krinsky, *There's a New Wave of Prosecutors. And They Mean Justice*, N.Y. TIMES, December 11, 2018 <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html#>.

¹⁷⁸ See Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1416-38 (2017); Heaton, et al., *supra* note 4, at 713-14; Simonson, *supra* note 3, at 595.

¹⁷⁹ The prosecution may also have some incentive to offer a person on pretrial release a speedy resolution of the case. Not only does it promote efficiency but demonstrates a type of benevolent prosecutorial discretion – if a defendant works hard and maintains a law-abiding existence, she will receive a benefit from the state that might otherwise seek her conviction.

¹⁸⁰ See BAZELON, *supra* note 18, at 43-50.

¹⁸¹ Kalief Browder, whose suicide ignited New York's bail reform movement, was held in pretrial detention for two years when his bail was set at \$500, an amount his family was unable to post on his behalf. McKinley & Southall, *supra* note 170.

especially low.¹⁸² Seen in this light, these reforms are important because they take an admittedly small step toward levelling the criminal-court playing field for marginalized defendants by granting poor defendants the same advantage of pretrial release enjoyed by wealthier defendants.¹⁸³

Second, early studies suggest that such reforms have not resulted in an increase in either failures to appear or recidivism among defendants who have benefitted from them.¹⁸⁴ A recent study of defendants in Philadelphia who were released pretrial under the district attorney's policy found no significant difference in either failures to appear or new offenses compared to the prior system, which followed a monetary bail schedule for such defendants.¹⁸⁵ Admittedly, the data are limited given the novelty of the policy. Such results, however, are consistent with longitudinal studies conducted by the Vera Institute and the Laura and John Arnold Foundations, which concluded that relatively low risk defendants – those with little to no criminal history, charged with minor offenses, and with community ties – are highly likely to reappear in court and to avoid new charges even with few or no conditions of release.¹⁸⁶

Admittedly such reform efforts in Philadelphia have come under criticism, as community stake holders assert that prosecutors are both erratic and non-transparent in their bail requests – requesting bail in cases that appear to fall within the no-bail policy inconsistently and without explanation or warning.¹⁸⁷ This may signal additional bias within prosecutor's office even as it seeks to implement a progressive policy or a lack of genuineness with regard to the reform. Either is difficult to diagnosis from afar. The fact that such policies are internal to the prosecutor's office (as opposed to the product of a court mandate or legislative reform) render them difficult to enforce. As frustrating as the failure to conform to the policy may be, the continued public critique of the office's policies, however, do demonstrate both a continued commitment towards the eradication of bail within the community the office purports to serve and to hold the elected prosecutor accountable. These commitments can and should be seen as a real sign of progress even as the policy itself may be imperfect in its implementation.

¹⁸² See *Barker v. Wingo*, 407 U.S. 514, 517 (1972); Heaton, et al. *supra* note 4, at 741-69.

¹⁸³ Even in this progress, clearly the power dynamic is still skewed. Policing and prosecutorial discretion still cut against marginal and minority defendants. Police still over patrol poor neighborhoods and prosecutors continue to charge low level offenses against minority defendants as a result of these patrols. See Mayson, *supra* note 6, at 2251-59 (noting this phenomena in the context of risk assessment tools which rely on arrests as indicia of risk).

¹⁸⁴ See Ouss & Stevenson, *supra* note 171.

¹⁸⁵ *Id.*

¹⁸⁶ See KATZIVE, *supra* note 2; THOMAS, *supra* note 2, at 11; Botien, *supra* note 2, at 322-23; Ares, et al., *supra* note 2, at 76-86; *Public Safety Assessment* (Laura and John Arnold Foundation), *supra* note 133.

¹⁸⁷ See Covert, *supra* note 5.

C. 2020 and Pretrial Release

Events of 2020 have highlighted shortcomings in the pretrial detention system – both in the context of monetary bail and in the context of non-monetary conditions of release. The global pandemic of COVID-19 not only has created new risks for pretrial detainees but has called into question calculations of safety and unrealistic compliance requirements for release. George Floyd’s killing and the protests that followed not only have sparked new calls for reform, disaggregation and abolition within the criminal system in general and the pretrial detention system in particular, but have also laid bare judicial reliance on pretrial release conditions as a means to silence dissent and promote a singular conception of safety. These combined occurrences – COVID-19, Floyd’s death, and the social unrest that followed – are not the products of the pretrial detention system (though police killed Floyd as they took him into custody). Nor do they solely affect this system. But they do bring to the surface in an exaggerated sense the flaws that have always existed in the system. This section explores what these crises exposed.

1. COVID-19

In many ways, COVID-19 exposed the flaws in existing pretrial detention systems.¹⁸⁸ As jail administrators witnessed the shutdown of courts in the face of the pandemic, pretrial detention populations, already disproportionately large, burgeoned.¹⁸⁹ With speedy trial checks no longer in place, pretrial detainees lingered in jails, increasing not only the population but the contagion risk.¹⁹⁰ Even before COVID-19 outbreaks in jails and prisons across the nation, advocates urged a reconsideration of pretrial detention policies.¹⁹¹ They noted not only that social distancing was impossible in jail, but that many pretrial detainees were especially vulnerable to the coronavirus and/or were held on accusations of non-violent or minor offenses more because of their poverty than their dangerousness or risk of flight.¹⁹²

¹⁸⁸ See Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 N.W.U. L. REV. ONLINE 59 (2020).

¹⁸⁹ *Id.* at 78.

¹⁹⁰ *Id.*

¹⁹¹ See, e.g. Frank Green, *ACLU, Others, Call for Urgent Prison and Jail Releases in Response to COVID-19*, RICHMOND NEWS, April 9, 2020, https://richmond.com/news/virginia/aclu-others-call-for-urgent-prison-and-jail-releases-in-response-to-covid-19/article_a767265a-a6e0-5ab8-8897-9af68bc41e15.html.

¹⁹² See, e.g., Miranda Bryant, *Coronavirus Spread at Rikers Is a ‘Public Health Disaster’, Says Jail’s Top Doctor*, GUARDIAN (Apr. 1, 2020, 10:36 AM),

Admittedly, different actors reacted differently to these calls for release. Consider the Mobile Jail in Alabama. Early in the pandemic, the jail made a decision to release a third of its inmate population – including many pretrial detainees.¹⁹³ Other responses were less vigorous. Mayor Bill DeBlasio’s office, which promised release of non-violent, older and medically vulnerable inmates as well as those held on small bail holds, was criticized for releasing few inmates even as COVID-19 rates rose at Riker’s Island.¹⁹⁴ And Attorney General William Barr was widely criticized for DOJ’s failure to make good on COVID-19 releases within the federal system.¹⁹⁵

Regardless of their reactions, the reality that COVID-19 exposed was threefold. The first was well documented previously: as judges calculate pretrial detention risks and mitigation, they tend toward detention or toward conditions of release (monetary or otherwise) that are out of reach of those to whom the conditions are applied.¹⁹⁶ In short, current pretrial detention models produce huge jail populations. Second, many pretrial release efforts failed in the midst of COVID-19 because inmates and their communities were unable to comply with required conditions of release. While monetary bail requirements were often

<https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster>.

¹⁹³ See Christopher Hurress, *Amid Covid-19 Pandemic, Mobile Metro Jail Releases a Third of Inmates*, AL.COM, Apr. 10, 2020, <https://www.al.com/news/2020/04/amid-covid-19-pandemic-mobile-metro-jail-releases-a-third-of-inmates.html>. Even with this release, the jail experienced an outbreak, with approximately 5% of its inmate population testing positive a month later. See John Sharp, *Mobile Metro Jail is Now COVID-19 Free Sheriff Says*, AL.COM, June 24, 2020, <https://www.al.com/crime/2020/06/mobile-metro-jail-is-now-covid-19-free-sheriff-says.html>.

¹⁹⁴ See Katie Shepherd, *‘Trapped on Rikers’: Jails and Prisons Face Coronavirus Catastrophe as Officials Slowly Authorize Releases*, Wash. Post, Mar. 23, 2020, <https://www.washingtonpost.com/nation/2020/03/23/coronavirus-rikers-island-releases/>.

¹⁹⁵ See Katie Benner, *Barr Expands Early Release of Inmates at Prisons Seeing More Coronavirus Cases*, N.Y. TIMES (Apr. 3, 2020), <https://www.nytimes.com/2020/04/03/us/politics/barr-coronavirus-prisons-release.html>; Ian MacDougall, *Bill Barr Promised to Release Prisoners Threatened by Coronavirus—Even as the Feds Secretly Made it Harder for Them to Get Out*, PROPUBLICA (May 26, 2020, 5:00 AM), <https://www.propublica.org/article/bill-barr-promised-to-release-prisoners-threatened-by-coronavirus-even-as-the-feds-secretly-made-it-harder-for-them-to-get-out>.

¹⁹⁶ See Sandra G. Mayson, *Detention by Another Name*, 69 DUKE L. J. 1643, 1652 (2020).

waived, conditions of release such as EHM or housing requirements were not. Without resources for these conditions of release, inmates lingered in jail in the midst of the crisis. Finally, pretrial detention models are inflexible or too singular in their construction of safety.¹⁹⁷ In the midst of a global pandemic like COVID-19, traditional calculations of safety that occurred in a pretrial setting failed to consider that a community and a defendant might be safer if allowed to shelter at home as opposed to remaining detained. As discussed above, such calculations of safety rely on rigid assumptions not only about what safety means, but about who should have the opportunity to define a safety.¹⁹⁸

2. George Floyd's Death and the Protests that Followed

Like COVID-19, George Floyd's death and the protests that followed revealed pre-existing global flaws in the criminal system that are informative to thinking about pretrial detention. On a basic level, like the COVID-19 crisis, the crisis following Floyd's death highlighted a need to reconsider concepts of safety within the criminal system. Protestors have taken to the streets across the nation and the globe to question the value of the criminal system defining safety and the wisdom or relying on criminal system actors to enforce those notions of safety.¹⁹⁹ Calls for reformation of the criminal system,²⁰⁰ decriminalization of low-level offenses, and defunding or disaggregation of policing and even abolitionism²⁰¹ are

¹⁹⁷ See Carroll, *supra* note 188.

¹⁹⁸ See also, *Id.* at 82-85 and Jenny E. Carroll, *Safety, Crisis and Criminal Law*, ASU LAW REV. _____ (forthcoming 2020).

¹⁹⁹ See e.g. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, New York Times, July 10, 2020, <https://www.nytimes.com/article/george-floyd-protests-timeline.html>; *Protests Across the Globe After George Floyd's Death*, CNN, June 6, 2020, <https://www.cnn.com/2020/06/06/world/gallery/intl-george-floyd-protests/index.html>.

²⁰⁰ See e.g., Garrett Felber, *Police Reform Hasn't Stopped the Killings Before. It Won't Now Either*. TRUTHOUT, July 5, 2020, <https://truthout.org/articles/police-reform-hasnt-stopped-the-killings-before-it-wont-now-either/>; Karl Racine, *The District's New Racial Justice Future*, WASHINGTON POST, June 1, 2020, <https://www.washingtonpost.com/opinions/2020/06/01/districts-new-racial-justice-future/>.

²⁰¹ See e.g., Amna A. Akbar, *How Defund and Disband Became the Demands*, NYR DAILY, June 15, 2020, <https://www.nybooks.com/daily/2020/06/15/how-defund-and-disband-became-the-demands/>; Jocelyn Simonson, *Power over Policing*, BOSTON REVIEW, June 8, 2020, <http://bostonreview.net/law-justice/jocelyn-simonson-power-over-policing>; Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES, June 12, 2020, <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>.

in many ways challenges to criminal laws' efforts to monopolize definitions of safety and the conditions that promote them in the face of a criminal accusation.

For its part, the criminal system's response to this challenge has been a rejection of any effort to realign definitions of safety and resistance to protestors' acts of dissent. Local police have tear gassed, pepper sprayed and bulletted, beaten and arrested protestors.²⁰² They have done so in riot gear in plain view²⁰³ and through stealth detainment by plainclothes officers in unmarked vans.²⁰⁴ Federal agents have joined in quelling the protests.²⁰⁵ United States Attorneys have indicted²⁰⁶ and courts have imposed bail and pretrial conditions of release –

²⁰² See e.g., Alta Spells, *Portland Police Have Made at Least 500 Arrests During Nightly Protests Since May 29*, CNN, August 21, 2020, <https://www.cnn.com/2020/08/21/us/portland-police-arrests/index.html>; Anita Snow, *AP Tally: Arrests at Widespread Protests Hit 10,000*, APNEWS, June 4, 2020, <https://apnews.com/bb2404f9b13c8b53b94c73f818f6a0b7>; *Video Appears To Show Police Pepper Spraying Yelling Protestor*, CNN, June 2, 2020, <https://www.cnn.com/videos/us/2020/06/02/protester-yell-police-pepper-spray-tapper-lead-vpx.cnn>; Shaila Dewan and Mike Baker, *Facing Protests Over Use of Force, Police Respond with More Force*, N.Y. TIMES, May 31, 2020, <https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html>.

²⁰³ See e.g., *How American Police Gear Up to Respond to Protests*, CNN, Aug. 3, 2020, <https://www.cnn.com/interactive/2020/07/us/police-gear-trnd/index.html>; Michael E. Miller, *'Begging' to be Heard: Young Protestors Implore Police to Acknowledge Them and Their Cause*, WASH. POST, June 4, 2020, https://www.washingtonpost.com/local/were-begging-for-us-to-be-heard-young-protesters-implore-police-to-acknowledge-them-and-their-cause/2020/06/04/19557452-a507-11ea-b473-04905b1af82b_story.html.

²⁰⁴ See e.g., Mihir Zaveri and Michael Gold, *Video of N.Y.P.D. Pulling Protestor into Unmarked Van Draws Criticism*, N.Y. TIMES, July 28, 2020, <https://www.nytimes.com/2020/07/28/nyregion/nypd-protester-van.html>; Katie Shepherd and Mark Berman, *'It was like being preyed upon': Portland Protesters Say Federal Officers in Unmarked Vans are Detaining Them*, WASH. POST, July 17, 2020, <https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/>.

²⁰⁵ See e.g., Katie Rogers, *Protestors Dispersed with Tear Gas so Trump Could Pose at Church*, N.Y. TIMES, June 1, 2020, <https://www.nytimes.com/2020/06/01/us/politics/trump-st-johns-church-bible.html>.

²⁰⁶ See e.g., Press Release from U.S. Attorney's Office, Oregon: *22 Arrested Facing Federal Charges After Weekend Protest at Federal Courthouse in Portland*, July 27, 2020 <https://www.justice.gov/usao-or/pr/22-arrested-facing-federal-charges-after-weekend-protest-federal-courthouse-portland>; Eric Halliday, *the Federal Government's Aggressive Prosecution of Protestors*, LAWFARE, July 13, 2020, <https://www.lawfareblog.com/federal-governments-aggressive->

including, in at least one jurisdiction, the imposition of a pretrial condition of release that prohibits further participation in protest movements.²⁰⁷ While this may appear at first blush to be a novel pretrial condition of release, in reality it is consistent with the imposition of pretrial conditions that restrict the accused's liberty and should trigger substantive due process concerns.

D. *The Takeaway from Years of Reform and a Year of Unrest*

Just as it is hard to understate the impact of the twin crises of 2020 – COVID-19 and social unrest following George Floyd's death – on conceptions of the criminal system and the calculus of pretrial detention, it is hard to understate the positive impact of years of bail reform for poor and marginalized defendants. Despite reform efforts, the events of 2020 make clear that criminal law, in its construction of safety, often miscalculates community needs – particularly the needs of marginalized communities. While this argument can certainly be made broadly, it is also clear that continued emphasis on the twin concerns of future dangerousness and flight risk in the pretrial detention context – despite reform efforts – has created a system more likely to detain the poorest and most marginalized. In addition, conditions of release imposed during the COVID-19 crisis emphasize how difficult it is for marginalized individuals to comply. The absence of support systems or even EHM capability in communities resulted in continued detention for many in the midst of the pandemic despite release orders. They couldn't get out of jail because there was no way for them to comply with the court's release order. This disconnect between the court's calculus of what is necessary to mitigate pretrial release and what is actually available in the community for defendants exacerbates the nation's current swollen pretrial detention population.

It is also worth noting that bail reforms, whether in states like New Jersey, California, New York, or Kentucky or in jurisdictions like Philadelphia or New York City, are imperfect even as they are beneficial. First, pretrial detention

[prosecution-protestors](#); Cyrus Farivar and Olivia Solon, *FBI Trawled Facebook to Arrest Protestors for Inciting Riots, Court Records Show*, NBC NEWS, June 19 2020. This is not uniformly the case, *see e.g.* Keith L. Alexander, Peter Hermann and Michael Laris, *Prosecutors Drop Many Rioting Charges as Dozens Charged in D.C. Protests Appear in Court*, WASH. POST, June 1, 2020, https://www.washingtonpost.com/local/public-safety/prosecutors-drop-many-rioting-charges-as-dozens-charged-in-dc-protests-appear-in-court/2020/06/01/b581d5d2-a38b-11ea-bb20-ebf0921f3bbd_story.html.

²⁰⁷ *See* Rebecca Boone and Jake Bleiberg, *Federal Court to Review 'Protest Bans' in Portland Arrests*, WASH. POST, July 29, 2020, https://www.washingtonpost.com/national/federal-court-to-review-protest-bans-in-portland-arrests/2020/07/29/2e2117ae-d1e1-11ea-826b-cc394d824e35_story.html.

hearings remain truncated affairs.²⁰⁸ In Kentucky, for example, there is little evidence that the use of the actuarial risk assessment tool has rendered the hearing more nuanced or lengthier.²⁰⁹ Judges still rely on the assessment tool to set the baseline and studies suggest that bail hearings remain one- to five-minute events.²¹⁰ This is significant not only because it suggests that major decisions are being made quickly and based on relatively little information, but also because, once a bail decision is made, a party may not request reconsideration of that decision absent evidence of some new circumstance.²¹¹ This restriction has the effect of rendering a pretrial detention decision, once made, nearly irreversible from the defendant's perspective.²¹²

Beyond this, pretrial detention hearings often fail to engage in a meaningful analysis of appropriate conditions of release.²¹³ Instead, such hearings tend to be quick, relatively superficial and formulaic, with courts routinely imposing conditions on defendants regardless of the perceived risks – and often based on the perception of the risk alone with little or no effort to establish the nexus between the risk and the proposed cure.²¹⁴ Such conditions include no new arrests, no use of illegal drugs (and in some jurisdictions alcohol), reporting to a pretrial services officer, and a no-contact order if the allegation involved either a particular location

²⁰⁸ See BAZELON, *supra* note 18, at 37; Heaton, et al, *supra* note 4, at 794.

²⁰⁹ See Stevenson, *supra* note 6, at 309. Data from other jurisdictions are similar.

²¹⁰ *Id.* Data from other jurisdictions is similar. A study in Prince George's County, Maryland, found that pretrial detention decisions were made in a matter of minutes. See PROGRESSIVE MD. & COLOR OF CHANGE, PRINCE GEORGE'S COUNTY: A STUDY OF BAIL 4, 13 (2018), https://static.colorofchange.org/static/v3/pg_report.pdf?akid=14740.3112990.hZo0eM&rd=1&t=8 (describing bail hearings in Prince George's County as quick affairs with “most lasting no more than five minutes, and some concluding within one minute”); Douglas L. Colbert, et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1755 (2002) (observing that pretrial detention hearings in Baltimore City with counsel lasted “on average two minutes and thirty-seven seconds versus one minute and forty-seven seconds without counsel”).

²¹¹ See 18 U.S.C. § 3142(f) (providing a judge may reopen a pretrial detention question only when there is new evidence that is material to the decision of whether detention is appropriate). Courts have found that the statute limits a judge's discretion to reopen bail issues. See, e.g., *United States v. Rodriguez-Adorno*, 606 F. Supp. 2d 232 (D.P.R. 2009); *United States v. Cannon*, 711 F. Supp. 602 (E.D. Va. 2010).

²¹² *Id.* In contrast, from the prosecutor's perspective decisions of release are reversed when defendant's violate conditions of release.

²¹³ See Gold, *supra* note 10, at 519; Samuel Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 446-47 (2016); Colbert, et al., *supra* note 210, at 1755.

²¹⁴ See PROGRESSIVE MD. & COLOR OF CHANGE, *supra* note 210.

(for property crimes) or a particular victim (for crimes against a person).²¹⁵ In cases involving narcotics, random urinalysis is also routinely ordered regardless of whether the defendant has demonstrated any risk for drug use or whether that risk of drug use is related to the articulated interests of bail statutes – preventing flight and ensuring safety.²¹⁶ All such conditions carry consequences – monetary and otherwise – for the defendants and their communities.

Even in jurisdictions that have adopted no bail positions, prosecutors ask for, and defendants often agree to, set conditions of release.²¹⁷ In other words, it is disingenuous to label the pretrial release that occurs in jurisdictions like Philadelphia or New York City for designated offenses “unregulated” release. In fact, such release may still require defendants, for example, to report to pretrial services, maintain no contact orders, submit to drug testing or maintain work or educational commitments.²¹⁸ When asked what happens if a defendant does not agree to these conditions, a defense attorney responded, “I don’t know. No one has ever not signed the release papers.”²¹⁹

All this raises a real and neglected concern in the context of pretrial detention reform. Even as the bail reform movement has succeeded in ensuring pretrial release more frequently for marginalized defendants, it has failed to address the reality that such defendants may still be subject to release conditions that are costly, carry significant collateral consequences, and have been subjected to relatively little scrutiny as to their necessity. Whether talking about statutory or constitutional aspects of bail, the requirement of a link between the risk and the infringement on liberty is constant.²²⁰ A court may only impose a condition of release if it promotes the State’s interest.²²¹ Otherwise such a condition is arbitrary and, by its very nature, excessive.²²² This is true whether discussing money bail or other conditions of release. And yet, non-monetary conditions of release are routinely imposed on defendants prior to trial with little to no consideration of the

²¹⁵ See 18 U.S.C. § 3142(c) (listing possible conditions of release in federal court); Tobolowsky & Quinn, *supra* note 8 (listing state conditions of release).

²¹⁶ *Id.*; Colbert, et al., *supra* note 210, at 1755.

²¹⁷ Interview with Philadelphia Assistant Public Defender, March 7, 2019, notes on file with author.

²¹⁸ *Id.*

²¹⁹ *Id.* I do not want to suggest that this response reveals a lack of zealous advocacy by Ms. Levya or her colleagues, but rather reflects a sentiment that when faced with the prospect of pretrial detention, the lure of release is too great and defendants will, understandably, accept curtailment of their liberty. My own experience in arraignment court as a public defender was much the same. Defendants wanted to be free and would accept conditions that promoted that freedom, even if such conditions ultimately proved impossible to conform with.

²²⁰ See *infra* notes 25-111 and accompanying text.

²²¹ *Id.*

²²² See Gouldin, *supra* note 60.

function they *actually* serve. The next Part considers the effects of such conditions, arguing they are worthy not only of increased scrutiny but constitutional challenge.

III. THE REALITY OF CONDITIONS OF RELEASE

Even as the most recent iteration of bail reform has enjoyed tremendous success in curtailing and, in some states, removing cash bail requirements for some or all offenses, the reality lingers that barring bail may increase the probability that a defendant will be released on stricter conditions or not at all.²²³ Such conditions carry equally if not more devastating collateral consequences for the defendant and her community. Courts impose such conditions with minimal or sometimes no effort to ascertain their necessity or their utility in mitigating perceived risk.²²⁴ Further, the administration of such conditions grants tremendous discretionary power to pretrial services officers, essentially placing the defendant on probation prior to conviction or sentence.²²⁵ Not only is this reality contrary to the Supreme Court's characterization of permissible bail – that linked to the mitigation of legitimate State identified risks – but it perpetuates racial and social inequity in the pretrial system.²²⁶ This Part explores the realities of non-monetary conditions of pretrial release, arguing that these conditions represent a potentially more insidious form of control and future incarceration than the system of bail they replaced. As Michelle Alexander notes, “[f]reedom – even when it’s granted, it turns out – isn’t really free.”²²⁷

A. *The Cost of Conditions of Release*

Modern bail reform movements have focused in no small part on the consequences of pretrial detention on marginalized communities.²²⁸ There is little question that pretrial detention carries tremendous and multifaceted burdens for the

²²³ See BAUGHMAN, *supra* note 77, at 52; Tobolowsky & Quinn, *supra* note 8, at 289 (noting that non-monetary conditions of release were designed to replace bail).

²²⁴ Fiona Doherty has also noted in the is in the context of post-conviction release. See Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 1013 (2013).

²²⁵ See *infra* note 268 and accompanying text.

²²⁶ See *supra* notes 44-59 and accompanying text.

²²⁷ Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES, Nov. 8, 2018, <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html>

²²⁸ See, e.g., Community Justice Exchange, *National Bail Fund Network*, <https://www.communityjusticeexchange.org/national-bail-fund-network>; Simonson, *supra* note 3; Charlotte Alter, *Black Lives Matter Groups are Bailing Black Women Out of Jail for Mother’s Day*, TIME, May 12, 2017; Shawn Carter, *Jay-Z: For Father’s Day, I’m Taking on the Exploitive Bail Industry*, TIME, June 16, 2017.

defendant, her family, and her community.²²⁹ Even a short period of detention can cost a defendant her home, child custody or her job.²³⁰ Detained defendants are more likely to accept plea offers and less able to assist in their defense.²³¹ The bail reform movement recognizes that bail, even in small or bondable amounts, creates a sort of Sophie's choice²³² for marginalized defendants. They can forgo bail and remain detained. Or they – or often more accurately their community, family, or friends – could pay bail by selling valuables, handing over meager savings, or relying on a bond system with its own notoriously predatory nature.²³³ For someone without even \$500 to post for bail or bond, there was no winning choice.

The difficulty, however, is that in the face of a bail reform movement that advocates the wholesale abandonment of monetary bail, courts and legislatures have turned to conditions of release as a substitute for cash bail, particularly for defendants with criminal histories, with past non-compliance with conditions of release (including bail jumping), or charged with non-eligible offenses.²³⁴ Such conditions, however, carry their own set of underexplored consequences.²³⁵ Consider three: monetary costs, social costs and criminogenic effects.

To understand such consequences, it is helpful to think of them in the context of typical release conditions.²³⁶ Some conditions, such as the requirement

²²⁹ See Yang, *supra* note 178, at 1416-38; Heaton, et al., *supra* note 4, at 713-14; Simonson, *supra* note 3, at 595.

²³⁰ *Id.*

²³¹ *Id.*

²³² WILLIAM STYRON, *SOPHIE'S CHOICE* (1979). In the novel, the title character, Sophie, must choose between her two children. A personally catastrophic choice has become known colloquially as a "Sophie's choice."

²³³ See BAZELON, *supra* note 18, at 44-47.

²³⁴ Such conditions are often offered as viable alternatives for monetary bail. See, e.g., Yang, *supra* note 178, at 1480-82; Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344 (2014); Tobolowsky & Quinn, *supra* note 8, at 289.

²³⁵ Yang, *supra* note 229, at 1480-82; Wiseman, *supra* note 234, at 1351 (both noting that little work has been done regarding the practical realities of EHM).

²³⁶ 18 U.S.C. § 31429(c)(B) offers a list of such possible conditions in federal court. In state court, these types of conditions are common, but broader conditions may also exist such as to be good or avoid bad people or bad behavior. See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 303-09 (2016). As Doherty notes enforcement of such vague conditions further already broad pretrial discretion. *Id.* at 308. The National Conference of State Legislatures and the National Association of Pretrial Services Agencies both provide information about conditions of release in state court which includes most commonly the conditions described below. See National Conference of State Legislatures, *Pretrial Release Conditions* <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx> and National Association of Pretrial Services, *Pretrial Release*,

for no new law violations or appearing at all future court appearances, carry fewer additional obligations for a defendant than others. A defendant must already appear at all future proceedings or risk a new arrest for a failure to appear. And like everyone, a defendant risks arrest (and detention) if she commits new law violations.²³⁷

Other conditions, however, carry more onerous obligations and, with them, higher collateral consequences whether the defendant complies or not. A court may order a defendant, for example, to remain employed or in school, to refrain from the use of illegal drugs or alcohol or to report to an assigned pretrial services officer either in person or by phone.²³⁸ A court may order a defendant to submit to random urinalysis or other forms of randomized drug testing.²³⁹ A court may condition a defendant's release on her agreement to be tethered to an electronic ankle bracelet that utilizes GPS to track her movements (often known as electronic home monitoring or EHM).²⁴⁰ Or a court may require her to accept placement at a monitored facility such as a half-way house, mental health or drug treatment center.²⁴¹ A court may order a defendant to submit to work release, where she is permitted to leave the pretrial detention facility – usually the county jail – only to go work or go to school.²⁴² A court, particularly in cases involving known victims, may order a defendant to have no contact with a person or place during the pendency of her case.²⁴³ Finally, a court in Oregon ordered arrested protestors to “not attend any other protests, rallies, assemblies, or public gatherings in the state of Oregon” as a condition of pretrial release.²⁴⁴ This is by no means an exhaustive list of pretrial conditions, but I offer it to give a sense of what conditions the court might impose pretrial.

Each of these conditions, by their very nature, curtail the defendant's liberty to some extent. Some curtailments are minor, others more severe. All carry some form of collateral consequence. At the most extreme end, the conditions imposed by the Oregon court implicate the defendant's First Amendment rights of speech, assembly and to petition the government. Less extreme conditions may create their own burdens. Attendance requirements – whether at the next court appearance, a

<https://napsa.org/eweb/DynamicPage.aspx?Site=napsa&WebCode=Release>.

Release documents are surprisingly hard to locate outside of electronic court dockets. For an example of one such release order available in a court's opinion, see *United States v. Havcevic*, 2015 WL 1821509, at *1-2 (E.D. Mo. 2015).

²³⁷ Though, as will be discussed, for a defendant, a new law violation may be calculated in terms of a new arrest. *See infra* note 277 and accompanying text.

²³⁸ *See* 18 U.S.C. §3142(c)(B).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *See* Order Setting Conditions of Release, Case No. 3:20CR00272-HZ-01, United States District Court for the District of Oregon, Copy on File with Author.

meeting with a pretrial services officer, urine or blood collection for drug testing, court ordered drug or mental health treatment, or a particular workplace or school – may impose burdens on defendants with little access to transportation. Similarly, such attendance requirements may prove disruptive to other obligations. A defendant who waits for several hours in a crowded courtroom for her case to be called may miss work, school or other familial obligations. Defendants who work jobs with inflexible schedules and poor job security may find that absences for court, pretrial services meetings (even those by phone), or drug testing or treatment are rewarded with either a reduced work schedule or termination.

Although some attendance obligations are scheduled in advance and may accommodate a defendant's schedule, even these are not always reliable. Courts – particularly heavily docketed arraignment, motions and status conference courts – are often overscheduled with multiple defendants scheduled for a single appearance time. Add overburdened prosecutors and defenders to the mix and even a scheduled appearance can consume more time than a defendant's counsel may have predicted or a defendant may have allotted. In addition, given the stigma attached to criminalization, a defendant may not want to share with an employer, teacher or daycare provider that she has a pending criminal charge, leaving the impression that the defendant is merely unreliable, negligent or uninterested. Ironically, then, for defendants ordered to remain employed or in school, the additional court-imposed attendance requirements may challenge the maintenance of the employment or education condition.²⁴⁵

Attendance requirements may also carry financial burdens for defendants. In addition to lost work time (and therefore wages), defendants with care obligations for children or elderly or disabled family members may have to hire someone else to provide the care. Few criminal courtrooms are hospitable to young children (if they are allowed at all).²⁴⁶ Fewer still offer daycare, child or elder centers.²⁴⁷ Transportation may also prove costly for defendants and their families.

²⁴⁵ Superficially, attendance requirements may seem a mere necessary burden to a criminal charge. Many court appearances, however, do not require a defendant's participation *per se* and yet the court may require her attendance as a pretrial condition of release. Motions to continue in which the defendant agrees with the need for a continuance, for example, do not benefit from the defendant's attendance. Some courts agree to waive the defendant's presence if the request is submitted in advance, but not all courts do so and not all attorneys communicate this option to the defendant or request to the court in advance, producing a *de facto* required appearance.

²⁴⁶ Consider the advice that the Maryland Court system gives to jurors on their webpage. After listing the dress and decorum expectations in the courtroom, the website states "No courthouse provides child care or elder care. Please, do not bring children or adults needing care with you. If you bring a child or adult needing care with you, you could be sanctioned by the court." <https://mdcourts.gov/juryservice/atcourthouse>.

²⁴⁷ *Id.*

Outside of major metropolitan areas, access to public transportation is limited. What does exist may run on an infrequent schedule, rendering some attendance obligations all-day, or near all-day events.²⁴⁸ Defendants without or unable to use public transportation must rely on private transportation – either their own, borrowed, or rented. Private transportation carries additional costs of gas and parking. Given that many courthouses that also often house pretrial services offices are located in downtown areas away from residential communities and with limited free parking, defendants may find hidden costs to court attendance or in-person pretrial services meetings. Work, school and treatment facilities may enjoy the advantage of proximity to the defendant’s home, though not always.

Attendance requirements are not the only conditions that carry a monetary burden for defendants.²⁴⁹ EHM requires a “hook up” fee, between \$350 and \$450, and a monthly maintenance fee, usually in the range of \$190 to \$450.²⁵⁰ In addition,

²⁴⁸ In urban areas such as New York City, public transportation is not only available, but websites now provide information regarding schedules and routes for court appearances. *See, e.g.*, https://moovitapp.com/index/en/public_transit-Suffolk_County_District_Court-NYCNJ-site_14389606-121. This is contrasted with scheduling and fare information in Etowah County, Alabama <http://etowahcounty.org/fares-and-scheduling/>.

²⁴⁹ Such monetary burdens have repeatedly been upheld by state and federal courts, *see, e.g.*, *Havcevic*, 2015 WL1821509, at *2; *State v. Hardtke*, 352 P.2d 771 (Wash. 2015); *Ex Parte Kevin Eugene Elliott*, 950 S.W.2d 714 (Tex. App. 1997) (each upholding pretrial monitoring fees assessed defendants). Some states have begun to statutorily limit such fees. *See, e.g.*, RCWA 10.10.160 (2018) (limiting cost for pretrial fees in Washington State Court to \$150). For an in depth analysis of electronic surveillance, *see* Kate Weisburd, *Punitive Surveillance: The (Un)Constitutionality of Non-Carceral Punishment*, draft on file with author.

²⁵⁰ While much work has been done on the amount jurisdictions can save by utilizing EHM over pretrial detention, surprisingly little attention has been paid to the cost to the defendant. *See, e.g.*, Yang, *supra* note 229, at 1480-82 (for a summary of studies demonstrating the cost benefit to counties and the state for EHM); John K. Roman, et al., *The Costs and Benefits of Electronic Monitoring for Washington D.C.*, <https://www.urban.org/sites/default/files/alfresco/publication-pdfs/412678-The-Costs-and-Benefits-of-Electronic-Monitoring-for-Washington-D-C-.PDF> (for an example of a single state analysis). For information about costs to defendants for monitoring services, *see* Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants into Debt*, NEW YORK TIMES, July 3, 2019, <https://www.nytimes.com/2019/07/03/magazine/digital-jail-surveillance.html>; NPR, *State-By-State Court Fees*, May 19, 2014, <https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>, or the information provided by one management company regarding payment schedules for EHM Offender Management, <http://offender-management.com/>. Some new bail reform proposals suggest EHM as an alternative to bail and/or detention, but

defendants are required to maintain internet services at their designated location to facilitate tracking.²⁵¹ Fees for EHM services can also vary widely from jurisdiction to jurisdiction, creating further disparity.²⁵² School and treatment programs – assuming an opening at either exists – may carry tuition or enrollment fees. Work release programs often charge a defendant a “housing” fee to remain in the pretrial detention facility when not working. Even pretrial services meetings in which a defendant is permitted to call a service and confirm their location often come with a service fee between two and four dollars per call.²⁵³ Urinalysis can also carry monetary consequences. Some jurisdictions charge pretrial detainees a fee for leaving urine samples at designated locations, analysis of the urine, or both.²⁵⁴

Pretrial conditions can also curtail physical liberty. Defendants on EHM or work release may only travel within court-designated perimeters.²⁵⁵ Even within those perimeters, the presence of an EHM bracelet may carry a stigma that curtails movement.²⁵⁶ No-contact orders also often rely on perimeters for ease of enforcement.²⁵⁷ A defendant therefore will be ordered to remain a particular distance – say 300 feet – from a person or place. Depending on the defendant’s

do not impose the cost of such monitoring on the defendant. *See, e.g.*, ALA. H.B. 150, § 1(c) (Feb. 2020 Legislative Session).

²⁵¹ *See* Erik Markowitz, *Chain Gang 2.0: If You Can’t Afford This Ankle Bracelet, You Get Thrown in Jail*, International Business Times, September 21, 2015, <https://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283>;

²⁵² *See Opportunity Costs: Unequal Justice in Alabama Community Correction Programs*, available at: <https://www.splcenter.org/opportunity-costs-unequal-justice-alabamas-community-corrections-programs>.

²⁵³ Such fees are imposed because call in services are administered by private companies that set fee schedules. For an example of one, *see* EHM Offender Management, <http://offender-management.com/>. Admittedly not all aspects of pretrial services require a fee. Many jurisdictions offer free court date reminder services either through calls, texts or emails. For an example of one in Durham County, *see* www.courtreminders.dconc.gov. Such services are also distinguishable as they are truly services, as opposed to imposed conditions.

²⁵⁴ Fiona Doherty has tracked such costs in the context of probation, though my own contact with pretrial services offices suggest that such costs are the same for pre and post-conviction monitoring. *See* Doherty, *supra* note 236, at 314.

²⁵⁵ *See* 18 U.S.C. §§ 3142(c)(B), 3154(12).

²⁵⁶ *See* Kofman, *supra* note 250 and Markowitz, *supra* note 251. This stigma remains for many defendants even as celebrities have attempted to glamourize their EHM trackers – most notably Lindsey Lohan who commissioned a Chanel cover for her EHM ankle bracelet. *See Lindsey Lohan Asks Chanel to Trick Out Her SCRAM Anklet*, Huff. Post, May 28, 2010, https://www.huffpost.com/entry/lindsay-lohan-asks-chanel_n_593154.

²⁵⁷ *See, e.g.*, IDAHO CRIM. R. 46.2 (requiring no contact orders to set up “distance restrictions”).

living, work or community situation, such perimeters around people or locations can necessitate acquiring a new home, job or neighborhood.

Like their monetary bail counterparts, non-monetary conditions of release can carry collateral effects as well. In addition to burdens that directly affect the defendant – the loss of employment, educational opportunities, home, and money described above – such conditions and the collateral consequences they carry can impact the defendant’s family and community. As with monetary bail, financial and other obligations are often borne not only by the defendant herself, but by those in her immediate and larger community.²⁵⁸ Costs of EHM or a taxi to meet a pretrial services officer may be a communal financial obligation in the sense that the defendant will not be able to use that money for other needs or the obligation will literally be paid by the community.

No-contact orders also carry criminogenic effects.²⁵⁹ A defendant accused of either a property crime or a crime against a person may be ordered to have no contact with either the property or person allegedly victimized.²⁶⁰ Often no-contact orders are surprisingly broad. For example, defendants accused of shoplifting items from a drug store such as CVS may not only be ordered to have no contact with the CVS store alleged in the complaint, but all CVS stores. Likewise, a defendant accused of assaulting a particular person may not only be ordered not to have contact with that person, but, as described above, to remain a designated distance from that person or to avoid contact with other persons related in some way to the alleged victim.²⁶¹ The consequences of violating a no-contact order are two-fold. First, the defendant violates a condition of release. This may result in her incarceration in the immediate case, and in future risk assessments she will score as a higher risk as a result of the violation.²⁶² Second, the defendant violating a no-contact order imposed as a pretrial condition of release may face a new, previously unavailable criminal charge of either trespass²⁶³ or violation of a no-contact order.²⁶⁴ These new charges stems entirely from the existence of the pretrial no-

²⁵⁸ See Alexander, *supra* note 227; Markowitz, *supra* note 251.

²⁵⁹ See, e.g., State v. Anya, 976 P.2d 1251, 1253 (Wash. App. 1999) (finding the willful violation of a pretrial no contact order not only carried consequences for pretrial release, but constituted a separate criminal offense); IDAHO CODE § 18-920 (providing that the violation of a no contact order is a separate criminal offense); Doherty, *supra* note 224, at 1005 (describing this phenomena in the context of post-trial supervision).

²⁶⁰ See 18 U.S.C. § 3142(c)(B).

²⁶¹ See *supra* note 257 and accompanying text.

²⁶² See Heaton, et al., *supra* note 4.

²⁶³ Criminal trespass is defined in most jurisdictions as unlawful entry onto property. Under this common statute, a defendant does not have to intent to commit an additional crime upon entry. Her entry alone is sufficient for conviction. The presence of the no contact order renders the entry unlawful even for public and semi-public spaces such as the CVS in my hypothetical.

²⁶⁴ See, e.g., Anya, 976 P.2d at 1253; IDAHO CODE § 18-920.

contact order and may proceed regardless of whether or not the defendant is convicted of the offense that spawned the no-contact order to begin with.²⁶⁵ In short, the condition of release generates a new crime for which the defendant may be convicted and sentenced.

Beyond these costs, conditions of release, like pretrial detention, may impact the defendant's ability to maintain housing, custody of children or social stability.²⁶⁶ Even seemingly innocuous conditions such as reporting to pretrial services may present significant challenges to marginalized defendants. Yet failure to comply with such conditions, even minor ones, may result in detention and increased risk scores on future assessments.²⁶⁷ For their part, pretrial services officers carry tremendous discretionary power to report violations to the court and to seek remand to custody.²⁶⁸ Even a report of a violation alone can trigger detention.²⁶⁹ Reform movements have rightly bemoaned the bias that is often embedded in judicial discretion, but little attention has been paid to the power of unelected and largely unseen pretrial services officers.²⁷⁰

Pretrial services officers serve as an informational conduit to the court – gathering information about the defendant but also monitoring compliance with conditions of release.²⁷¹ Once a violation is suspected by the officer, he has the discretion to order the defendant's arrest for non-compliance with the conditions of release.²⁷² To be sure, a judge must determine whether or not the reported violation has occurred and whether or not, given the violation, modifications of conditions of release are necessary.²⁷³ But just as short periods of pretrial detention can carry

²⁶⁵ *Id.*

²⁶⁶ *See* Heaton, et al., *supra* note 4.

²⁶⁷ *Id.*

²⁶⁸ *See* 18 U.S.C. § 3152 (allowing for the creation of pretrial services); 18 U.S.C. §3154 (granting power to pretrial services to monitor and report on violations of conditions of release); 8E ADMIN. OFF. OF THE U.S. CTS., GUIDE TO JUDICIARY POLICY, PROBATION AND PRETRIAL SERVICES, SUPERVISION OF FEDERAL OFFENDERS §§ 620.10(a), 620.40.10 & 620.40.20 (noting that while 18 U.S.C. § 3154.12(B) requires immediate reporting of pretrial violations, pretrial services officers may exercise discretion regarding their response and offers a list of possible responses).

²⁶⁹ *See* 18 U.S.C. § 3154(5) & 12(B).

²⁷⁰ Fiona Doherty has called attention to this in the context of post-conviction supervision, *see* Doherty, *supra* note 236, at 324, but there is no corresponding work in the context of pretrial supervision.

²⁷¹ *See* 18 U.S.C. § 3154(5) & 12(B).

²⁷² 18 U.S.C. § 3154.12(B) requires immediate reporting of pretrial violations, but as noted above, pretrial services officers exercise discretion regarding such reporting. *See* 8E ADMIN. OFF. OF THE U.S. CTS., GUIDE TO JUDICIARY POLICY, PROBATION AND PRETRIAL SERVICES, SUPERVISION OF FEDERAL OFFENDERS §§ 620.40.10 & 620.40.20.

²⁷³ 18 U.S.C. § 3148(a).

devastating collateral consequences, so too can brief periods of detention triggered by alleged violations.

For a no new law violations condition, this problem is compounded by the fact that an arrest or a new charge can constitute a violation even if it never leads to a conviction.²⁷⁴ Accordingly, pretrial services offices rely entirely on police discretion to support an allegation of a violation.²⁷⁵ Given the overwhelming data that poor and minority populations are overpoliced and most often arrested, this condition is stacked against marginalized defendants.²⁷⁶ Beyond this, pretrial services officers often fail to take into account whether or not the offense that forms the basis of the “new” charge occurred before or after the matter for which the defendant is released.²⁷⁷ In other words, a preceding charge may trigger a detention hearing for a defendant. Admittedly, a defendant may raise the sequence at the detention hearing or argue that the subsequent arrest or even charge are baseless.²⁷⁸ Regardless of whether or not the judge ultimately finds this argument persuasive, the defendant may still have spent twenty-four hours in jail awaiting a hearing after a pretrial services officer found her to be in violation.²⁷⁹

B. Bail Reform and Conditions of Release

Even as California sat poised to become one of the first states to go to a no money bail system, a position the state ultimately delayed,²⁸⁰ last minute changes to the bill replaced presumptive release with presumptive detention.²⁸¹ The bill, which got rid of the bail schedule whereby defendants were previously assessed a predetermined bail based on the charge and the defendant’s criminal history, sought to individualize release decisions.²⁸² Changes to the bill, however, complicated this calculation. First, and least controversially, under the bill some misdemeanor

²⁷⁴ See 18 U.S.C. § 3154(5) & 12(B); Eaglin, *supra* note 6, at 101; Doherty, *supra* note 236, at 324.

²⁷⁵ *Id.*

²⁷⁶ See Mayson, *Bias In, Bias Out*, *supra* note 6.

²⁷⁷ See Eaglin, *supra* note 6, at 101.

²⁷⁸ 18 U.S.C. § 3148 authorizes a hearing for allegations of violations of pretrial conditions.

²⁷⁹ See 18 U.S.C. § 3148; Doherty, *supra* note 224, at 960.

²⁸⁰ See *California’s Historic Overhaul of Cash Bail is Now on Hold Pending 2020 Referendum*, LA TIMES, Jan. 16, 2019, <https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-story.html>

²⁸¹ See Meagan Flynn, *California Abolishes Money Bail with New Law. But Reformers Think It Creates New Problems*, WASH. POST, Aug. 29, 2018, https://www.washingtonpost.com/news/morning-mix/wp/2018/08/29/california-abolishes-money-bail-with-a-landmark-law-but-some-reformers-think-it-creates-new-problems/?utm_term=.8a41bfcc3c6d.

²⁸² *Id.*

charges trigger pretrial release within twelve hours of arrest.²⁸³ All other defendants must undergo a risk assessment using an algorithmic tool such as those described in Part II.²⁸⁴ Defendants who receive a low or medium risk assessment score could be released either on their own recognizance or subject to conditions.²⁸⁵ Those who receive a high risk assessment score must remain detained until a judge conducts a hearing to assess their level of risk and what conditions, if any, will ameliorate such risks.²⁸⁶

Not only do these changes in California's bail reform statute mirror those adopted in other "no bail" jurisdictions such as New Jersey and New York, but the adoption of the risk assessment tool as a component of such reforms ensures that they will maintain the very bias the reform sought to eradicate.²⁸⁷ Defendants who are members of overpoliced and under-resourced communities will continue to face an increased probability of pretrial detention or release under conditions that may be challenging to meet.

Setting aside the highly problematic realities of risk assessment tools, which others have extensively explored and have been the largest source of challenge to bail reform,²⁸⁸ the shift from release granted because a defendant can post bail toward release on conditions is equally troubling for reasons described above. Put simply, for some defendants these mechanisms of bail reform have replaced one broken system with another – another system that systematically disadvantages poor and marginalized defendants.

C. Going Forward

Each of the collateral consequences of pretrial release carry their own significant concerns, yet little work has been done to challenge their imposition or even to determine if the imposed conditions actually achieve their purported goals. Perhaps such conditions, despite their impact, are seen as more benign or desirable than monetary bail or detention.²⁸⁹ It is important to recognize, however, that such conditions, like bail or detention, create burdens on defendants who have neither been convicted nor sentenced for the alleged crime that is used to justify the imposition of the conditions in the first place. Courts impose conditions following truncated hearings, often relying on checklists or party agreements, with little proof as to whether or not such conditions accomplish their perceived goals of ensuring appearance or reducing whatever danger the defendant's presence in the community might pose.

²⁸³ *Id.*

²⁸⁴ *Id.*; Alexander, *supra* note 227.

²⁸⁵ See Flynn, *supra* note 281.

²⁸⁶ *Id.*

²⁸⁷ See *supra* Part II B.

²⁸⁸ *Id.*

²⁸⁹ See, e.g. Yang, *supra* note 178, at 1480-82; Wiseman, *supra* note 234; Tobolowsky & Quinn, *supra* note 8, at 289.

For their part, scholars, activists and advocates have likewise done little work to draw the link between the perceived risk and the conditions imposed.²⁹⁰ What data is available suggests that intensive pretrial supervision of defendants has done little to reduce recidivism or promote community well-being.²⁹¹ Instead, a Brookings Institute report concluded that reducing the burden of pretrial supervision would promote jobs and child care and reduce stigmatization. “It would be a good first step towards breaking the vicious incarceration cycle.”²⁹²

Going forward, it is clear that more work needs to be done regarding the impact and efficacy of pretrial release conditions. This work needs to focus not only on the text of the statutes and rules that govern these conditions, but also their application. The on-the-ground view of such conditions is one of saddled communities and defendants for whom the promise of release is burdened and sometimes impossible. Some have taken an abolitionist stance with regard to particular conditions.²⁹³ This stance – particularly as it relates to extreme conditions of release – is beneficial but alone it is insufficient. Courts and advocates alike need to take the realities of conditions of release seriously. They need to take seriously the charge that impositions on pretrial liberties must be justified by more than mere fear, but by evidence that a condition is needed and that it actually promotes articulated goals. They need to take seriously the cultural, social and political realities that have rendered the criminal system a tool of racial and economic oppression.

As a result, while this Article acknowledges that some pretrial release conditions curtail more liberty than others, it has not tried to rank or categorize conditions of release in this Article in terms of their acceptability based on the harm they carry. There is a temptation to do so. There is a temptation to conclude that some conditions would be tolerable if they were offered at reduced cost or more discerningly. There is a temptation to conclude that some minor impositions on pretrial liberty could be forgiven if other conditions were barred altogether. There is a temptation to conclude that human psychology suggests that judges in many cases will avoid greater impositions on liberty if they can readily impose lesser impositions on liberty. For each of these reasons there is a temptation to offer up a ranking of pretrial release conditions and to conclude that because some conditions are admittedly less imposing than others that these lesser conditions are acceptable.

²⁹⁰ But see Joseph Darius Jaafari, *Illinois put ankle monitors on thousands. Now it has to figure out who gets tracked and why*. The Marshall Project, July 15, 2019, <https://www.themarshallproject.org/2019/07/15/illinois-puts-ankle-monitors-on-thousands-of-people-now-it-has-to-figure-out-exactly-who-gets-tracked-and-why>.

²⁹¹ See Ouss & Stevenson, *supra* note 171; Jennifer L. Doleac, *Study after Study Shows Ex-Prisoners Would be Better Off Without Intense Supervision*, Brookings Institute, July 2, 2018, <https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision/>.

²⁹² Doleac, *supra* note 291.

²⁹³ See Alexander, *supra* note 227.

To give in to this temptation, however, would be to miss one of the primary claims of this Article – that the imposition of conditions of pretrial release should not be lawless or a due process free for all. Any pretrial deprivation of liberty demands process and justification. No matter how small the imposition – even an agreement to return to court, to maintain employment or to avoid a new arrest – the fact that the imposition occurs at all requires the State and the court to justify the need for the condition in the first place.

Certainly, there are different ways to think about honing pretrial release to its constitutionally defined purpose. Most obviously courts could develop a robust process around pretrial detention – engaging in an examination not only of the risk a defendant presents, but the conditions that might actually mitigate that risk and the community’s assessment of that risk. This could require the traditional procedural rights associated with trial – appointment of counsel, right to discovery, right to call and/or cross examine witnesses, presumption of innocence and even a right to jury. And it should acknowledge that multiple stakeholders – the State represented by the judge and prosecutor, the defendant, the complaining witness and the community – may have distinct calibrations of risk and appropriate conditions, prompting the question of who precisely poses a danger to the community and what is that danger?

Pretrial conditions may also be honed by building flexibility into such conditions. Allow defendants to bring children to court or establish day or night care facilities to accommodate defendants and their families. Allow “off hour” courts to accommodate defendants’ work schedules. Offer multiple satellite pretrial services offices to reduce travel obligations. Send free reminders to defendants regarding upcoming court dates and establish meaningful grace periods for failures to appear. Permit telephonic appearances for some court dates. Allow meaningful reconsideration of imposed conditions. The list goes on and could go on far beyond any permitted word count for a law review submission. Each of these proposals, some of which have been instituted in limited jurisdictions, acknowledge a defendant’s lived experience in crafting the conditions of her pretrial release. They in turn require a court to contemplate the humanity of the defendant – the defendant as a person – as opposed to the defendant as a danger that must be contained and controlled by conditions.

Contemplating the humanity of a defendant in pretrial release conditions also highlights the reality that pretrial detention considerations are one stage in a criminal justice process that is riddled with bias and inequities and is premised on the dehumanization of the people who move within it as defendants. To think of pretrial release conditions as one point on a continuum raises questions akin to those above as to what is a sufficient risk or danger, but also more fundamental questions of what is criminal and what is a “just” response? As jurisdictions experiment with the decriminalization of marijuana possession, the question becomes why not decriminalize all non-violent misdemeanors? Or in the alternative, why not adopt mechanisms beyond a carceral system to address these types of offenses? Why not seek more community input at the outset as to the appropriate resolution of an alleged offense? It is beyond the scope of this Article to explore such proposals in

a way they deserve – they are admittedly complex and raise their own risks of cruel punitiveness and intergenerational burdens. But it would also be remiss not to acknowledge, even in this last paragraph, that pretrial detention considerations and the conditions they generate are symptoms of a system built on the backs of poor and marginalized people – a system that has lost credibility as it has languished too long in cruelty and prejudice.

CONCLUSION

The fight against monetary bail is in no small part a fight against economic discrimination. It was, and is, a fight against the reality in which, to borrow Paul Butler's assessment of the appointed counsel system, poor people lose because they are poor.²⁹⁴ Under a monetary bail system, defendants are detained as much because they cannot pay bail as because they represent a real risk of flight or danger to the community. Studies have demonstrated that money bail does little to mitigate such risks. With or without monetary bail, defendants return to court and reoffend at the same rate. For its part, pretrial detention carries awful consequences for an already marginalized population. In jail, awaiting trial, a defendant may lose her dignity, her home, her family, her job, her educational opportunities and, eventually, her ability or willingness to contest her charges. As others have observed, pretrial detention becomes the means by which the state grinds a guilty plea out of a defendant.

In contrast, release is good. Release permits a defendant to maintain all that she might lose in pretrial detention, and it creates the opportunities to either fight an accusation or to negotiate a disposition from a position of (relative) power. Yet, without money bail, courts increasingly rely on non-monetary conditions of release to guard against risk of flight or danger to the community. Such conditions, like their purely monetary counterparts, carry their own consequences – consequences that fall harder and faster on poor and minority defendants. Such conditions are imposed with an assumption that they will produce the desired mitigation of risk, yet with no data that such conditions accomplish their purported goals.

Pretrial detention has always been a predictive balancing process – with courts weighing the potential risk the defendant poses against the presumption of innocence and the right to be set free. Ask any criminal defendant in any courthouse in America and she will tell you that accusations carry a burden of curtailed liberty no matter who you are or how good your defense might be. For years, courts accepted at face value that defendants with “skin in the game” in the form of bail would return to court and those without would not. Analysis has proved this assumption both false and biased, and the use of monetary bail has receded. In its place, conditions of release have emerged, premised on the same assumption that supported the monetary bail system – some condition must be imposed to ensure appearance and safety. Yet that assumption has not been justified, and courts and

²⁹⁴ Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013).

commentators have overlooked the extent to which such nonmonetary conditions of release place unwarranted burdens on defendants awaiting trial.

For all the good work that has been done to right that balance of pretrial detention and to reduce bias, little work has been done to push back against the untested proposition that pretrial conditions of release serve a desired end. This is a mistake. It is a mistake as a constitutional matter, as the ability of such conditions to promote the State's goals remains unvetted. And it is a mistake as a matter of social policy, as such conditions carry debilitating consequences for marginal defendants and their communities. If we are to be serious about the correcting the devastating impact of pretrial detention, we must in turn be serious about demanding that all conditions of release, monetary or otherwise, be both fair and justified.