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# Disentangling Flight Risk from Dangerousness

Lauryn P. Gouldin

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## Disentangling Flight Risk from Dangerousness

*Lauryn P. Gouldin\**

*There is a growing national consensus about the urgent need to shrink the population of pretrial detainees and to fix our broken money bail system. Even as scholars and reformers are showing renewed interest in pretrial detention and bail, however, they have neglected a fundamental pretrial problem: the conflation (by judges and in statutes) of flight risk and danger. Reformers have offered up an array of proposals and increasingly sophisticated risk assessment tools that promise to improve judicial decision-making, but many of these tools merge flight risk and danger in ways that reinforce problematic legislative and judicial practices.*

*This Article identifies the legal and practical reasons that judges must evaluate flight risk independently of danger. Federal and state constitutions and statutes include detention and bail provisions that require judges to make separate determinations of flight risk and dangerousness. There are also compelling policy arguments for separating flight from danger. First, combining risks may cause judges to overestimate both kinds of risks. Second, forcing separate analyses of pretrial risks may provide judges with much-needed political cover (alleviating pressure to detain). In addition, isolating the two types of risks offers an opportunity to improve judicial accountability and system legitimacy. Finally, the conditions of release that judges employ to mitigate flight risk are different from those that are used to manage danger. Disentangling flight risk from dangerousness will be a critical piece of efforts to improve pretrial decision-making and reduce unnecessary pretrial detention.*

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## INTRODUCTION

On any given day, jails in the United States hold an average of over 450,000 pretrial detainees.<sup>1</sup> There is a growing consensus that reforms are urgently needed to reduce our overreliance on pretrial detention and that our nationwide money bail crisis has reached a “tipping point.”<sup>2</sup> Federal, state, and local officials are increasingly vocal about the deeply flawed structures and policies that have led to a near-doubling of annual jail admissions over the last three decades.<sup>3</sup>

By most accounts, we are now well into what has been called the third generation of bail reform.<sup>4</sup> As with other criminal justice reform efforts, the range of different bail reform efforts percolating around the country is driven by a mix of moral outrage and economic reality.

1. Todd D. Minton and Zhen Zeng, *Jail Inmates at Midyear 2014*, U.S. DEP’T OF JUSTICE at 3 (June 2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf> (indicating that the number of unconvicted jail inmates increased from 453,200 at midyear 2013 to 457,500 at midyear 2014). The United States now leads the world in the total number of individuals detained before trial. Roy Walmsley, World Prison Brief, *Pre-Trial/Remand Prison Population: Trend, United States*, PRISON STUDIES, <http://www.prisonstudies.org/country/united-states-america> (last visited Mar. 2, 2016) (pre-trial population of 453,200 as of 2013).

2. Lisa Foster, Dir., Office for Access to Justice, Remarks at ABA’s 11th Annual Summit on Public Defense (Feb. 6, 2016) (transcript available at <http://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit>) (describing consensus that current bail practices are “deeply troubling”).

3. RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 7, 45 (2015) (stating that jail admissions increased from “six million in 1983 to 11.7 million in 2013”).

4. KRISTIN BECHTEL ET AL., PRETRIAL JUSTICE INSTITUTE, DISPELLING THE MYTHS: WHAT POLICY MAKERS NEED TO KNOW ABOUT PRETRIAL RESEARCH 2 n.1 (2012) (noting that since 2000, there has been an increase in focus on the pretrial portion of the criminal process, referred to as the “third wave” of bail reform—the first wave beginning in the 1960s, the second beginning in the 1980s); Timothy R. Schnacke, Claire M.B. Booker & Michael R. Jones, *The Third Generation of Bail Reform*, DENV. U. L. REV. (Mar. 14, 2011), <http://www.denverlawreview.org/online-articles/2011/3/14/the-third-generation-of-bail-reform.html> (“[J]urisdictions across the country are [implementing], in a wave of legislation, policy changes, and various projects aimed at improving pretrial justice.”).

It is apparent that we cannot afford our bloated, wealth-based pretrial detention system. We also cannot abide it.<sup>5</sup>

Many current reforms attack the ways that bail amounts are set and push for greater reliance on nonfinancial conditions of release. In 2015 and 2016, plaintiffs successfully waged class action challenges to existing money bail systems in a number of jurisdictions.<sup>6</sup> The Department of Justice stated the problem plainly in the first sentence of a Statement of Interest that it filed in the first of those lawsuits: “Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment.”<sup>7</sup> Other reforms focus on who pays bail, including efforts to prohibit commercial bail<sup>8</sup> and increased use of community-supported bail funds.<sup>9</sup>

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5. As United States Attorney General Loretta Lynch explained in a December 2015 speech, “When bail is set unreasonably high, people are behind bars only because they are poor. Not because they’re a danger or a flight risk—only because they are poor.” Loretta Lynch, U.S. Attorney Gen., Remarks at White House Convening on Incarceration and Poverty (Dec. 3, 2015) (transcript available at <http://www.justice.gov/opa/speech/attorney-general-loretta-lynch-delivers-remarks-white-house-convening-incarceration-and>); *see also* Complaint at 7, *Buffin v. City of San Francisco*, No. 15-cv-4959 (N.D. Cal. Oct. 28, 2015) (challenging “wealth-based detention”); *cf.* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1299 (2012) (“[T]he decision to imprison a defendant before trial all too often hinges on wealth and power.”).

6. For a more detailed discussion of these class-action litigation efforts, *see infra* Section I.C.4.

7. Statement of Interest at 1, *Varden v. City of Dayton*, No. 2:15-cv-34 (M.D. Ala. Feb. 3, 2015), <http://www.justice.gov/file/340461/download>. This Statement of Interest has since been cited in bail challenges across the country. *See Foster, supra* note 2.

8. Commercial bail bondsmen or commercial sureties provide bail to defendants for a price and have, over time, become a fixture in American criminal justice. Efforts to reform bail are frequently challenged by lobbyists for these companies. The Open Society Institute is one of a number of groups that advocates for abolition of these for-profit bail enterprises. *See generally* JUSTICE POLICY INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 1–3, 20 (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/pretrial\\_detention\\_and\\_remand\\_to\\_custody.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/pretrial_detention_and_remand_to_custody.pdf) (observing that other countries like Australia, Canada, Finland, Germany, and England do not permit commercial bail).

9. In 2015, the New York City Council recommended that the city allocate \$1.4 million of community funds to pay “bail set at \$2,000 or lower for [indigent] defendants charged with low-level misdemeanors . . . .” Emily Ngo, *NYC Council Speaker Melissa Mark-Viverito Proposes Bail Fund for Indigent Defendants*, NEWSDAY (June 17, 2015), <http://www.newsday.com/news/new-york/melissa-mark-viverito-nyc-council-speaker-proposes-bail-fund-for-indigent-defendants-1.10554795>; *see also* Jocelyn Simonson, *Bail*

Some reforms have come from the legislature; for example, New Jersey made comprehensive changes to its state bail laws in 2014 to shift away from reliance on money bail.<sup>10</sup> Similar legislation is pending in New Mexico and has been proposed in New York.<sup>11</sup>

One key component of many reforms has been the adoption of actuarial-style pretrial risk assessment tools. These tools promise to improve judges' pretrial calculations of the likelihood that a released defendant will either fail to appear for trial ("flight risk")<sup>12</sup> or commit other crimes ("public safety risk" or "dangerousness").<sup>13</sup> By 2015, approximately ten percent of jurisdictions in the United States had adopted some sort of empirically-based risk assessment tool, and that number continues to rise.<sup>14</sup>

All of these reforms work toward either (or both) of two overlapping goals: (i) reducing the population of pretrial detainees overall and/or (ii) helping judges make "smarter" pretrial decisions by better identifying risky defendants.<sup>15</sup> As with past generations of

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*Nullification* (forthcoming 2016) (manuscript at 14–19) (on file with author) (describing the growing phenomenon of community bail funds in detail). *See also infra* Section IV.B (brief discussion of community bail funds).

10. 2014 N.J. Sess. Law Serv. Ch. 31 (2014) (West) (including several new provisions that shift away from reliance on monetary bail); *Public Question Results for 11/04/2014 – General Election, Constitutional Amendment to Allow a Court to Order Pretrial Detention of a Person in a Criminal Case*, N.J. DEP'T OF STATE (Dec. 2, 2014), <http://www.state.nj.us/state/elections/2014-results/2014-official-general-public-question-1.pdf> (amending constitution to eliminate constitutional right to bail and to permit judges to order pretrial detention based on public safety concerns).

11. Alex Goldsmith, *Bail constitutional amendment compromise clears House*, KRQE NEWS 13 (Feb. 15, 2016, 8:05 PM), <http://krqe.com/2016/02/15/bail-constitutional-amendment-compromise-clears-house/>. During his most recent State of the State address, Governor Andrew Cuomo proposed similar reforms for New York. Andrew Cuomo, Governor of N.Y., 2016 State of the State and Budget Address (Jan. 13, 2016), <https://www.ny.gov/programs/2016-state-state-and-budget-address>.

12. *See infra* Section I.A (defining flight risk).

13. *See infra* Section I.B (defining dangerousness).

14. LAURA & JOHN ARNOLD FOUND. [hereinafter Arnold Found.], PUBLIC SAFETY ASSESSMENT, <http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/>; *see also, e.g.*, Press Release, Arnold Found., *Data-driven tool gives Harris County judges new way to assess defendants' pretrial risk level* (May 24, 2016), [http://www.arnoldfoundation.org/data-driven-tool-gives-harris-county-judges-new-way-assess-defendants-pretrial-risk-level/\(identifying-additional-jurisdiction-adopting-risk-assessment-tool\)](http://www.arnoldfoundation.org/data-driven-tool-gives-harris-county-judges-new-way-assess-defendants-pretrial-risk-level/(identifying-additional-jurisdiction-adopting-risk-assessment-tool)).

15. *See, e.g.*, U.S. DEP'T OF JUSTICE, BJA-2014-3874, SMART PRETRIAL DETENTION INITIATIVE FY 2014 COMPETITIVE GRANT ANNOUNCEMENT 6 (2014), <https://www.bja.gov/Funding/14SmartPretrialSol.pdf> (describing federal grant program to research

bail reform, there seems to be general agreement that constraining or improving judicial discretion is a central piece of the pretrial puzzle.<sup>16</sup> Although risk assessment tools have been the subject of criticism,<sup>17</sup> their promises—to make pretrial decision-making less subjective, to improve risk prediction, and to alleviate pressure on judges to err on the side of (over)detention—are understandably appealing.

One key problem with most of the risk assessment tools employed in the federal system and around the country, however, is that they combine flight risk and dangerousness into a single “risk of pretrial failure” score.<sup>18</sup> This surprising oversight fails to address—and inadvertently reinforces—a significant, fundamental, and perennial problem with pretrial judicial decision-making that should be a central focus of bail reform efforts: judges’ muddling of flight risk and dangerousness in the pretrial process.<sup>19</sup>

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and support programs that use risk assessment tools to improve pretrial decision-making; explaining that program goals include “cost savings and public safety enhancements”); Anne Milgram, *Why smart statistics are the key to fighting crime*, TED (Jan. 2014), [http://www.ted.com/talks/anne\\_milgram\\_why\\_smart\\_statistics\\_are\\_the\\_key\\_to\\_fighting\\_crime/transcript?language=en](http://www.ted.com/talks/anne_milgram_why_smart_statistics_are_the_key_to_fighting_crime/transcript?language=en) (explaining that the Arnold Foundation risk assessment research intends to fix “incredible system errors, where we’re incarcerating low-level, nonviolent people and we’re releasing high-risk, dangerous people”).

16. John S. Goldkamp & E. Rely Vilciã, *Judicial Discretion and the Unfinished Agenda of American Bail Reform: Lessons from Philadelphia’s Evidence-Based Judicial Strategy*, in *STUDIES IN LAW, POLITICS, AND SOCIETY: SPECIAL ISSUE NEW PERSPECTIVES ON CRIME AND CRIMINAL JUSTICE* 117 (Austin Sarat ed., vol. 47, 2009) (explaining that bail reform efforts must include “a viable method for addressing the difficult problems of judicial discretion that lie at the core of bail, pretrial release, and detention problems in the United States”); JOHN S. GOLDKAMP & MICHAEL R. GOTTFREDSON, *POLICY GUIDELINES FOR BAIL: AN EXPERIMENT IN COURT REFORM* 14–15 (1985) (“The exercise of discretion by bail judges was of great concern to early critics of the administration of bail in the United States for two related reasons: the questionable purposes bail was seen to serve and the debatable criteria relied on by judges in arriving at their decisions.”); cf. Samuel R. Wiseman, *Fixing Bail*, 84 *GEO. WASH. L. REV.* 417, 455 (2016) [hereinafter Wiseman, *Fixing Bail*] (describing “judicial discretion” as a “significant factor” in the pretrial detention crisis and observing that “when judges’ discretion is more constrained, it appears more defendants are released without a concomitant increase in crime or flight”).

17. See *infra* note 152 and accompanying text.

18. See *infra* Sections I.D.3.

19. This problem has been documented by bail reformers dating to the early twentieth century. GOLDKAMP & GOTTFREDSON, *supra* note 16, at 15 (describing studies dating to 1927 that documented that bail was being used by judges to manage dangerousness (and not merely for the legitimate purpose of ensuring appearance)); Goldkamp & Vilciã, *supra* note 16, at 120–21 (citing Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 *U. PA. L. REV.* 1031, 1038–39 (1954) (describing prior studies that identified that money

This Article asserts that judges must analyze flight risk and dangerousness independently. By extension, the tools that are being developed to aid and guide judicial risk assessment must also provide separate risk measures. This Article marshals constitutional, statutory, and policy-based arguments to illustrate why this disentangling project is integral to reform efforts. Although reformers have begun to focus on this issue,<sup>20</sup> it has not yet been examined by the small but growing group of twenty-first century bail scholars.<sup>21</sup>

The Article proceeds as follows. Part I provides background—briefly explaining the historical role of flight risk in driving pretrial decisions, tracing the changes in state and federal statutes to permit

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bail was being used for incapacitative purposes—to accomplish *sub rosa* the detention of “dangerous” defendants—as a means to ‘break crime waves,’ or, simply, as a method for inflicting punishment as well as to express personal prejudice toward certain defendants). Judges’ tendency to merge flight risk and danger in evaluating pretrial risk continues to be a problem. See Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 549–50 (2012) (explaining that “[m]ost state judges consider dangerousness at a much higher rate than flight risk, though most states claim to consider both factors in release decisions and some even state the flight risk is the primary consideration”); cf. Lauryn P. Gouldin, *When Deference is Dangerous: The Judicial Role in Material-Witness Detentions*, 49 AM. CRIM. L. REV. 1333, 1349–60 (2012) (describing the merger of flight risk and dangerousness as part of the over-detention of material witnesses in the decade after September 11, 2001).

20. As outlined in Section I.D.3, *infra*, there is one pretrial risk assessment tool that separates flight risk from dangerousness. Although the Arnold Foundation advertises that feature, it does not explain why it is essential. ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA 3, <http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf>.

21. For most of the nearly three decades since the Supreme Court’s decision in *United States v. Salerno*, bail and pretrial detention have been neglected in academic literature. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 725–26 (2011) [hereinafter Baradaran, *Innocence*] (describing reduced scholarly attention to bail and pretrial detention issues in recent decades); Samuel R. Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L. J. 121, 123 (2009) [hereinafter Wiseman, *Discrimination*] (observing that “[t]here has been relatively little innovation in the law and scholarship on bail in the twenty years since *Salerno*”). In the last several years, however, there has been a much-needed resurgence of interest in these topics. See Wiseman, *Fixing Bail*, *supra* note 16, at 420 (noting that “[r]ecently, a handful of scholars has rejuvenated the debate, focusing on the continuing problems of the pretrial system and the legal avenues for addressing them left open by *Salerno*.”); Appleman, *supra* note 5, at 1303 (“Although bail and detention was a popular scholarly topic a generation ago, only a few contemporary legal academics have scrutinized the current machinations of pretrial release.”). Even with this renewed interest, there has been too little focus on issues around judicial decision-making in this context. Cf. Wiseman, *Fixing Bail*, *supra* note 16, at 24 (“[L]egal literature, too, has largely focused on the difficulties associated with predicting dangerousness generally, rather than on the decisionmaking [sic] process.”); *id.* at 43 (briefly asserting that “the risks of dangerousness and flight should be separately scored” but not elaborating on justifications for that separation).



some pretrial detention based on dangerousness, and outlining problems with current practices. Part I concludes by analyzing the evolution of pretrial risk measurement from judicial intuition and statutory risk factors to modern actuarial risk assessment tools.

As outlined in Part II, flight risk must be measured and evaluated independently of dangerousness because federal and state laws governing pretrial detention and release frequently require separate consideration of these distinct risks. These legal requirements are the product of both (i) constitutional and statutory limitations on the circumstances in which pretrial detention may be ordered by a judge and (ii) constitutional and statutory provisions governing the imposition of bail or other conditions of release.

Judges must also consider flight risk and dangerousness independently for several policy reasons that are outlined in Part III of the Article. First, combining the risks may cause judges to overestimate both kinds of risks. Second, forcing separate analyses of pretrial risks may provide judges with political cover, alleviating pressure to detain. In addition, isolating flight risk from danger may improve the feedback that judges receive about release decisions—either through data about release outcomes or as embedded in validated risk assessment tools. Finally, courts have a range of readily available conditions of release that can be used to manage pretrial risks, but those conditions mitigate flight and danger in different ways and to varying degrees.

### I. DECONSTRUCTING PRETRIAL DECISION-MAKING

For judges abiding by statutory requirements, the pretrial process turns out to be a blend of art, science, and will. Judges first evaluate factors deemed by the legislature to be relevant to flight risk and danger to gauge the pretrial riskiness of a particular defendant. As outlined in greater detail below, the risk assessment process is evolving from what has traditionally been loosely-guided intuitive judgment to something more scientific and data driven. State and federal statutes generally contain presumptions in favor of unrestricted release for defendants before trial, but if the risks are too high, judges must undertake a second statutory task: developing a plan for managing pretrial risks. There is a third crucial step: judges must have the will

(and perhaps the job security) to make release or detention decisions based on those calculations.<sup>22</sup>

This Section makes clear that the current problem with bail and pretrial detention is a function of the confused mismanagement of flight risk and danger in contemporary pretrial practice. How did we get here? The following subsections briefly explain the history of the relationship between flight risk and bail, describe the evolution of preventive pretrial detention (i.e., pretrial detention to manage danger),<sup>23</sup> and outline how these two pretrial risks—flight and danger—are currently mismanaged and mismeasured.

#### *A. Flight Risk and Bail: Historically*

The need to ensure a defendant's appearance at trial has historically been the principal driver of judicial decisions around bail and pretrial detention.<sup>24</sup> Judges have always been expected to make predictions of a defendant's so-called "flight risk" or risk of nonappearance.<sup>25</sup> Flight risk is properly assigned to defendants who are expected to flee a jurisdiction or to be difficult to locate.<sup>26</sup>

22. See *infra* Section IV.B for a more detailed discussion of how disentangling flight risk and dangerousness might address these political issues.

23. The expression "preventive detention" is used throughout the Article in the traditional sense to refer to detention that is intended to prevent future crimes. It does not include detention that might be intended to "prevent" flight.

24. See *Stack v. Boyle*, 342 U.S. 1, 5 n.3 (1951) ("If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure [sic] the presence of the defendant . . ."); see also *Appleman*, *supra* note 5, at 1335 ("[A]lthough the specific intent of the Framers regarding bail cannot be conclusively determined, all the available evidence points to the fact that pretrial detention, both under the English common law and at the time the Constitution was written, was limited to flight risk."); *GOLDKAMP & GOTTFREDSON*, *supra* note 16, at 51 ("[O]ne aim of [first generation] bail reform was to influence judges to restrict their motives or purposes in bail decisionmaking [sic] to the one viewed as legitimate—guaranteeing the defendant's attendance at required proceedings."). Before the Supreme Court's 1987 decision in *United States v. Salerno*, 481 U.S. 739 (1987), flight risk was the only legitimate (i.e., constitutional) basis for detaining a defendant before trial. *Salerno* is discussed in detail in Section I.B.3, *infra*.

25. These terms—flight risk and nonappearance—are too often used interchangeably in court decisions, in academic literature, and in risk assessment tools. As this author asserts in another work in progress, titled *Defining Flight Risk*, the terms are not truly interchangeable. That project builds on the arguments outlined here: if flight risk is isolated properly from danger, it is easier to undertake the task of defining precisely what flight risk means and how to manage it. Lauryn P. Gouldin, *Defining Flight Risk* (forthcoming 2017).

26. This category of defendants who would be inclined to flee (and who might pose a risk of being successful doing so) is a small category of all non-appearing defendants. With advances

Judges traditionally managed flight risk by setting bail or imposing other conditions of release to secure defendants' future appearance. Bail—the practice of requiring a defendant or his sureties to put up money or property to incentivize the defendant to return to court—has a long pedigree in this country and in England before here.<sup>27</sup> Aside from early English practices, where bail was sometimes set to approximate the debt that a defendant might owe to a victim at the resolution of a case,<sup>28</sup> money bail has traditionally been justified as a means of discouraging flight by enticing released defendants back to court to recover their money or property.<sup>29</sup>

In most states and under federal law, from 1789 to the 1960s, individuals who were arrested for noncapital offenses were entitled to bail.<sup>30</sup> Indeed, this right, generally envisioned as essential to the presumption of innocence, was incorporated into many state constitutions.<sup>31</sup> At the federal level, this right to bail was part of the

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in GPS monitoring and other technology, disappearing has become much more difficult, so this is also a shrinking subcategory of non-appearing defendants. See Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1352–53 (2014) [hereinafter Wiseman, *Detention*] (“Recent, extensive changes in technology, such as the rise of Internet photos and enhanced police communication, have greatly decreased flight incentives, and technologies such as GPS monitoring also allow the police to easily monitor those individuals who still have an incentive to flee.”). The broader category of non-appearing defendants includes a range of more innocuous and preventable conduct that calls for different types and degrees of supervision and management. See Gouldin, *supra* note 25.

27. Wiseman, *Detention*, *supra* note 26, at 1352 (“Since the founding of this country, judges have required individuals to post some form of collateral in order to incentivize them to appear at a trial that they strongly wish to avoid—a process that could ultimately lead to their conviction and imprisonment.”) (citation omitted).

28. See TIMOTHY R. SCHNACKE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 40 (2014).

29. Wiseman, *Detention*, *supra* note 26, at 1352.

30. See June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 531–32 (1983) (explaining that Pennsylvania's constitutional provision which provided a right to bail for all but capital offenses “became the model for almost every state constitution adopted after 1776”).

31. See *id.*; see also Baradaran, *Innocence*, *supra* note 21, at 727–28 (explaining that the presumption of innocence has historically operated in several ways: it “required a legal determination at trial to punish a defendant for a crime,” it was the foundation for the right to bail in noncapital cases, and “it did not allow judges to detain defendants because they were likely to commit a crime while released, or to weigh the evidence against defendants before trial, in deciding whether they should be released”); GOLDKAMP & GOTTFREDSON, *supra* note 16, at 19–20 (describing historical criticism of “pretrial detention . . . as an affront to the notion of presumption of innocence”).

Judiciary Act of 1789.<sup>32</sup> Although this right was not included in the United States Constitution, the Eighth Amendment does state that “[e]xcessive bail shall not be required.”<sup>33</sup> The Supreme Court has given this clause very limited attention<sup>34</sup> and, to date, the excessive bail provision has not provided significant protection for pretrial detainees.<sup>35</sup>

In passing the 1966 Bail Reform Act, Congress significantly narrowed the federal right to bail by empowering courts, at least in certain cases, to deny bail and order defendants to be detained until trial.<sup>36</sup> Until the 1980s, however, a federal judge could only legally order detention (i.e., deny bail) based on flight risk.<sup>37</sup>

### *B. Legitimizing Detention for Dangerousness*

Notwithstanding this history, the one-dimensional task of predicting and managing flight risk has long been complicated by judicial and community concerns about a second, separate risk: the danger that a defendant released before trial poses to public safety.<sup>38</sup> As outlined below, dangerousness eventually came to be viewed by

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32. The Judiciary Act of 1789, 1 STAT. 73. Until 1966, this right to bail was also part of Rule 46(a)(1) of the Federal Rules of Criminal Procedure (drafted in 1944). FED. R. CRIM. P. 46(a)(1) (1944).

33. U.S. CONST. amend. VIII.

34. Wiseman, *Discrimination*, *supra* note 21, at 123. (“There has been relatively little innovation in the law and scholarship on bail since *Salerno* . . .”); *see also* United States v. Salerno, 481 U.S. 739, 752-54 (1987) (citing only two previous cases where the Supreme Court addressed the Excessive Bail Clause (*Carlson v. Landon*, 342 U.S. 524, 72 (1952) and *Stack v. Boyle*, 342 U.S. 1, 5 (1951))).

35. Samuel R. Wiseman makes a very compelling case that detention of non-dangerous defendants is almost always “excessive” as a means of managing flight risk given the ready availability of cheap and effective electronic monitoring. Wiseman, *Detention*, *supra* note 26, at 1392.

36. The 1966 Bail Reform Act included a presumption in favor of release, but if the court could not devise conditions of release that would assure the defendant’s appearance at trial, the court could order a defendant to be detained. 18 U.S.C. §§ 3146–3152 (2012).

37. *Id.* (listing only “the appearance of the person” as a relevant pretrial concern for judges). As other scholars have noted, however, the legislative history for the 1966 Act makes clear that at least some legislators acknowledged that preventive pretrial detention might be justifiable in the future. Thomas E. Scott, *Pretrial Detention Under the Bail Reform Act of 1984: An Empirical Analysis*, 27 AM. CRIM. L. REV. 1, 4 (1989) (citing H.R. REP. NO. 89-1541 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2296). More detail about current bail practices is provided in Sections I.C.3–5, *infra*.

38. This Article principally uses the term “dangerousness” both because it is easy shorthand and because it is a more precise descriptor (than the vague “public safety risk” or some broader risk of reoffending) of the type of risk that most justifies pretrial detention.

state and federal legislatures, and by the Supreme Court, as a legitimate basis for pretrial detention in some cases. This subpart briefly recounts the evolution of that doctrine.

### 1. *Pretextual preventive detention*

Even before dangerousness was deemed a legitimate basis for pretrial detention, judges made decisions about pretrial release and bail with an eye toward the perceived dangerousness of the defendants standing before them. Prior to the adoption of the modern state and federal statutes that explicitly permit some consideration of public safety risks, it was widely acknowledged that judges deliberately set unaffordable bail amounts on pretextual flight risk grounds so that dangerous individuals would be detained until trial.<sup>39</sup>

Beginning in the 1970s and 1980s, Congress and most state legislatures, amended or rewrote bail statutes to adapt to what had been happening at bail hearings for decades. The federal statute, most state statutes, and most state constitutions now permit some detention for dangerousness.<sup>40</sup> These legislative changes clearly responded to the public's increasing fears of criminal activity and, specifically, to reports of high rates of recidivism among those on pretrial release.<sup>41</sup> On the one hand, then, these changes were clearly intended to lead to some increase in preventive pretrial detention.<sup>42</sup>

According to some reformers, however, the goal was not necessarily to increase pretrial detention, but to regulate what judges were already doing. In their view, the new state and federal legislation

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39. Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 813 (2012) (explaining that between 1966 and 1984, "federal courts were taking matters into their own hands, effectively denying bail in cases where they deemed defendants to be dangerous by setting inordinately high bail, albeit on stated grounds of risk of flight."); Goldkamp & Vilciã, *supra* note 16, at 128 (describing the historical problem of the "*sub rosa* use of preventive detention through cash bail").

40. *See infra* Sections III.B.1–2, which review these provisions in more detail; *see also* GOLDKAMP & GOTTFREDSON, *supra* note 16, at 23 (lamenting that second generation bail reform had "modified itself to accommodate preventive detention as a legitimate bail function").

41. *See* S. REP. NO. 98-225, at 3, 6 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185, 3189 (asserting that reform was necessary to "address the alarming problem of crimes committed by persons on release" and to empower courts "to make release decisions" based on "the danger a person may pose to others if released"); *see also* Scott, *supra* note 37, at 6 (describing the studies).

42. *See* Scott, *supra* note 37, at 6.

simply made explicit considerations of dangerousness that had long animated judicial decision-making around bail and pretrial detention.<sup>43</sup> There was some expectation that allowing judges to be transparent about their assessment of defendants' dangerousness would discourage judges from using flight risk as a pretext for danger-based detention decisions. As described by some legislators, the changes introduced to the federal statute were expected to make bail decisions more "honest[]" and protect the integrity of the process.<sup>44</sup>

The following subsection examines the specific statutory changes that introduced dangerousness as a pretrial consideration in some federal cases. These provisions were later upheld by the Supreme Court in *United States v. Salerno*.<sup>45</sup>

## 2. *The Bail Reform Act of 1984*

By permitting federal judges to rely explicitly on the dangerousness of a defendant in making certain pretrial decisions, the federal Bail Reform Act of 1984 followed the lead of a number of similar state statutes.<sup>46</sup> The Act expressly states that the terms of a

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43. See *id.* at 6–7; Michael Harwin, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 ARIZ. L. REV. 1091, 1093–94 (1993).

44. Daniel Richman, *The Story of United States v. Salerno: The Constitutionality of Regulatory Detention*, in CRIMINAL PROCEDURE STORIES: AN IN-DEPTH LOOK AT LEADING CRIMINAL PROCEDURE CASES 413, 419 (Carol S. Steiker ed., 2006) (explaining that part of the rationale for the Bail Reform Act was a desire to bring the statute in line with judicial practices); S. REP. NO. 98-225, at 11 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3194 (explaining that permitting detention for dangerousness "would allow the courts to address the issue of pretrial criminality honestly and effectively").

45. *United States v. Salerno*, 481 U.S. 739 (1987).

46. The District of Columbia Court Reform and Criminal Act of 1970 was one of the first statutes that allowed judges to order defendants detained before trial based on concerns about public safety. District of Columbia Court Reform and Criminal Procedure Act of 1970, PUB. L. NO. 91-358, 84 STAT. 473, 642–43 (1970) (requiring the release of a defendant "unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required or the safety of any other person or the community"); Scott, *supra* note 37, at 4–5. This preventive detention feature of the act was attacked in a series of cases, but was ultimately held constitutional. See *United States v. Edwards*, 430 A.2d 1321, 1342–43 (D.C. 1981) (en banc); *De Veau v. United States*, 454 A.2d 1308 (D.C. 1982) (same), *abrogated by* *Lynch v. United States*, 557 A.2d 580, 581 (D.C. 1989) (en banc). Thirty-four states passed statutes similar to the District of Columbia's before 1984. See Appleman, *supra* note 5, at 1330. For a detailed description of modern state statutes' approaches to factoring dangerousness into pretrial decision-making, see Baradaran & McIntyre, *supra* note 19, at 506–13.

defendant's pretrial release turn on a judicial officer's assessment of both flight risk *and* dangerousness. The statute begins with a direction to the judge that she

shall order the pretrial release of a person on personal recognizance, or upon execution of an unsecured appearance bond . . . unless the judicial officer determines that such release *will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.*<sup>47</sup>

The italicized text illustrates the pairing of the two risks; they are similarly conjoined in multiple other places in the statute.

If the judge believes that a defendant is too great a flight or public safety risk, she may impose conditions of release on the defendant in order to mitigate those risks.<sup>48</sup> The statute is clear that judges must choose “the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community,”<sup>49</sup> but the interplay between flight risk and danger and the connection between these risks and the conditions the judge may impose are not well- articulated.<sup>50</sup>

The most significant and controversial change in the 1984 Act related to its detention provisions. For defendants charged with certain specified categories of very serious offenses, if there were not conditions of release that could effectively mitigate those defendants' dangerousness, judges could order detention.<sup>51</sup> In fact, the Act created a rebuttable presumption in favor of preventive detention for defendants arrested for certain more serious offenses and defendants with certain types of prior convictions.<sup>52</sup>

Although the risk of dangerousness is not clearly defined in the Bail Reform Act, courts have construed it broadly—in part, at the

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47. 18 U.S.C. § 3142(b) (2012) (emphasis added).

48. *Id.* § 3142(c).

49. *Id.* § 3142(c)(1)(B). Many state statutes contain similar language. *See* Wiseman, *Detention*, *supra* note 26, at 1395 n.229 (collecting statutes).

50. For further discussion, *see infra* Section III.D.

51. 18 U.S.C. § 3142(d)(2) (“If the judicial officer determines that [a defendant] may flee or pose a danger to any other person or the community, such judicial officer shall order the detention of such person.”).

52. *Id.* § 3142(e)(2)–(3). These detention provisions and procedures are examined more closely in Section II.B, *infra*.

direction of the Senate Committee on the Judiciary. In passing the 1984 Act, the Committee provided an example of what it viewed as “dangerousness”: “[T]he risk that a defendant will continue to engage in drug trafficking constitutes a danger to the ‘safety of any other person or the community.’”<sup>53</sup> As a result, at least under some interpretations of the federal statute, defendants can be deemed “public safety risks” if they pose a risk of committing any crime on release; the label is not limited to those who may commit violent or dangerous crimes.<sup>54</sup>

### 3. United States v. Salerno

The Supreme Court upheld the constitutionality of some preventive pretrial detention in its 1987 decision *United States v. Salerno*.<sup>55</sup> The *Salerno* Court upheld the Bail Reform Act, against a facial challenge, on the ground that these provisions were “regulatory,” and that they furthered the government’s legitimate interest in the safety of the community.<sup>56</sup>

It is worth emphasizing that *Salerno* does not provide a blanket authorization for preventive pretrial detention.<sup>57</sup> The *Salerno* holding expressly rested on the limits of the statute.<sup>58</sup> In the Court’s view, the liberty interests implicated by pretrial detention were sufficiently protected by “Congress’ careful delineation of the circumstances

53. S. REP. NO. 98-225, at 13 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3196; *see* Kalthous & Meringolo, *supra* note 39, at 806–07; *see also* Wiseman, *Discrimination*, *supra* note 21, at 143 (collecting federal cases that broadly construe “danger” under the Bail Reform Act).

54. Wiseman, *Discrimination*, *supra* note 21, at 143 (citing to cases that broadly interpret “danger” under the Bail Reform Act); *cf.* Appleman, *supra* note 5, at 1339 (criticizing the “imprecision of [this] terminology” in the Bail Reform Act). One appealing feature of the newest pretrial risk assessment tool on the market is that it differentiates between this sort of broad public safety risk and the narrower, more concerning, and more difficult to manage risk of violence. *See* Section I.D.3, *infra*, for more discussion of the PSA-Court assessment tool.

55. 481 U.S. 739 (1987).

56. *Id.* at 746–49; *see also id.* at 747 (“[T]he punitive/regulatory distinction turns on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’” (second and third alterations in original) (citation omitted)).

57. *See* Sandra Mayson, *Dangerous Defendants*, at 7 (on file with author) (explaining that *Salerno* “held that neither substantive due process, procedural due process, nor the Excessive Bail Clause categorically prohibits preventive detention”).

58. *Salerno*, 481 U.S. at 755 (“In our society liberty is the norm, and detention . . . without trial is the carefully limited exception.”).



under which detention [is] permitted.”<sup>59</sup> As the Court explained, “[t]he Act operates only on individuals who have been arrested for a specific category of extremely serious offenses” and it rests on specific legislative findings that “individuals [arrested for those crimes] are far more likely to be responsible for dangerous acts in the community after arrest.”<sup>60</sup>

The Court also identified several other safeguards to a defendant’s liberty interests: to detain a defendant, the Act requires probable cause that the defendant committed the crime, and it states that the government must prove its case to detain for dangerousness by clear and convincing evidence that the individual poses a risk to public safety.<sup>61</sup> In addition, the Court cited the fact that the Act requires the judicial officer to make written findings of fact and a statement of reasons to detain and grants immediate appellate review.<sup>62</sup>

### *C. Mismanaging Flight and Danger*

Once judges evaluate the risks posed by a particular defendant, they have tiers of risk-management options they can employ. As outlined briefly below, mismanagement of flight risk and dangerousness occurs at every step, whether defendants are released or detained. The following subsections detail some of the specific ways judges mismanage pretrial risks, including: releasing too few defendants on their own recognizance; imposing excessive and counterproductive nonfinancial conditions on defendants who are released; imposing overly burdensome financial conditions on defendants who are released; detaining too many low-risk individuals who are simply too poor to afford their bail; and, relatedly, using unaffordable money bail pretextually to ensure the detention of defendants perceived as dangerous.

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59. *Id.* at 751. The *Salerno* Court’s view of the meaning of “excessiveness”—and its relationship to the purposes articulated by the government—is examined in more detail in Section II.A, *infra*.

60. *Id.* at 750.

61. *Id.* at 751–52.

62. *Id.* at 752.

*1. Neglect of release on recognizance*

Defendants who pose low risks of flight and danger should be released on their own recognizance (i.e., without any court-imposed restrictions).<sup>63</sup> It is essential to present this as the first inquiry—as many statutes do—because release protects the presumption of innocence.<sup>64</sup> Most statutes are structured in this way to preserve the idea that ordering pretrial detention is a last resort.

Over the last several decades there has been a significant reduction in the number of defendants who are released on recognizance.<sup>65</sup> That drop is explained by increases in the imposition of bail and other conditions of release and in pretrial detention, both of which are examined more closely in the following subsections.

*2. Counterproductive use of nonfinancial conditions of release*

Defendants who pose risks of flight and/or danger that make them too risky to be released on recognizance may still be released with a range of possible conditions imposed on them.<sup>66</sup> Unfortunately, however, statutes give judges almost no direction about which conditions of release effectively manage which kinds of risk.<sup>67</sup>

So-called “bail” statutes include a number of nonfinancial conditions of release (examined in this Section) that can be imposed in lieu of or in addition to bail or bonds (examined in the next Section). Typical nonfinancial conditions include requiring a defendant to: remain in the custody of a third party; seek or maintain employment or education; refrain from associating with particular

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63. See SCHNACKE, *supra* note 28, at 10–17 (explaining that this is not a zero risk requirement).

64. Cf. Baradaran, *Innocence*, *supra* note 21, at 730–31 (elaborating on historical recognition of the link between general right to bail and fundamental presumption of innocence); Wiseman, *Fixing Bail*, *supra* note 16, at 426 (“Despite legislative treatment of pretrial release as a default, and requirements that judges make certain findings when departing from the default, pretrial detention rates are high and have risen steadily . . .”).

65. SUBRAMANIAN, *supra* note 3, at 29 (explaining that in the two decades from 1990 to 2009, the ROR rate dropped significantly; “in 2009 (the latest year for which data are available), those released on their own recognizance (also referred to as ROR) made up only 23 percent of all felony defendants released pretrial”).

66. See, e.g., 18 U.S.C. § 3142(c)(1)(B) (2012). These conditions of release are examined in more detail in Section IV.D, *infra*.

67. See *infra* Section IV.D.

people; abide by restrictions on travel and housing; comply with curfews or restrictions on living arrangements; refrain from excessive alcohol use; avoid all drug use; not possess weapons; report regularly to supervising authorities; and undergo medical, psychiatric and/or substance abuse treatment.<sup>68</sup> Judges are not limited to these conditions; most statutes permit them to craft other appropriate conditions of release.<sup>69</sup>

Studies raise real questions about how well judges tailor conditions of release to the risks they identify. Although unaffordable bail and overuse of pretrial detention get more attention from scholars and reformers,<sup>70</sup> there are also reasons to be concerned about overloading defendants with expensive and counterproductive conditions of release. As Marie VanNostrand has explained:

Despite the appealing logic of involving low-risk individuals in intensive programming to prevent them from graduating to more serious behavior, numerous studies show that certain programs may actually worsen their outcomes.<sup>71</sup>

In a recent article analyzing probation conditions, Fiona Doherty explains why this might be: “[T]he expectations set by many standard conditions fall differently on those who are poor and least able to make their experiences visible.”<sup>72</sup> Doherty describes in detail how some standard conditions operate differently on poor defendants:

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68. 18 U.S.C. § 3142(c)(1)(B) (2012) (identifying conditions which may be imposed by the court to assure defendant’s appearance at trial and the safety of the community).

69. *See, e.g., id.* § 3142(c)(1)(B)(xiv) (stating the court may require the defendant to “satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.”).

70. *Cf.* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 344 (2016) (explaining that probation gets too little scrutiny from scholars who focus instead on incarceration because of probation’s “outdated reputation as a progressive alternative to incarceration”); *see also id.* (“[T]he hope that probation might solve the problems of mass incarceration has led policymakers to glide over the problems created by probation itself.”).

71. *See* Marie VanNostrand, Presentation at the California Realignment Conference: *Using Evidence to Advance Effective Justice Realignment Pretrial* 5 (Sept. 21, 2011), [http://libcloud.s3.amazonaws.com/211/7e/f/247/panel\\_1.1\\_vannostrand\\_impacting\\_pretrial\\_jail\\_populations\\_092111\\_2.pdf](http://libcloud.s3.amazonaws.com/211/7e/f/247/panel_1.1_vannostrand_impacting_pretrial_jail_populations_092111_2.pdf).

72. Doherty, *supra* note 70, at 345; *see also id.* at 349 (observing that “people are poor because of long-standing factors like educational background, family circumstances, and lack of stable work history”).

The requirement to report as directed, for example, can be disproportionately difficult for poor people, as can the requirement to attend fixed treatment appointments. People with low paying jobs are less likely to have flexibility in their work schedules. Missing work makes them at risk of losing their jobs. They lose money if they lose work hours. If they have children, they may struggle to pay for a babysitter. For the poorest probationers, of whom there are many, finding reliable and affordable transportation to the probation office or to a treatment program can be an insurmountable hurdle.<sup>73</sup>

Doherty also notes that, in contrast to defendants with more resources, poor defendants will have less power to object to the manner in which their compliance with these conditions is enforced.<sup>74</sup> These probation-focused arguments have equal purchase for poor defendants facing similar conditions of pretrial release.

In some cases, judges craft alternative conditions of release that are difficult to justify in terms of managing either flight risk or dangerousness. In a 2012 op-ed, Dan Markel and Eric Miller highlighted some particularly egregious examples, including cases where judges ordered defendants on pretrial release to write book reports or to take a spouse bowling.<sup>75</sup> In addition to violating *Salerno*'s definition of "excessiveness" and inviting obvious policy objections, imposing unnecessary supervision obligations or other conditions violates most bail statutes, which direct judges to utilize the least restrictive condition or combination of conditions of release that will prevent flight and protect public safety.<sup>76</sup>

### *3. Overreliance on money bail to secure release*

The conditions most often used are financial conditions of release, which are often referred to as different forms of "money bail."<sup>77</sup> Money bail is particularly problematic because it frequently leads to

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73. *Id.* at 350.

74. *Id.* at 345.

75. Dan Markel & Eric J. Miller, Opinion, *Bowling, as Bail Condition*, N.Y. TIMES (July 13, 2012), [http://www.nytimes.com/2012/07/14/opinion/not-yet-tried-but-sentenced-to-red-lobster.html?\\_r=0](http://www.nytimes.com/2012/07/14/opinion/not-yet-tried-but-sentenced-to-red-lobster.html?_r=0).

76. *See, e.g.*, 18 U.S.C. § 3142(c)(1)(B) (2012).

77. Timothy R. Schnacke, former Executive Director of the Pretrial Justice Institute has written in some detail about the history of the term "bail" and the problems with our modern association of the term "bail" with money. *See* SCHNACKE, *supra* note 28, at 21–35.

detention instead of securing release. The detention-related critiques of money bail are outlined in the subsections that follow. As outlined here, even for defendants who are able to pay for their release, the type and/or amount of bail imposed can be excessive.

Money bail can take a range of different forms. Sometimes courts impose unsecured appearance bonds, where a defendant is released without any up-front payment but agrees to pay a set amount of money if he or she fails to show up for court.<sup>78</sup> If a friend or family member makes this promise it is called an unsecured surety bond.<sup>79</sup> These underutilized conditions impose financial penalties for failing to return to court but do not require prepayment for release. More frequently, however, courts impose more traditional forms of money bail: requiring defendants to pay some money upfront or to find a third party (surety) to do so.<sup>80</sup>

Even for defendants who are able to make bail and are released pretrial, there are important problems with the system. There is a dearth of evidence that money bail is an effective or necessary financial

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78. The definitions supplied here and in note 80, *infra*, are drawn from Schnacke's helpful article, *see id.*, and from a summary and chart created by the Justice Policy Institute that illustrates the range of possible financial conditions that may be imposed. *See* JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 7–9 (Sept. 2012).

79. Baradaran, *Innocence*, *supra* note 21, at 733 (explaining the perceived role of the surety as a guarantor of the defendant's presence: "Because the defendant, presumably, would not want to punish his sureties he would not flee, and because the sureties would not want to pay a fine, they would make sure the defendant appeared in court.").

80. These arrangements can take a number of different forms that are given different names. For shorthand in this Article and to contrast them to the far less problematic unsecured bond conditions just discussed, I refer to these prepaid bail arrangements as "money bail." Sometimes defendants will be released if they post a partially secured appearance or surety bond (this is also called a deposit bond), which means that they post a percentage of the total bail amount (often ten percent) and agree to pay the remainder if they fail to appear. Defendants may also be released if they post a commercial bond and the bail bondsman posts the full amount to the court. *See* SCHNACKE, *supra* note 28, at 2–3. Some defendants will be required to post the entire amount in cash; some will be permitted to use credit cards; others may post collateral (by providing the deed or title to a house or car or other property, for example). The use of these different forms of bail and bonds will vary according to the jurisdiction and by judge. *See id.* at 3–4.

Bail or bond amounts that are posted to the court are typically refunded when the defendant appears as required. (There may, however, be court fees that are imposed as part of these transactions.) A defendant who uses a commercial bail bondsman typically pays at least ten percent of the total bail amount as a nonrefundable fee to the bondsman.

incentive, particularly given the alternatives that are available.<sup>81</sup> To justify money bail, studies would need to demonstrate that bail is a more effective financial incentive than the unsecured bond provisions described above (or than other non-financial alternatives). None have done so.<sup>82</sup>

Defendants who are able to somehow raise money for their bail may face excessive financial hardships. Because bail is generally not calibrated based on a defendant's ability to pay, "indigent defendants and their families" who are able to scrape together the funds for release may be forced "to spend money that otherwise would have covered basic necessities."<sup>83</sup> Additionally, in many cases where defendants are able to gather the resources for their bail, judges use this to challenge their eligibility for court-appointed counsel.<sup>84</sup> In other cases where defendants' incomes exceed those thresholds, using financial resources to pay bail means having fewer resources to devote to their legal defense.

#### *4. Detention for poverty*

The preceding subsections addressed problems relating to defendants who are released. Of course, not all defendants are released before trial. There are two principal means by which defendants wind

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81. There is surprisingly no real data that suggests that money bail is an effective flight risk management tool. *See* SCHNACKE, *supra* note 28, at 10–17.

82. *Id.* at 91–92.

83. Wiseman, *Detention*, *supra* note 26, at 1360.

84. States generally fall into one of three categories for how they consider defendants' ability to post bond in determining indigency: (1) ability to post bond creates a rebuttable presumption of nonindigency, (2) ability to post bond is a factor in determining indigency, (3) ability to post bond is not a consideration in determining indigency. Allison D. Kuhns, *If You Cannot Afford an Attorney, Will One Be Appointed for You?: How (Some) States Force Criminal Defendants To Choose Between Posting Bond and Getting a Court-Appointed Attorney*, 97 IOWA L. REV. 1787, 1799–1800 (2012). "[E]ven in states that appear to have a multifactor test, a defendant's posting of bond is frequently abused in the indigency determination." *Id.* at 1804. Additionally, "there is evidence that even in [states where a defendant's ability to post bond is not a factor in determining his or her indigency] some courts use bond posting as a factor in determining indigency." *Id.* at 1805. The practice of challenging defendants' eligibility for court-appointed counsel based on their ability to post bail runs counter to ABA guidance. N.Y. STATE OFFICE OF INDIGENT LEGAL SERVS., CRITERIA AND PROCEDURES FOR DETERMINING ASSIGNED COUNSEL ELIGIBILITY 25 (2016) ("The American Bar Association (ABA) has stated strongly and succinctly that '[c]ounsel should not be denied . . . because bond has been or can be posted.'" (quoting another source)).

up being detained before trial: (1) a judge may deny bail and order the defendant to be detained until trial (also known as remanding the defendant to custody) or (2) a judge may set bail at a sum that the defendant cannot pay.<sup>85</sup>

First, depending on the jurisdiction's pretrial detention statute, the judge may deny bail and order detention based on (i) the risk that the person will not appear for trial ("flight risk") or, in some cases, (ii) the person's risk to public safety ("dangerousness"). Federal and most state statutes are generally phrased to authorize detention if a judge finds that there are no conditions of release that can mitigate these risks.<sup>86</sup> According to the Vera Institute of Justice, this direct route is the path to pretrial detention for only about one out of every ten pretrial detainees in state and local jails.<sup>87</sup>

The other nine out of ten pretrial detainees identified in the Vera report follow a second, more indirect path to pretrial detention.<sup>88</sup> If a judge does not order a defendant to be remanded, the judge may impose conditions of release (including financial conditions, like bail).<sup>89</sup> If a defendant is unable to satisfy those conditions—most frequently, if a defendant cannot afford her bail—she will be detained.<sup>90</sup>

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85. Defendants may also end up in custody if they fail to abide by other conditions of release.

86. As explained in more detail in Sections II.A and II.B, "dangerousness" is only a permissible basis for ordering detention in certain types of cases. For certain categories of offenses, federal and state statutes create presumptions of dangerousness. 18 U.S.C. §§ 3142 (e)(2)–(3), (f)(1) (2012); *see also infra* notes 166–186 and accompanying text for more detailed discussion. For similar state provisions, see N.C. GEN. STAT. § 15A-533(d), (e) (2015); VA. CODE ANN. § 19.2-120(B), (C) (West 2015); OKLA. STAT. tit. 22, § 1101(D) (2011).

87. *See* SUBRAMANIAN ET AL., *supra* note 3, at 32.

88. *Id.* (citing Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, U.S. DEP'T OF JUSTICE (Dec. 2013), <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>) ("[Thirty-eight] percent of felony defendants will spend the entirety of their pretrial periods in jail[,] but within that population, "only one in ten of these defendants is detained because he or she is denied bail. The rest simply cannot afford the bail amount the judge sets").

89. *See supra* Section I.C.3.

90. Simonson, *supra* note 9, at 3 (explaining that bail for indigent defendants is "the ballgame"; if they cannot afford bail, defendants suffer myriad costs of pretrial detention). Practitioners also report cases of defendants whose families might be able to pay bail but elect not to do so because judges warn (or threaten) that it will jeopardize their access to court-appointed counsel. *See* Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 264 (2015) ("On recent trips to Tennessee, Alabama, and Missouri, for example, . . . I saw judges routinely inform jailed defendants that they would refuse to give them a court-appointed lawyer if their families were able to pay a bond to have them released from jail.").

Judicial motives for setting unaffordable bail are not always clear and that opacity is increased when flight risk and dangerousness are considered together. There are, however, several possible motives. The first explanation, which some courts have accepted as reasonable, is that judges have simply set a price for flight risk. In theory, if we consider bail in isolation from other conditions of release, when a judge determines that a defendant's flight risk mandates a particular bail figure and the defendant cannot afford that price, detention is warranted.<sup>91</sup> In practice, however, money bail is not an isolated or singular option. Judges have a range of additional conditions of release they may impose instead of money bail or in addition to more modest or affordable money bail amounts to try to manage flight risk. Given these other options, judges' overreliance on monetary bail is legally indefensible.<sup>92</sup>

There are other possible explanations. Unaffordable bail may also result from judges' blind reliance on bail schedules that set bail amounts according to offenses and do not adjust based on defendants' resources. It may also be the product of neglect, ignorance, or overtaxed judges. These explanations do not, of course, resolve the underlying constitutional and statutory problems.

The negative outcomes for defendants who are jailed before trial go well beyond the custody itself.<sup>93</sup> For those detained, even short jail stays jeopardize employment or housing and can create risks that parents will lose custody of their children.<sup>94</sup> Pretrial detention alters

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91. See Michael S. Woodruff, Note, *The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation*, 66 RUTGERS L. REV. 241, 244 (2013) (explaining that courts have held that unaffordable bail is not necessarily "excessive," so long as the figure set can be justified by the risk of flight) (collecting federal circuit cases); see also Wiseman, *Discrimination*, *supra* note 21, at 140, 140 n.104 (explaining that although courts are not required to "set bail at an amount that defendants can actually afford," at least two circuits "have held that if the defendant protests that the trial court has set bail higher than he can pay, the trial court must provide a reasoned explanation for its arrival at the disputed figure") (collecting cases).

92. The constitutional and statutory arguments are outlined in detail in Part II, *infra*.

93. The nature of the jail experience should not be minimized, of course. Jails are known to be less well-regulated, higher-risk facilities than prisons. See Appleman, *supra* note 5, at 1302 (describing the country's "rotting jail cells of impoverished defendants—still innocent before proven guilty" as "the Shadowlands of Justice"); see also David Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 419 (2009).

94. See SUBRAMANIAN ET AL., *supra* note 3, at 18, 22.



legal outcomes for defendants in troubling ways, too.<sup>95</sup> Those who are detained before trial are more likely to be convicted and to serve longer sentences than defendants with comparable risk levels who are released before trial.<sup>96</sup> Not surprisingly, pretrial detainees—even those who claim innocence—feel heightened pressure to plead guilty.<sup>97</sup>

Money bail's practical role as a path to detention for the poor is well documented and it is not a twenty-first century revelation. When President Lyndon Johnson signed the first Bail Reform Act into law in 1966, he was optimistic that the statute would fix a money bail system that he described as “archaic and cruel.”<sup>98</sup> Johnson

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95. See Wiseman, *Detention*, *supra* note 26, at 1353–58 (describing the burdens of pretrial detention in detail).

96. ARNOLD FOUND., DEVELOPING A NATIONAL MODEL FOR PRETRIAL RISK ASSESSMENT 5 (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf) [hereinafter ARNOLD FOUND., RESEARCH SUMMARY]; see also SUBRAMANIAN ET AL., *supra* note 3, at 14 (“While results varied by length of detention and risk level, in virtually every category, those detained were more likely to be rearrested before trial, to receive a sentence of imprisonment, to be given a longer term of imprisonment, and to recidivate after sentence completion.”).

97. See Paul Heaton, Sandra Mayson, and Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. (forthcoming 2017); Will Dobbie, Jacob Goldin, Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, NBER Working Paper No. 22511 (August 2016); Mary T. Phillips, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY 115 (2012), <http://issuu.com/csdesignworks/docs/decadebailresearch12?e=2550004/5775378> (“The pressure on a jailed defendant to plead guilty seems a particularly compelling explanation for how detention could lead to a greater likelihood of conviction. A defendant who is facing a non-custodial sentence can be released immediately by pleading guilty, whereas holding out for acquittal may mean spending many more days, weeks, or months behind bars. Moreover, prosecutors may be less willing to offer postarrestment plea bargains when they already have the leverage of detention to encourage a guilty plea—resulting in conviction to more severe charges merely because the defendant could not make bail.”); VERA INST. OF JUST., LOS ANGELES COUNTY JAIL OVERCROWDING REDUCTION PROJECT 10 (2011), [http://www.vera.org/sites/default/files/resources/downloads/LA\\_County\\_Jail\\_Overcrowding\\_Reduction\\_Report.pdf](http://www.vera.org/sites/default/files/resources/downloads/LA_County_Jail_Overcrowding_Reduction_Report.pdf) (“[S]ome . . . [in law enforcement] acknowledged that defendants in custody have a greater incentive to plead than those who are released pretrial, and that this pressure may serve the purpose of settling cases more quickly.”); see also Karakatsanis, *supra* note 90, at 264 (describing watching “hundreds of defendants in minor misdemeanor cases plead guilty without a lawyer just so that they could finally get out of jail after weeks in custody because they were too poor to pay for their release pending trial”).

98. Foster, *supra* note 2 (describing Johnson's speech); see also Robert Young, *Bail Reform Act is Signed by President*, CHI. TRIB. 2 (June 23, 1966), <http://archives.chicagotribune.com/1966/06/23/page/30/article/bail-reform-act-is-signed-by-president>.

acknowledged that “[b]ecause of the bail system, the scales of justice [were] weighted not with fact nor law nor mercy. They [were] weighted with money.”<sup>99</sup>

Legislatures, other government officials, and courts across the country have begun to recognize the patent unfairness of detaining defendants who cannot afford to pay bail.<sup>100</sup> In a series of class action lawsuits filed over the last year, Equal Justice Under Law, a Washington, D.C., nonprofit legal services organization, has begun to challenge money bail systems that do not take account of a defendant’s ability to pay.<sup>101</sup> As noted *supra*, the Department of Justice filed a Statement of Interest in the first such suit in federal court, which challenged money bail schedules used in Clanton, Alabama.<sup>102</sup> The Statement of Interest emphasized that, in addition to violating the Equal Protection Clause of the Fourteenth Amendment, when bail is set at an amount that does not “account for a defendant’s indigency,” it stops fulfilling the “central rationales underlying pretrial detention.”<sup>103</sup> In accepting the parties’ settlement agreement, the Alabama district court declared that the use of a secured (money) bail to detain an individual following arrest “without an individualized hearing regarding the person’s indigence and the need for bail or alternatives to bail, violates the Due Process Clause of the Fourteenth Amendment.”<sup>104</sup>

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99. *Id.*

100. See *infra* Section II.B.2 for details about legislative and constitutional changes to end the use of money bail in New Jersey and similar legislative proposals in other states.

101. Equal Justice Under Law, *Ending the American Money Bail System*, <http://equaljusticeunderlaw.org/wp/current-cases/ending-the-american-money-bail-system/> (last visited Oct. 29, 2015); see also E-mails from Equal Justice Under Law (Oct. 30, 2015, 11:57 PM), (Oct. 22, 2015, 9:10 PM) (on file with author). Equal Justice Under Law has filed similar suits in six other states (California, Georgia, Kansas, Louisiana, Mississippi, and Missouri), alleging that individual money bail and pretrial detention systems are unconstitutional. See Complaint at 2, 10–11, *Martinez v. City of Dodge City*, No. 15-cv-09344 (D. Kan. Oct. 21, 2015) (alleging that Dodge City, Kansas routinely “refuse[s] to release arrestees from jail unless they pay a generic and arbitrary ‘bond’ amount”).

102. See DOJ Statement of Interest, *supra* note 7, at 1 (announcing that “[i]ncarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment”).

103. *Id.* at 10–11.

104. *Jones v. City of Clanton*, No. 15cv34-MHT, 2015 WL 5387219, at \*2 (M.D. Ala. Sept. 14, 2015).

Equal Justice Under Law was similarly successful in a challenge to the use of fixed bail schedules in Velda, Missouri.<sup>105</sup> In June 2015, the Missouri district court issued an injunction preventing the city from using secured money bail in any case, and a declaratory judgment stating that the Equal Protection Clause is violated when an individual is detained after an arrest because that person cannot afford to post a monetary bond.<sup>106</sup> Equal Justice Under the Law was again successful in November 2015, when the Southern District of Mississippi declared it unconstitutional for an individual to be held in custody after an arrest because the person is too poor to post monetary bond.<sup>107</sup> The organization also filed a similar lawsuit challenging the money bail practices of Harris County, Texas, where approximately 6,500 people (80% of the county jail population) are incarcerated because they cannot afford to make bail.<sup>108</sup> These legal successes have driven important reforms to reduce judges' default reliance on money bail and to end the sort of wealth-based detention highlighted by the lawsuits.

##### 5. *Misuse of money bail: Pretextual preventive detention*

It is important, however, to resist the temptation to oversimplify the problem of unaffordable bail as merely one of finances. Although it is clear that in some cases judges inadvertently set excessive bail, it is also well-understood that, in other cases, judges continue to set unpayable bail figures to manage perceived public safety risks.<sup>109</sup> In a

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105. See Class Action Complaint at 1, *Pierce v. Velda*, No. 15-cv-00570 (E.D. Mo. Apr. 2, 2015).

106. Order at 1, *Pierce v. Velda*, No. 15-cv-00570 (E.D. Mo. June 3, 2015).

107. See *Thompson v. Moss Point*, No. 1:15cv182LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015).

108. Eesha Pandit, *Criminal injustice in Texas: Thousands stay jailed in just one county because they can't pay bail—and it's happening all over the U.S.*, SALON (June 5, 2016), [http://www.salon.com/2016/06/05/criminal\\_injustice\\_in\\_texas\\_thousands\\_stay\\_jailed\\_in\\_just\\_one\\_county\\_because\\_they\\_cant\\_pay\\_bail\\_and\\_its\\_happening\\_all\\_over\\_the\\_u\\_s/](http://www.salon.com/2016/06/05/criminal_injustice_in_texas_thousands_stay_jailed_in_just_one_county_because_they_cant_pay_bail_and_its_happening_all_over_the_u_s/). The plaintiffs in the Harris County case are three individuals arrested for misdemeanor offenses who were incarcerated after they could not afford their bail amounts. *Id.* This includes one pregnant mother who was arrested and detained for failing to show proper identification. Lise Olsen, *Lawsuit adds pregnant mom who was jailed five days after traffic stop*, HOUS. CHRON. (May 24, 2016), <http://www.houstonchronicle.com/houston/article/Lawsuit-adds-pregnant-mom-detained-five-days-7942253.php?t=d1d8c5d1f1438d9cbb&cmpid=email-premium>.

109. Wiseman, *Detention*, *supra* note 26, at 1346 n.2 (explaining that “in some cases[,] this reflects a judgment [in the form of high bail setting] that the defendants are dangerous, but

recent article, the *New York Times* quoted one Baltimore judge who was “presented with abundant evidence” that a defendant had been involved with protests.<sup>110</sup> She explained that the defendant was “out of control and . . . a threat to public safety.”<sup>111</sup> She set his bail at \$500,000 because “there is no way that I can guarantee public safety, should he make bail.”<sup>112</sup> Another judge stated it plainly: “The bail is really being set to keep the person in custody. You have to kind of concede that.”<sup>113</sup>

This is the point in the pretrial detention system that seems to operate most illogically—and where judicial practice diverges most widely from statutory and constitutional requirements. Thirty-plus years after federal and state statutes were rewritten to fix this precise problem by permitting judges to order dangerous defendants to be detained, money bail is still used as a back-door means to manage dangerousness, even in cases where there is no serious risk of flight.<sup>114</sup>

Properly calculated, money bail is set at the precise amount that will induce a released defendant to return to court (or, conversely, the

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in other cases not . . .”). Judges may also set high bail to induce defendants to plead guilty. *See* Simonson, *supra* note 9, at 21–22.

110. Shaila Dewan, *When Bail Is Out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), <http://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html> [hereinafter Dewan, *Defendant's Reach*]. The defendant, teenager Allen Bullock, was charged with throwing a traffic cone through the windshield of a police car during an April 2015 protest of the police-related death of Freddie Gray. Justin Fenton, *Teen charged with riot at downtown protest gets 6 months, community service*, BALT. SUN (Feb. 29, 2016), <http://www.baltimoresun.com/news/maryland/freddie-gray/in-depth/bs-md-ci-bullock-riot-plea-20160229-story.html>.

111. Dewan, *Defendant's Reach*, *supra* note 110.

112. *Id.*

113. *Id.*; *see also, e.g.*, Associated Press, *Memo: Violence long simmered between rival Texas biker gangs*, WACO TRIBUNE-HERALD (May 19, 2015), [http://www.wacotrib.com/news/twin-peaks-biker-shooting/memo-violence-long-simmered-between-rival-texas-biker-gangs/article\\_94584d74-fe21-11e4-b1cb-3706e00320a8.html](http://www.wacotrib.com/news/twin-peaks-biker-shooting/memo-violence-long-simmered-between-rival-texas-biker-gangs/article_94584d74-fe21-11e4-b1cb-3706e00320a8.html) (setting bail at \$1 million for subjects in shootout based on public safety concerns); Sophia Kazmi, *Judge sets \$3 million bail for suspect in Livermore road rage killing*, SAN JOSE MERCURY NEWS (Apr. 22, 2011), [\\$3 million bail for suspect deemed by judge to be “an extreme danger to the community”](http://www.mercurynews.com/ci_17909960)).

114. S. Rep. No. 98-225 (1983), *supra* note 53 (stating that in 1983, Congress made a “significant departure” from the basic philosophy of the Bail Reform Act” by empowering courts to consider a defendant’s dangerousness when making pretrial detention decisions). Even with this additional power, however, courts still often turn to money bail as a means of managing dangerousness instead of using the power to detain dangerous defendants awaiting trial as explained above.

amount of money that will dissuade a released defendant from fleeing the jurisdiction). Although there are real debates about how well bail serves this purpose, there is not much to debate about the purpose of bail.<sup>115</sup> When priced to ensure detention on the basis of dangerousness, money bail violates both law and policy.<sup>116</sup>

In many jurisdictions, statutes governing the setting of bail expressly state that the purpose of bail is to ensure appearance.<sup>117</sup> Many jurisdictions also expressly condition the forfeiture of bail (i.e., the loss of bail money) on a failure to appear, not on the commission of a new offense. These provisions are consistent with a long history that makes clear that money bail is a tool for managing flight risk, not a legitimate means of managing danger.<sup>118</sup>

Suggesting that bail—which is of questionable utility in managing flight risk, the very risk it was developed to manage—should be extended to manage public safety risk is also simply illogical. There is no evidence that threatening to withhold a bail payment if a person commits a crime while on pretrial release provides any marginal deterrence value over the existing blanket of criminal sanctions and penalties that a new crime would trigger. Viewed slightly differently, if a court views a defendant as being a high risk for committing a new crime on release, it does not seem appropriate to simply set a high price for release. Dangerous defendants do not become less dangerous by paying bail.<sup>119</sup>

Whatever path to detention is followed, and whatever rationale judges might claim drives their decisions, modern studies reinforce decades-old claims:<sup>120</sup> our jails contain far too many low-risk detainees.<sup>121</sup> For misdemeanor detainees, there are estimates that as

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115. *See infra* Section II.C.

116. SCHNACKE, *supra* note 28, at 14 (2014) (“[M]oney set with a purpose to detain is likely unlawful under numerous theories of law, and is also unnecessary given the Supreme Court’s approval of a lawful detention scheme that uses no money whatsoever.”).

117. *See infra* Section II.C.

118. *See supra* Section I.A.

119. SCHNACKE, *supra* note 28, at 14 (“[N]o study has ever shown that money can protect the public.”).

120. *See* GOLDKAMP & GOTTFREDSON, *supra* note 16, at 18 (describing historical criticism of the effectiveness of bail: “jails appeared to hold a substantial number of defendants who could be characterized as good release risks”).

121. Baradaran & McIntyre, *supra* note 19, at 553 (“[A]bout half of those detained have a lower chance of being rearrested pretrial than many of the people released.”); Tina Rosenberg,

many as twenty percent of detainees will not be convicted and some portion of those who are convicted will not be sentenced to jail time.<sup>122</sup>

#### *D. Mismeasuring Flight and Danger*

Judges' measurement of pretrial risk factors has long been the subject of criticism and, therefore, a perennial target of reform efforts.<sup>123</sup> Dating at least to the Vera Institute of Justice's Manhattan Bail Project in the 1960s, bail reformers have studied which factors best predict which defendants pose a flight risk, and, as statutes have evolved, which factors correlate to dangerousness.<sup>124</sup> As outlined below, in recent years this process has shifted from reliance on judges' relatively subjective evaluations of statutory factors to the growing use of more objective, actuarial-style measurement tools.

##### *1. Traditional approaches and statutory factors*

Legislators have endeavored to guide judicial discretion within the pretrial detention decision-making process by including predictive factors in federal and state bail statutes. Those statutory factors generally fall into the following categories: the "nature and circumstances" of the charged offense; the "weight of the evidence" against the defendant; the defendant's criminal history (including the defendant's record of prior appearances at court proceedings); the defendant's "character, physical and mental condition" (including any

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*Putting Fewer Innocents Behind Bars*, N.Y. TIMES (July 3, 2015), [http://opinionator.blogs.nytimes.com/2015/07/03/putting-fewer-innocents-behind-bars/?\\_r=0](http://opinionator.blogs.nytimes.com/2015/07/03/putting-fewer-innocents-behind-bars/?_r=0) ("Pretrial detention should be reserved for flight risks or dangers to society. Yet 62 percent of people in jail in America are awaiting trial [up from 40 percent 30 years ago]—and most are charged with crimes no more dangerous than shoplifting, driving with a suspended license, public drunkenness, drug possession, missing their curfew or otherwise violating parole."); ARNOLD FOUND., RESEARCH SUMMARY 5, *supra* note 96 (explaining that, under the current approach, "too many high-risk defendants go free, and too many low-risk defendants remain locked up for long periods. These systemic failures put the public in danger and place unnecessary strain on budgets, jails, law enforcement, families, and communities.").

122. HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 2 (2010).

123. Goldkamp & Vilcica, *supra* note 16, at 116 ("The main explanation for the limited success of bail reform lies in its failure to engage judges centrally, to make bail reform 'judicial' reform.").

124. Scott Kohler, *Vera Institute of Justice: Manhattan Bail Project*, FORD FOUND. (1962), [http://cspcs.sanford.duke.edu/sites/default/files/descriptive/manhattan\\_bail\\_project.pdf](http://cspcs.sanford.duke.edu/sites/default/files/descriptive/manhattan_bail_project.pdf).

substance abuse history); and his or her ties to the jurisdiction (employment, family, or length of residence).<sup>125</sup> Notably, however, the statutes do not indicate which factors are relevant to flight risk and which are believed to predict dangerousness.<sup>126</sup>

Traditionally, the information about these statutory factors was gathered prior to a defendant's bail hearing. Some of the information (e.g., the charge, the defendant's criminal history, and the defendant's record of appearances) could be easily obtained from public records. Information about substance abuse or family ties, on the other hand, was gathered through an interview with the defendant.

## 2. *Bail schedules*

In the past, some states, like California, have gone further: creating bail schedules that effectively supplant judicial discretion by setting presumptive dollar amounts for bail that are based exclusively on the charged offense.<sup>127</sup> These types of bail schedules, which do not adjust for defendants' financial resources, have recently come under attack in a series of lawsuits.<sup>128</sup> As Sam Wiseman explains, charge-driven bail schedules are "the worst sort of 'actuarial' instrument, and their widespread use is an indicator of both how little time judges have

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125. *See, e.g.*, 18 U.S.C. § 3142(g) (2012); N.Y. CRIM. PROC. LAW § 510.30(2) (McKinney Supp. 2016); OHIO REV. CODE ANN. § 2937.222(C) (LexisNexis 2014); TENN. CODE § 40-11-115(b) (2012); FLA. STAT. § 903.046(2) (2016). *But see* Wiseman, *Discrimination*, *supra* note 21, at 155 (asserting that, although these statutory factors may be relevant to determining what the right amount of bail is, they will lead to improper discrimination if used by judges to determine the "threshold question" of who is eligible for bail).

126. *See infra* Section III.D for a discussion of which release conditions best manage flight risk or dangerousness.

127. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE IN AMERICA: A SURVEY OF COUNTY PRETRIAL RELEASE POLICIES, PRACTICES, AND OUTCOMES 5–6 (2009) (describing bail schedule procedures); *see also* SUBRAMANIAN ET AL., *supra* note 3, at 29 ("In some jurisdictions, police commanders have the authority to release people directly from the station house using a bail schedule.").

128. *See supra* notes 101–108 and accompanying text. Scholars have also been explicit about the flaws with bail schedules. Wiseman, *Fixing Bail*, *supra* note 16, at 445–46 ("The crime charged is an extremely rough, singular indicator of likely dangerousness and flight risk compared to the sophisticated actuarial models deployed elsewhere, and judges augment this rudimentary predictor only with impressionistic assessments reached after questioning a defendant for a few minutes, at best.").

to devote to pretrial release determinations and how little accuracy appears to matter in most systems.”<sup>129</sup>

### 3. *Data-driven risk assessment tools*

Over the last decade, reform efforts have focused on moving away from reliance on charge-driven bail schedules or judges’ “gut and intuition” and toward using “rigorous, scientific, data-driven risk assessments.”<sup>130</sup> Federal courts and courts in New Jersey, Kentucky, and Colorado, among others, are increasingly employing risk assessment tools that promise more accurate and efficient risk calculations to refine judges’ pretrial detention decisions.<sup>131</sup> While in 2015 fewer than ten percent of jurisdictions used “scientifically validated risk assessments . . . partly because of cost,” that number is rapidly growing, particularly as less costly tools are being developed.<sup>132</sup>

*a. The federal tool.* The Federal Risk Assessment Tool relies on nine key factors to predict pretrial risk, including (1) “charges pending against the defendant at the time of arrest,” (2) “number of prior misdemeanor arrests,” (3) “number of prior felony arrests,” (4) “number of prior failures to appear,” (5) employment status of defendant at the time of arrest, (6) defendant’s residency status, (7) defendant’s substance abuse problems, (8) “nature of the primary charge,” and (9) if the primary charge is a misdemeanor or a felony.<sup>133</sup>

129. *Id.* at 446.

130. ARNOLD FOUND., RESEARCH SUMMARY, *supra* note 96, at 5.

131. MARIE VANNOSTRAND & CHRISTOPHER T. LOWENKAMP, ARNOLD FOUND., ASSESSING PRETRIAL RISK WITHOUT A DEFENDANT INTERVIEW (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF\\_Report\\_no-interview\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_no-interview_FNL.pdf); Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 233 (2015) (summarizing evolution of risk assessment tools and observing that automated risk assessment “is enjoying its heyday in criminal justice”). There are a number of competing risk assessment tools, but studies suggest that, among those most commonly used, there are not significant differences in their “predictive validity.” NATHAN JAMES, CONG. RESEARCH SERV., R44087, RISK AND NEEDS ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM 3 (2015) (citing 2010 study comparing tools that predict violent recidivism) (discussing theories that explain why the different tools yield the same outcomes).

132. Shaila Dewan, *Judges Replacing Conjecture With Formula for Bail*, N.Y. TIMES (June 26, 2015), [http://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html?\\_r=0](http://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html?_r=0) [hereinafter Dewan, *Judges*].

133. Marie VanNostrand et al., *Pretrial Risk Assessment in the Federal Court*, FED. PROB., Sept. 2009, at 3, 5.



Points for each of these risk factors are tallied into a single comprehensive risk value (lumping risks of flight and dangerousness together) during pretrial release.<sup>134</sup> This single risk assessment includes two separate sections, but each section contains factors relevant to both types of predictions: (i) criminal history and current offense and (ii) other factors.<sup>135</sup>

By 2011, federal judges were relying on the federal risk assessment tool in about one out of six cases.<sup>136</sup>

*b. Selected state risk assessment tools.* A number of states have adopted risk assessment tools that are similar to the federal tool.<sup>137</sup> The Virginia Pretrial Risk Assessment Instrument (“VPRAI”) is one of the oldest and has served as a model for other states. Like the federal tool, VPRAI generates one single risk score (which predicts a combined risk of flight and dangerousness) for a judge to evaluate at a pretrial detention hearing.<sup>138</sup> VPRAI relies on eight factors that were found to be statistically significant in predicting pretrial failure. These factors fall into the same general categories as the federal factors.<sup>139</sup>

The Colorado Pretrial Assessment Tool (CPAT) operates similarly to the tools used at the federal level and in Virginia, but has twelve relevant factors.<sup>140</sup> CPAT includes the same factors seen in the federal

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134. *Id.* at 13, 21 (combining failure to appear and dangerousness into one risk figure; evaluating various alternatives to detention and evaluating whether (and to what extent) the alternatives would mitigate a combined risk of flight and dangerousness). Although the study of the federal risk assessment tool combined failure to appear and dangerousness into one risk figure to be used by a judge evaluating the risks, the study did disaggregate the risks for measuring outcomes. In other words, the data did not note which defendants did not appear for court and which defendants committed a new crime. *Id.* at 13.

135. *See id.*

136. Wiseman, *Fixing Bail*, *supra* note 16, at 421 (citing Timothy P. Cadigan & Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, FED. PROB., Sept. 2011, at 33).

137. For a detailed review of the risk assessment instruments currently being used across the country, see Sandra Mayson, *Dangerous Defendants*, at 8–14, appendix, (forthcoming).

138. *See* MARIE VANNOSTRAND & KENNETH J. ROSE, PRETRIAL RISK ASSESSMENT IN VIRGINIA, 8–9 (2009), <http://www.pretrial.org/download/risk-assessment/VA%20Risk%20Report%202009.pdf>.

139. *Id.* at 8.

140. PRETRIAL JUSTICE INST., THE COLORADO PRETRIAL ASSESSMENT TOOL 13 (rev. Oct. 19, 2012), <http://www.pretrial.org/download/risk-assessment/CO%20Pretrial%20Assessment%20Tool%20Report%20Rev%20-%20PJI%202012.pdf>. The twelve factors include: “(1) Having a Home or Cell Phone; (2) Owning or Renting One’s Residence; (3) Contributing to Residential Payments; (4) Past or Current Problems with Alcohol; (5) Past or Current Mental

assessment and in Virginia, but also adds factors like “having a home or cell phone” and “owning or renting one’s residence.”<sup>141</sup> As at the federal level and in Virginia, Colorado defendants are given a single risk score, which places them into one of four risk categories.<sup>142</sup> Florida and Ohio employ risk assessment tools that are similar to the Colorado and Virginia tools.<sup>143</sup>

*c. The Public Safety Assessment—Court tool.* In June 2015, the Laura and John Arnold Foundation announced a rollout of its algorithm (the Public Safety Assessment-Court or “PSA-Court”), which gives each defendant two scores—one for risk of flight and one for risk of committing a crime while on release.<sup>144</sup> The tool also highlights those defendants who pose a special risk of violence.<sup>145</sup> The separation of these risk scores was one of the Foundation’s priorities from the beginning of the project, and this feature marks a significant improvement over other tools.<sup>146</sup> The PSA-Court tool is now used in

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Health Treatment; (6) Age at First Arrest; (7) Past Jail Sentence; (8) Past Prison Sentence; (9) Having Active Warrants; (10) Having Other Pending Cases; (11) Currently on Supervision; (12) History of Revoked Bond or Supervision.” *Id.*

141. *Id.*

142. In Colorado, judges seem to be given more information about whether that single risk score is more predictive of flight risk or danger, but those two risks are, again, not expressed as separate risk numbers. The defendant’s success rate in each of the categories can be measured against an average defendant’s score in that category, whether it be public safety, failure to appear, or a combination of both. *Id.*

143. *See generally* JFA INST., FLORIDA PRETRIAL RISK ASSESSMENT INSTRUMENT 13 (2012), <http://www.pretrial.org/download/risk-assessment/FL%20Pretrial%20Risk%20Assessment%20Report%20%282012%29.pdf>; EDWARD LATESSA ET AL., CREATION AND VALIDATION OF THE OHIO RISK ASSESSMENT SYSTEM FINAL REPORT 49 (2009), [http://www.ocjs.ohio.gov/ORAS\\_FinalReport.pdf](http://www.ocjs.ohio.gov/ORAS_FinalReport.pdf).

144. Dewan, *Judges*, *supra* note 132; *see also* ARNOLD FOUND., RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT—COURT IN KENTUCKY 3 (2014), <http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf> [hereinafter ARNOLD FOUND., RESULTS].

145. ARNOLD FOUND., RESEARCH SUMMARY, *supra* note 96, at 4; *see also* ARNOLD FOUND., RESULTS, *supra* note 144, at 3.

146. ARNOLD FOUND., RESEARCH SUMMARY, *supra* note 96, at 3 (explaining that federal and Virginia tools “present[ed] a single risk level for each defendant, combining—and assigning equal weight to—the risk that a defendant will fail to appear and the risk that he will reoffend”). It is important to recognize that this separation of risks was contemplated by bail reformers John Goldkamp and Michael Gottfredson in their study in the late 1970s to develop bail guidelines for use in Philadelphia courts. GOLDKAMP & GOTTFREDSON, *supra* note 16, at 100–01. That study marked the first use of these actuarial-type “prediction instruments.” *Id.* Goldkamp and Gottfredson developed, but did not ultimately employ in their study, four separate prediction

twenty-nine jurisdictions in the United States, including three entire states: Arizona, Kentucky, and New Jersey.<sup>147</sup>

Part of the appeal of the PSA-Court tool is that it is “designed to be more economical than existing risk assessments and effective regardless of location.”<sup>148</sup> According to the Foundation, it is “more objective, far less expensive, and requires fewer resources to administer than previous techniques.”<sup>149</sup> The PSA-Court tool promises these substantial cost savings because it does not require defendant interviews.<sup>150</sup>

The new tool has three separate six-point scales (each ranging from the lowest level of risk, one, to the highest, six).<sup>151</sup> Two of these scales produce “dangerousness” predictions: one scale for “new criminal activity” (which calculates the likelihood that the defendant will commit [any] new crime while on pretrial release) and one scale for “new violent criminal activity.” The third scale calculates the risk of “failure to appear.”

Critics of risk assessment tools highlight a range of potential problems that the tools present,<sup>152</sup> but their critiques neglect the problem identified in this Article. With any tool that promises to improve decision-making, it is imperative to determine how well that tool maps onto existing legal requirements. Too many of the federal

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instruments that generated separate risk measures for failure to appear, rearrest, serious rearrest, and combined measures. *Id.*

147. ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT, *supra* note 14, <http://www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/>; *see also* Dewan, *Judges*, *supra* note 132.

148. Dewan, *Judges*, *supra* note 132. The tool is locally validated, meaning that the predictions for a particular jurisdiction are based on local data.

149. ARNOLD FOUND., SAFETY ASSESSMENT, *supra* note 14.

150. ARNOLD FOUND., RESEARCH SUMMARY, *supra* note 96; Dewan, *Judges*, *supra* note 132.

151. ARNOLD FOUND., RESEARCH SUMMARY, *supra* note 96 (“[T]he likelihood of a negative pretrial outcome increases with each successive point on the scale.”).

152. For more detailed analyses and critiques of these tools, see, e.g., Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231, 242–71 (2015) (analyzing evidence-based sentencing schemes and determining that the use of socioeconomic and demographic variables to contribute to a defendant’s sentence may violate the equal protection and due process clauses); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 851 (2014) (critiquing existing evidence-based regimes and urging approaches that would “base actuarial prediction only on crime characteristics and criminal history” and that would strip “demographic and socioeconomic factors”); John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 392–93 (2006).

and state risk assessment tools merge the analysis of flight risk and dangerousness into a single risk assessment calculation, the PSA-Court risk assessment tool being a notable exception. Because of this problem, these tools run the risk of reinforcing (instead of correcting) problematic judicial practices. The following Part outlines the legal and policy reasons that flight risk must be measured independently of dangerousness.

## II. DISENTANGLING FLIGHT FROM DANGER: LEGAL REQUIREMENTS

Judges making pretrial decisions often merge the risk of dangerousness with the risk of flight. Perhaps as a result, reformers (including many of those developing actuarial risk prediction models) also merge these risks. Why is combining the risks problematic? This Article asserts that flight risk and danger must be analyzed separately both because of legal requirements (outlined in this part) and for policy reasons (examined in Part III).

The first reason that flight risk must be measured and evaluated independently of dangerousness is that the federal and state laws governing pretrial detention and release (that were described in broad strokes in Section I.D) frequently require separate consideration of these distinct risks. As outlined in detail in the sections that follow, these legal requirements are the product of both (i) constitutional and statutory limitations on the circumstances in which pretrial detention can be ordered by a judge and (ii) constitutional and statutory provisions governing the imposition of bail or other conditions of release. This Part addresses both types of restrictions in turn, highlighting aspects of these provisions that explicitly and implicitly require independent risk assessment.

### *A. Constitutional Constraints*

As noted earlier, the Supreme Court upheld the constitutionality of the Bail Reform Act in its 1987 decision in *United States v. Salerno*.<sup>153</sup> The *Salerno* Court viewed the word “excessive” to be doing important work in the bail clause.<sup>154</sup> As the *Salerno* Court explained:

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153. 481 U.S. 739 (1987).

154. See Wiseman, *Detention*, *supra* note 26, at 1383 (“*Salerno* did not completely empty the clause of content: regardless of what ends are permissible, ‘excessive’-ness clearly implies an inquiry into the relationship between those ends and the means employed to achieve them.”).

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. Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more.<sup>155</sup>

This inquiry into "excessiveness" requires the government to be explicit about the risks it seeks to manage and precise in proposing restrictions (detention or conditions of release) to respond to those risks. Separation of flight risk and dangerousness will be essential to this inquiry. The dearth of successful excessive bail claims in the decades since *Salerno* suggest that the limits of the statutes and the *Salerno* decision are not well understood.<sup>156</sup>

### *B. Ordering Detention: Statutory Limitations*

Under the federal Bail Reform Act and in nearly all states, when a judge determines that no combination of release conditions will adequately manage flight risk and danger, he or she is empowered to order that a defendant be detained until trial. Because federal and state statutes often pair flight risk and danger together,<sup>157</sup> there is a conventional misconception that both types of risks are relevant for every type of determination made under these detention provisions. The provisions of federal and state detention statutes, however, clearly

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155. *Salerno*, 481 U.S. at 754.

156. See Sandra Mayson, *Dangerous Defendants*, at 7 (unpublished manuscript) (on file with author) (explaining that despite the holding's clear limitations, "*Salerno* was widely perceived as a robust endorsement of pretrial preventive detention and lesser forms of preventive restraint"); see also Wiseman, *Detention*, *supra* note 26, at 1384 ("A richer jurisprudence of excessiveness is needed."). Although the *Salerno*'s "excessive bail" analysis has not been revisited, the Supreme Court has repeatedly cited *Salerno* in support of other facial challenges to statutes, see, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2515 (2012) ("The fact that [a law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid"), and occasionally to reiterate that "[e]nsuring public safety" is "a fundamental regulatory goal," *Smith v. Doe*, 538 U.S. 84, 108 (2003) (Souter, J., concurring in judgment).

157. See, e.g., 18 U.S.C. § 3142 (repeatedly pairing the court's obligation to "assure the appearance" of a defendant with its obligation to protect "the safety of any other person or the community"); KY § 431.525 (pairing "flight risk" and "danger"); 15 M.R.S.A. § 1002 (pairing appearance and safety).

call for segregated risk assessment. Those provisions are addressed in the following subsections.

*1. Ordering pretrial detention after Salerno: Modern federal statutory requirements*

There are at least three aspects of the detention provisions of the federal Bail Reform Act that require independent risk analysis. Those include provisions that (i) outline the government's burden of proof, (ii) indicate when a detention hearing may be held, and (iii) restrict the scope of a detention hearing. While the federal pretrial reports that judges rely upon to make bail determinations do separate these risks, the federal risk assessment tool curiously does not.<sup>158</sup>

The first statutory distinction between flight risk and dangerousness relates to the government's burden of proof. The government's burden of proof for preventive (i.e., danger-based) detention—clear and convincing evidence of dangerousness—is higher than the preponderance of the evidence standard that has been applied to flight risk determinations.<sup>159</sup> As outlined in Part I, this heightened standard of proof of danger was one of the reasons that the *Salerno* Court specifically cited for upholding the constitutionality of the Bail Reform Act.<sup>160</sup> If the standards of proof for the two types of risks are different, the risks must be analyzed separately.

A second and less obvious requirement to distinguish between flight and danger emerges from the cases decided since *Salerno*. Lower federal courts are split on how the dangerousness and flight risk provisions of the Bail Reform Act interact with each other, particularly as they relate to a district court's decisions (i) to hold a detention hearing and (ii) to order detention. Although flight risk can be grounds for a detention order in any federal case, most courts have held that dangerousness may only be grounds for detention under the circumstances specified in the statute.

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158. See *supra* Section I.D.3.

159. 18 U.S.C. § 3142(f) (2012) (“The facts the judicial officer uses to support a finding . . . that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence.”). Although the statute is silent on the government's burden of proof for flight risk, several courts have agreed that it is a preponderance of the evidence. See, e.g., *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986).

160. See *supra* Section I.B.3; see also *Salerno*, 481 U.S. at 751–52.

The Third Circuit in *United States v. Himler* was the first court to consider this issue.<sup>161</sup> Himler was charged with crimes involving the production of false identification documents and the government argued that he posed a serious risk of flight and should be detained.<sup>162</sup> Given both Himler's criminal history (he had a prior larceny conviction and was on probation for possession of false identification when arrested for the current crime) and the nature of the current charge, the district court determined that he had experience in adopting a false identity.<sup>163</sup> For that reason, in the district court's view, Himler posed both a serious flight risk and a danger to the community and was ordered detained until trial.<sup>164</sup>

The key issue for the Third Circuit on appeal was whether the district court properly relied on the defendant's risk to public safety in ordering detention.<sup>165</sup> The district court had blended the two risks—flight and public safety—to justify its ruling. The court's decision turned on the operation of two provisions of the federal statute. Section 3142(e)<sup>166</sup> authorizes a judge to order pretrial detention, but specifies that the detention order may only be issued “after a hearing pursuant to the provisions of subsection (f).”<sup>167</sup> The provisions enumerated in Section 3142(f)(1) permit detention for dangerousness only in cases that involve crimes of violence, offenses with potential sentences of life imprisonment or death, certain narcotics offenses, offenders with two or more serious prior convictions, crimes involving minor victims, and crimes involving weapons.<sup>168</sup>

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161. 797 F.2d 156 (1986). The *Himler* Court addressed this issue before the Supreme Court's decision in *Salerno* was issued. It primarily relied on legislative history to interpret the statute, while later circuit courts cited legislative history and *Salerno*. *Id.* at 160 (quoting S. REP. NO. 98-225, at 6–7 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3189) (reviewing the legislative history of the Bail Reform Act).

162. *Id.* at 158.

163. *Id.*

164. *Id.*

165. *Id.* at 160–61.

166. 18 U.S.C. § 3142(e) (2012).

167. Subsection (f) has two provisions. The first provision addresses when certain types of crimes (viewed as posing higher public safety risks) will trigger a detention hearing. That provision is the focus of the next several paragraphs. The second provision of subsection (f) permits a detention hearing to be held to manage other potential risks (including flight risk) and that provision is discussed next. See *infra* notes 180–190 and accompanying text.

168. 18 U.S.C. § 3142(f)(1). On the government's motion, a detention hearing may be held in these cases. *Id.* For a critique of these and other statutory presumptions that drug offenses

The *Himler* court held that “the requisite circumstances for invoking a detention hearing . . . serve to limit the types of cases in which detention may be ordered prior to trial.”<sup>169</sup> According to the court, this narrow reading was required because, based on its review of the legislative history, the drafters of the Bail Reform Act intended the statute’s preventive detention provisions to apply narrowly to “a small but identifiable group of particularly dangerous defendants.”<sup>170</sup>

For other types of crimes not listed in subsection (f)(1), including, for example, the false identification charge in *Himler* and the bank fraud and false statements charges considered by the First Circuit in a similar case,<sup>171</sup> a detention hearing may not be held and, consequently, a defendant may not be detained for dangerousness. In other words, for less serious crimes that are not specified in the statute, a defendant’s danger to the community cannot justify detention under the Act.<sup>172</sup> In those cases, then, a federal court making a pretrial detention decision must have an independent assessment of flight risk because that is the only risk that could justify detention. The First, Second, Fifth, Ninth, and District of Columbia Circuits have all followed the Third Circuit’s approach in *Himler*.<sup>173</sup>

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predict future violence, see Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 254 (2015) [hereinafter Baradaran, *Drugs*] (“[S]ometimes there is a blanket presumption by courts and legislatures that where there are drugs, guns will be found and inevitably violence—without empirical backing or an individual showing based on particularized facts. This blanket presumption by courts and legislatures that drugs cause violence is separated from the empirical reality and disconnected from the wealth of social science research . . .”).

169. *Himler*, 797 F.2d at 160 (quoting S. REP. NO. 98-225, at 20 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3203).

170. *Id.* at 160 (quoting S. REP. NO. 98-225, at 6 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189). The list of offenses that can trigger detention for dangerousness have broadened since *Himler* was decided. In 2006, the statute was amended and subsection (f)(1)(e) was added. Under the amended language, felonies involving weapons or children can trigger a detention hearing. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 216, 120 Stat. 587 (2006); see also 18 U.S.C. § 3142(f)(1)(e).

171. *United States v. Ploof*, 851 F.2d 7, 9, 11, 13 (1st Cir. 1988) (stating defendant’s charges, including conspiracy to make false statements on a mortgage loan application, making false statements to a national bank, willful misapplication of bank funds, bank fraud, a narcotics offense, interstate transportation of stolen property, unlawful structuring of a financial transaction, and a claim by the government that defendant had plotted to kill his girlfriend’s husband were not deemed to trigger detention hearing).

172. *Himler*, 797 F.2d at 160.

173. *Ploof*, 851 F.2d at 11 (holding that a person’s threat to the safety of any other person or the community, in the absence of one of the statutorily specified circumstances, cannot justify detention under the Act); *United States v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003) (same);



Although the *United States Attorney's Manual* expresses the majority rule as the standard,<sup>174</sup> the government has occasionally argued for, and at least two district courts have adopted, a different interpretation: that Section 3142(f) is not exhaustive and merely mandates when the government must be given a hearing.<sup>175</sup> Under this view, which contradicts the majority approach, judges have the option to hold a detention hearing and order detention even in cases that do not fall within the provisions of Section 3142(f).<sup>176</sup>

The Supreme Court has not specifically ruled on this issue, but its earlier holding in *Salerno* provides strong support for the majority view.<sup>177</sup> In upholding the constitutionality of the Bail Reform Act, the *Salerno* Court explicitly held that the Act was sufficiently protective of individual liberty interests because it was limited in reach. In the Court's words, the Act was constitutional because of "Congress' careful delineation of the circumstances under which detention will be

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United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999) (same); United States v. Byrd, 969 F.2d 106, 109–10 (5th Cir. 1992) (same); United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988) (same). The majority of district courts that have addressed the issue have also followed this approach.

Because of later statutory amendments that broadened the categories of offenses that could trigger detention for dangerousness, *see supra* note 170, the felon-in-possession charges in *Twine* and *Singleton* and the child pornography charges in *Byrd* and *Friedman* would come out differently under the current statute. *See Twine*, 344 F.3d at 987 (defendant's charge [felon in possession of a firearm] did not trigger detention hearing); *Singleton*, 182 F.3d at 9 (same); *Byrd*, 969 F.2d at 109–10 (defendant's child pornography possession charge did not trigger detention hearing); *Friedman*, 837 F.2d at 49 (defendant's child pornography charges did not trigger detention hearing).

174. U.S. DEP'T OF JUSTICE, RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS, 26 CRIMINAL RESOURCE MANUAL (1997), <http://www.justice.gov/usam/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et>.

175. United States v. Megahed, 519 F. Supp. 2d 1236, 1245–49 (M.D. Fla. 2007) (holding that § 3142(f) does not limit the circumstances under which a defendant may be detained); *see also* United States v. Ritter, No. 2:08po00031-35, 2008 WL 345832, at \*1–2 (W.D. Va. 2008) (following the *Megahed* approach).

176. *Id.* Although these two district courts (in *Megahed* and *Ritter*) have held that detention is not limited to the circumstances in § 3142(f), several district courts in their same circuits have agreed with *Himler*, *Ploof*, *Friedman*, and *Byrd*. *See Holmes*, 438 F. Supp. 2d at 1344–51; United States v. Giordano, 370 F. Supp. 2d 1256, 1260 (S.D. Fla. 2005); United States v. DeBeir, 16 F. Supp. 2d 592, 593 (D. Md. 1998); United States v. Allen, 409 F. Supp. 2d 622, 625 (D. Md. 2006).

177. *See supra* Section II.A.

permitted.”<sup>178</sup> The Court elaborated that the Act “operates only on individuals who have been arrested for a specific category of extremely serious offenses” and that “Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest.”<sup>179</sup> Under the majority view, then, at least in certain types of cases, flight risk must be measured separately because it is the only type of risk that can trigger a detention hearing.

A third set of cases also requires independent assessment of flight risk: cases where a detention hearing is statutorily authorized because a defendant poses a “serious” risk of flight.<sup>180</sup> Here again, Section 3142(e) of the statute states that a judge may issue a detention order only “after a hearing pursuant to the provisions of subsection (f).”<sup>181</sup> In the category of cases just discussed, the relevant provision is subsection (f)(1), which permits a detention hearing for certain types of more serious crimes.<sup>182</sup> Section 3142(f)(2)(A) also permits a court to hold a detention hearing “in a case that involves . . . a serious risk that such person will flee.”<sup>183</sup>

The question in these cases is whether, when flight risk is what triggers a detention hearing, a court can consider public safety risk at the hearing as well.<sup>184</sup> Courts also differ about the scope of these flight hearings. The prevailing approach is that the specific authorization for the detention hearing must be the basis for the court’s detention

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178. *United States v. Salerno*, 481 U.S. 739, 751 (1987).

179. *Id.* at 750.

180. 18 U.S.C. § 3142(f)(2)(A) (2012) (allowing a court to hold a detention hearing [on a motion from the government or on the court’s own motion] “in a case that involves . . . a serious risk that [the defendant] will flee”). *Compare Himler*, 797 F.2d at 159–60, *with Holmes*, 438 F. Supp. 2d at 1344–51.

181. 18 U.S.C. § 3142(e); *see supra* notes 167 and 168 and accompanying text, describing the two provisions of subsection (f).

182. 18 U.S.C. § 3142(f)(1).

183. *Id.* § 3142(f)(2)(A). Subsection (f)(2)(B) also includes some obstruction of justice provisions (but it does not permit broad consideration of public safety risk). It permits the court to consider detention for a defendant when faced with “a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.” *Id.* § 3142(f)(2)(B).

184. To be clear, if both risks are present and, based on the statute, both risks are legitimate bases for detention, then both risks can be considered together by a judge making a decision whether to detain.

decision.<sup>185</sup> Under this view, if the hearing is held because the defendant is a serious flight risk (and if the offense of arrest does not fall within the public safety risk categories outlined in subsection (f)(1) of the statute), then these courts would only permit detention to be justified based on flight risk.<sup>186</sup>

This issue was also first addressed by *Himler*, which held that when the hearing is held pursuant to a defendant's risk of flight, "[a]ny danger . . . he may present to the community may be considered *only in setting conditions of release*."<sup>187</sup> In other words, if flight risk is the trigger for the hearing, then the defendant may not be ordered detained based on dangerousness; he may only be detained on the basis of flight.<sup>188</sup> This aspect of *Himler* has also been adopted by most other federal courts that have addressed the issue.<sup>189</sup> The First Circuit, following suit in *Ploof*, explained that the more narrow view of the statute was consistent with both the legislative history and with *Salerno*.<sup>190</sup> The takeaway from these cases is strict adherence to the statute's division of these risks. Proof of a serious flight risk can justify detention in any kind of case. Danger can only justify detention in the more serious cases specified in the statute.

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185. *Himler*, 797 F.2d at 160; *Giordano*, 370 F. Supp. 2d at 1261–64; *DeBeir*, 16 F. Supp. 2d at 595; *United States v. LaLonde*, 246 F. Supp. 2d 873, 875 (S.D. Ohio 2003); *Chavez-Rivas*, 536 F. Supp. 2d at 967–68; *United States v. Dodge*, 842 F. Supp. 643, 645 (D. Conn. 1994).

186. *Himler*, 797 F.2d at 160.

187. *Himler*, 797 F.2d at 160 (emphasis added).

188. *Id.*

189. *Friedman*, 837 F.2d at 49; *Ploof*, 851 F.2d at 10–12; *Giordano*, 370 F. Supp. 2d at 1261–64; *DeBeir*, 16 F. Supp. 2d at 595; *LaLonde*, 246 F. Supp. 2d at 875; *Chavez-Rivas*, 536 F. Supp. 2d at 967–68; *Dodge*, 842 F. Supp. 2d at 645. The Fifth Circuit, in *United States v. Byrd*, held that it is “in agreement with the First and Third Circuits.” *United States v. Byrd*, 969 F.2d 106, 109–10 (5th Cir. 1992) (“[A] defendant’s threat to safety of other person or to the community, standing alone, will not justify pre-trial detention.”). Lower courts applying *Byrd*, however, have reached conflicting results. Compare, e.g., *Giordano*, 370 F. Supp. 2d at 1261 with *Holmes*, 438 F. Supp. 2d at 1345 (interpreting *Byrd* to hold that § 3142(f) only establishes when a hearing is authorized, and once met, the defendant can be detained on dangerous alone). This may be due, in part, to the Fifth Circuit’s own discomfort with the *Byrd* holding. The *Byrd* court acknowledged that it “may be surprising . . . that even after a hearing, detention can be ordered only in certain designated and limited circumstances, irrespective of whether the defendant’s release may jeopardize public safety.” *Byrd*, 969 F.2d at 109–10.

190. *Ploof*, 851 F.2d at 10–12 (holding that the language of § 3142(e)–(f) require that the basis for the detention *must* be based on the specific authorization for the hearing; detention based solely on a finding of future dangerous is only authorized when a hearing is held pursuant to § 3142(f)(1)).

Properly interpreted, then, there are multiple aspects of the detention provisions of the Bail Reform Act that require separate consideration of flight risk and danger. Many state statutes contain similar provisions, as discussed in the next subsection.

## 2. State statutes authorizing judges to order pretrial detention

Like the federal statute, many states permit preventive pretrial detention for individuals who have been arrested for certain more serious crimes.<sup>191</sup> Some states even *require* detention in certain cases.<sup>192</sup>

New Jersey was an exception to this rule until recently. In 2014, New Jersey made comprehensive changes to its state bail laws. The legislature passed a statute that shifts away from reliance on money bail<sup>193</sup> and voters approved a constitutional amendment to permit detention based on public safety concerns.<sup>194</sup>

New York continues to be an outlier by prohibiting judges from making discretionary decisions to deny bail based on public safety concerns.<sup>195</sup> But that does not mean that there is not preventive

191. *See, e.g.*, VT. STAT. tit. 13, § 7553 (2009) (“A person charged with an offense punishable by life imprisonment when the evidence of guilt is great may be held without bail.”); N.M. CONST. art. II, § 13 (outlining situations [involving certain serious felonies] where courts may deny bail); S.C. CODE ANN. § 22-5-510 (Supp. 2015) (empowering courts to deny bail for certain violent offenses); TEX. CONST. art. I, § 11a (same).

192. These are typically cases involving capital crimes. *See, e.g.*, MICH. COMP. LAWS ANN. § 765.5 (West 2000) (“No person charged with treason or murder shall be admitted to bail if the proof of his guilt is evident or the presumption great.”); OHIO CONST. art. I, § 9 (“All persons shall be bailable . . . except for a person who is charged with a capital offense where the proof is evident or the presumption great . . .”).

193. 2014 N.J. Sess. Law Serv. Ch. 31 (2014) (West) (including several new provisions that shift away from monetary bail).

194. *Public Question Results, supra* note 10 (amending constitution to eliminate constitutional right to bail and to permit judges to order pretrial detention based on public safety concerns). As amended, New Jersey Constitution, Article I, Paragraph 11 reads, in part:

All persons shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person’s appearance in court when required, or protect the safety of any other person or the community, or prevent the person from obstructing or attempting to obstruct the criminal justice process.

The provision had previously stated: “All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.” N.J. STAT. ANN. CONST. ART. 1, ¶ 11 (repealed 2014).

195. *See* N.Y. CRIM. PROC. LAW § 510.30(2)(a) (McKinney 2012) (stating that judges setting bail “must consider the kind and degree of control or restriction that is necessary to

pretrial detention in New York; for some serious felonies, as a matter of law, defendants are ordered detained until trial.<sup>196</sup> For other offenses, however, New York judges are not permitted to consider a defendant's risk of dangerousness in making discretionary pretrial detention decisions.<sup>197</sup> And yet they do.

In 2015, legislation was introduced that would permit judges to consider an individual's potential danger to the community when deciding whether to detain an individual.<sup>198</sup> Those proposed changes have not been adopted, but they have been supported by different state and local officials, including, perhaps surprisingly, progressive New York City Mayor Bill de Blasio.<sup>199</sup> For now, New York judges continue to be limited to considering flight risk in making discretionary detention and release determinations.

In a range of state and federal cases, separate consideration of flight risk and dangerousness is necessary for a judge to determine

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secure [the defendant's] court attendance when required"; the discretionary bail statute does not permit decisions based on public safety); *see also* People ex rel. Ryan v. Infante, 485 N.Y.S.2d 852, 854 (N.Y. App. Div. 3d Dep't 1985) (citing § 510.30(2)(a) and noting "that the purpose of bail is to secure the defendant's appearance at all proceedings before the court") (internal citation omitted); People v. Maldonado, 407 N.Y.S.2d 393, 395 (Crim. Ct. 1978) ("The statutory structure as to bail is quite clear in that requiring the defendant's appearance is the major consideration in fixing the amount of bail. Danger to the community does not appear to be the primary concern of the bail structure.").

196. N.Y. CRIM. PROC. LAW § 510.30(1)(b) ("Determinations of applications for recognizance or bail are not in all cases discretionary but are subject to rules, prescribed in article five hundred thirty and other provisions of law relating to specific kinds of criminal actions and proceedings, providing . . . that [in some cases an application] must as a matter of law be denied and the principal committed to or retained in the custody of the sheriff . . .").

197. *See supra* note 195.

198. S. 5167, 2015 Leg., 238th Sess. (N.Y. 2015) (The proposed amendments provide that "[w]ith respect to any principal, the court must consider the kind and degree of control or restriction that is necessary to secure his or her court attendance when required *and to assure the safety of any other person or the community*") (emphasis added).

199. Mayor de Blasio's support was announced in the wake of the murder of a five-year veteran officer of the New York Police Department by an individual who had been released prior to trial. *See* A.J. Baker & J. David Goodman, *Suspect in Fatal Shooting of New York Officer Was on the Run for Weeks, Officials Say*, N.Y. TIMES (Oct. 21, 2015), <http://www.nytimes.com/2015/10/22/nyregion/new-york-police-officer-randolph-holder-fatally-shot-east-harlem.html>. The defendant was on bail at the time of the shooting and had most recently been arrested for a drug sale charge in late 2014. *Id.* Following the officer's death, de Blasio expressed outrage at a press conference that the defendant had been sent to a drug rehabilitation program rather than traditionally incarcerated. *De Blasio Calls For Changes In State Bail, Diversion Programs In Wake Of Officer's Death*, CBS N.Y. (Oct. 23, 2015), <http://newyork.cbslocal.com/2015/10/23/de-blasio-diversion-program-changes/>.

whether denying bail and ordering detention is appropriate. In other words, in some cases, flight risk alone must be measured before detention may be ordered. As explained in the next Section, statutes governing the setting or pricing of bail also require independent risk analysis.

*C. Federal and State Provisions Governing the Imposition of Bail*

This Article has already made the logical argument that money bail should not be set to manage dangerousness.<sup>200</sup> As this Section makes clear, the provisions of the federal bail statute and many state bail statutes reflect that logic. They describe money bail as a tool for managing flight risk—not dangerousness. Courts setting bail amounts, then, must have an estimate of flight risk that is independent of dangerousness.

Although part (c) of the federal Bail Reform Act describes generally the court’s power to set conditions of release that will both assure a defendant’s appearance and protect the community, not all of the provisions in the list are intended to manage both flight risk and danger.<sup>201</sup> The money bail provisions are explicitly flight-focused, stating that the money or property to be used as bail must be set at a value that the court deems is “reasonably necessary to assure the appearance of the person as required.”<sup>202</sup>

Federal bail forfeiture provisions reinforce this interpretation of the purpose of bail. Forfeiture of federal bail or bond is triggered by nonappearance, not by the commission of a new crime on release.<sup>203</sup>

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200. *See supra* Section I.C.5.

201. 18 U.S.C. § 3142(c) (2012).

202. *Id.* § 3142. The statutes are less clear about the purposes of the other conditions of release, but there are clear policy reasons for associating many conditions of release with one risk or the other. As a result, those provisions are discussed in the next Part of the Article. *See infra* Section III.D.

203. The bail statute outlines penalties for both failing to appear, 18 U.S.C. § 3146(a), and for committing an offense while on release, § 3147. The provision for failing to appear provides an affirmative defense if there are “uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.” § 3146(c). These penalty provisions make clear that defendants only lose bail or appearance bond for failure to appear. Section 3147 is silent about loss of bail or appearance bond. So while a new crime will trigger a penalty per § 3147, it does not mean that bail money is forfeited.

As a result, when a federal judge sets a bail amount, only flight risk is a relevant and legitimate consideration for bail. As such, mixing dangerousness into the risk calculus will likely lead to an excessive (and therefore unconstitutional) bail amount.<sup>204</sup>

State statutes take a range of approaches to outlining the purposes of bail. Some state statutes are similar to the federal statute: they state explicitly that the purpose of bail is to secure a defendant's appearance, in other words, to manage flight risk.<sup>205</sup> Some states qualify this slightly by stating that the appearance is the primary, but not necessarily exclusive purpose of bail.<sup>206</sup>

Many states merge the description of the purpose of setting a specific bail amount with other decisions that are made at a bail hearing, such as a decision to deny bail or to impose other conditions of release.<sup>207</sup> In this way, many statutes do a poor job of guiding judges

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204. *United States v. Salerno*, 481 U.S. 739, 754 (1987).

205. *See* ARK. CODE § 17-19-101 (2010) (bail is “for the appearance of the defendant”); DEL. CODE tit. 11, § 2107 (2015) (“the court shall not require oppressive bail but shall require such bail as reasonably will assure the reappearance of the accused”); HAW. REV. STAT. § 804-1 (1993); IDAHO CODE ANN. § 19-2902 (Supp. 2015); LA. CODE CRIM. PROC. ANN. art. 311; MASS. GEN. LAWS ch. 276, § 20D (2015); MICH. COMP. LAWS ANN. § 765.1 (West 2000) (explaining that a “recognizance for the appearance of an accused person may be taken”) (emphasis added); MISS. CODE § 99-5-25 (2015); N.Y. CRIM. PROC. LAW § 510.30 (McKinney Supp. 2016) (a recognizance for the appearance of an accused person may be taken); *Lemme v. Langlois*, 104 R.I. 352, 356 (1968) (“The object of bail in a criminal case is to assure the presence in court of the accused for trial.”).

206. *See*, for example, Alabama, ALA. CODE § 15-13-102 (2011) (“Definitions and purpose of bail”—“The primary purpose of bail is to procure the release of a person charged with an offense upon obtaining assurance, with or without security, of the defendant’s future appearance in court.”).

207. *See* Alaska, ALASKA STAT. ANN. § 12.30.011 (West) (“Release before trial”); Arizona, ARIZ. REV. STAT. ANN. § 13-3961 (Supp. 2016) (“Offenses not bailable; purpose, preconviction; exceptions”), invalidated in part by *Simpson v. Miller*, 377 P.3d 1003 (2016); California, CAL. PENAL CODE § 1275(a)(1) (West Supp. 2016) (“Setting, reducing or denying bail; considerations”—“In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration.”); Florida, FLA. STAT. § 903.046(1) (2016) (“The purpose of a bail determination in criminal proceedings is to ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the criminal defendant.”); Illinois, 725 ILL. COMP. STAT. ANN. § 5/110-5 (West Supp. 2016) (“Determining the amount of bail and conditions of release”—discussing the factors a court may consider when it “determin[es] the amount of monetary bail or conditions of release, if any, which will reasonably assure the appearance of a defendant as required or the safety of any other person or the community and

about which risks are relevant to different pretrial decisions. Public safety risks are often woven into these definitions because they frequently drive either (i) the denial of bail or (ii) the imposition of other conditions of release.

While danger is clearly relevant to a decision to deny bail or to impose certain conditions of release, it is illogical to suggest that bail should be priced according to danger.<sup>208</sup> Nevertheless, some state statutes do seem to authorize courts to calculate bail to manage public safety risk. In California, the statute explicitly says that “[i]n setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case.”<sup>209</sup> The statute goes on to emphasize that “[t]he public safety shall be the primary consideration.”<sup>210</sup> Similarly, in Maine and Kansas, the applicable statutes permit the imposition of bail to manage public safety risk, as well as flight.<sup>211</sup> Although the commission of a new crime

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the likelihood of compliance by the defendant with all the conditions of bail”); Iowa, IOWA CODE § 811.2 (2016) (“Conditions of release—penalty for failure to appear”); Indiana, IND. CODE ANN. § 35-33-8-1 (LexisNexis 2012) (“Bail bond” defined); Kentucky, KY. REV. STAT. ANN. § 431.525 (West Supp. 2016) (“Conditions for establishing amount of bail”); Minnesota, MINN. R. CRIM. P. 6.02 (West 2010) (“Release by Court or Prosecutor”); Missouri, MO. SUP. CT. R. 33.01 (West 2002) (“Misdemeanors or Felonies—Right to Release—Conditions”); Montana, MONT. CODE § 46-9-106 (2015) (“Release or detention of defendant pending trial”); Nebraska, NEB. REV. STAT. § 29-901 (2014) (“Bail; personal recognizance; conditions”); New Jersey, N.J. STAT. ANN. § 2A:162-17 (West Supp. 2016) (“Pretrial release decision; timing; considerations; non-monetary conditions; monetary bail”); Washington, WASH. REV. CODE § 10.21.010 (2016) (“Intent”); West Virginia, W. VA. CODE ANN. § 62-1C-2 (LexisNexis 2014) (“Bail defined”); and Wisconsin, WIS. STAT. § 969.01 (2013–2014) (“Eligibility for release”).

208. See *supra* notes 109–114 and accompanying text.

209. CAL. PENAL CODE § 1275(a)(1) (West) (“Setting, reducing or denying bail; considerations”); see also Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1–2 (2008) (describing California’s statute and asserting that it gives judges an impossible task “because there is no relationship between the dollar amount of bail and any *in terrorem* inhibiting effect that would deter future criminal conduct by the defendant”).

210. § 1275(a)(1) (West).

211. ME. REV. STAT. tit. 15, § 1026 (West) (“The judicial officer may not impose a financial condition that, either alone or in combination with other conditions of bail, is in excess of that reasonably necessary to ensure the appearance of the defendant at the time and place required, to ensure that the defendant will refrain from any new criminal conduct, to ensure the integrity of the judicial process or to ensure the safety of others in the community.”); KAN. STAT. ANN. § 22-2802 (Supp. 2015) (“Any person charged with a crime shall . . . be ordered released pending preliminary examination or trial upon the execution of an appearance bond in an amount



does not seem to trigger bail forfeiture in Maine, the violation of public safety-related conditions of release that were imposed in addition to money bail will trigger forfeiture of that bail.<sup>212</sup>

New Jersey's recently amended bail statute avoids the potential for this type of confusion by directly specifying that the purpose of monetary bail is "to reasonably assure the eligible defendant's appearance"<sup>213</sup> and by expressly forbidding the use of money bail to manage public safety (or for other non-flight purposes):

The court shall not impose the monetary bail to reasonably assure the protection of the safety of any other person or the community or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, or for the purpose of preventing the release of the eligible defendant.<sup>214</sup>

Even in those states where bail statutes do not clearly state or isolate the purposes of bail, the purpose can be derived by looking at bail forfeiture provisions. When forfeiture of bail is triggered by non-appearance only and not by the commission of a new offense during release, that is a clear reflection of the purpose of bail.<sup>215</sup> In New York and most other jurisdictions, bail is forfeited by the defendant's failure to appear or flight and not by the commission of a new crime during release.<sup>216</sup>

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specified by the magistrate and sufficient to assure the appearance of such person before the magistrate when ordered and to assure the public safety.").

212. ME. REV. STAT. tit. 15, § 1094 ("When a defendant who has been admitted to either preconviction or post-conviction bail in a criminal case fails to appear as required or has violated the conditions of release, the court shall declare a forfeiture of the bail.").

213. N.J. STAT. ANN. § 2A:162-15 (West 2015).

214. *Id.* § 2A:162-17(3)(c)(1) (2014).

215. *See* SCHNACKE, *supra* note 28, at 14 (2014) ("[I]n virtually every American jurisdiction, financial conditions of bail bonds cannot even be forfeited for new crimes or other breaches in public safety, making the setting of a money bond for public safety irrational.").

216. N.Y. CRIM. PROC. LAW § 500.10(10) (McKinney 2009) ("Cash bail" means a sum of money . . . posted by a principal or by another person on his behalf . . . upon the condition that such money will become forfeit to the people of the state of New York if the principal does not comply with the directions of a court requiring his attendance at the criminal action or proceeding involved or does not otherwise render himself amenable to the orders and processes of the court."); *see also, e.g.*, ALASKA R. CRIM. P. 41(h)(1) (2014) ("If the person released on bail on the giving or pledging of security fails to appear before a court or a judicial officer as required, the judge or magistrate judge before whom the person released was to appear shall forfeit the security."); FLA. STAT. § 903.26(2)(b) (2016) ("Failure of the defendant to appear at the time, date, and place of required appearance shall result in forfeiture of the bond."); IOWA

In many states and at the federal level, then, setting bail to manage public safety risks violates the statutory purpose of bail as expressed in both “purpose” and “forfeiture” provisions. Again, in these jurisdictions, if bail is set at a figure higher than necessary to manage flight risk, it should be viewed as “excessive” and therefore unconstitutional.<sup>217</sup> While this has not traditionally been a successful course for defendants, the statutes direct that it should be.

Furthermore, federal and state bail statutes also empower judges to impose conditions of release other than bail to “reasonably assure the appearance of the person as required and the safety of any other person and the community.”<sup>218</sup> Many of the other available conditions of release that judges are authorized by statute to impose are also better for managing either flight risk or danger and are not equally useful for both.<sup>219</sup> As outlined in more detail in Section III.D below, the choice of which conditions to impose must—for policy reasons—be guided by the type (and degree) of risk that is present.

### III. ISOLATING FLIGHT FROM DANGER: POLICY ARGUMENTS AND PROPOSALS

As outlined in Part II, federal and state statutory provisions frequently require that flight risk be considered independently of danger. Even when the statutes do not expressly require separate consideration of risks and even in cases where both risks are present, flight and danger must be considered separately by judges for several policy reasons. First, combining the risks may lead to inaccurate calculations and/or overestimation of both kinds of risks. The second reason for isolating flight risk from danger is that forcing separate analyses of pretrial risks may help limit judicial discretion in ways that

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CODE § 311.6(1) (2016) (“If the defendant fails to appear at the time and place when the defendant’s personal appearance is lawfully required, or to surrender in execution of the judgment, the court must direct an entry of the failure to be made of record, and the undertaking of the defendant’s bail, or the money deposited, is thereupon forfeited.”); MASS. GEN. LAWS ch. 276, § 20F (2015) (“If the accused is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond or undertaking, such court or justice, by proper order, shall declare the bond or undertaking forfeited.”). Arizona courts have interpreted Arizona statutes in the same way. *See, e.g.*, *State v. Surety Ins. Co.*, 622 P.2d 52 (Ariz. Ct. App. 1980) (holding that defendant’s commission of new crimes while on pretrial release did not trigger forfeiture of surety bond).

217. *United States v. Salerno*, 481 U.S. 739, 752 (1987).

218. 18 U.S.C. § 3142(c)(1)(B) (2012).

219. For a longer discussion of these conditions, see *infra* Section III.D.

provide judges with necessary political cover (thus alleviating pressure for judges to err on the side of detention). In addition, analyzing these risks separately will improve the feedback that judges receive about their release decisions. Finally, courts can devise and impose a range of conditions of release to mitigate pretrial risks, many of which do not manage both flight and danger (at least not to the same degree). Each of these policy arguments is outlined in more detail in the sections that follow.

### *A. Separating Risks to Avoid Overestimation*

The first practical justification for separating flight risk from dangerousness is that merging the two risks may contribute to inaccurate risk measurements. At the outset, judges should evaluate these risks separately simply as a matter of statistical precision.

Furthermore, judicial efforts to calculate risks are vulnerable to well-documented cognitive biases or distortions. As outlined below, requiring separate consideration of flight risk and dangerousness may reduce judges' overreliance on problematic intuitive calculations.

Scholars have researched and written extensively about two systems that govern our decision-making or reasoning processes.<sup>220</sup> The first, our intuitive system, operates on a subconscious level, processing information quickly and with little effort.<sup>221</sup> By contrast, our deliberative system requires “effort, motivation, concentration, and the execution of learned rules.”<sup>222</sup> While reliance on our intuitive system is essential because we need to make so many rapid and efficient “decisions” as we navigate our days, the shortcuts taken by the intuitive system (also called heuristics) are vulnerable to distortion.<sup>223</sup> As Chris Guthrie, Jeffrey Rachlinski, and Andrew

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220. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1127 (1974).

221. See *id.*; DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2011); see also Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 7–8 (2007) [hereinafter Guthrie, Rachlinski & Wistrich, *Blinking*] (describing the intuitive system as “spontaneous, intuitive, effortless, and fast”).

222. Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 221, at 31.

223. See Tversky & Kahneman, *supra* note 220, at 1127; Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 221, at 31 (“[I]ntuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system.”); cf. Alex Stein, *Behavioral Probability*, in RESEARCH HANDBOOK ON BEHAVIORAL LAW AND ECONOMICS (Joshua C. Teitelbaum & Kathryn Zeiler eds., 2014).

Wistrich have shown, even judges are vulnerable to these distortions.<sup>224</sup> Judges tend to “favor compelling intuitive reactions over careful deliberative assessments—even when the intuitive reactions are clearly wrong.”<sup>225</sup>

The distortions or biases described above may be amplified in situations like bail hearings where “the law is unclear, the facts are disputed, or judges possess wide discretion.”<sup>226</sup> Judges may also overestimate pretrial risks—dangerousness in particular—because they rely on what is called the “availability heuristic” which is the “tendency to measure the probability of an event ‘by the ease with which instances or occurrences can be brought to mind.’”<sup>227</sup> When salient examples of “worst-case scenarios” can readily be brought to mind, individuals are vulnerable to a phenomenon known as “probability neglect.”<sup>228</sup>

In the bail context, the worst-case scenarios are defendants on pretrial release who commit horrific and highly-publicized acts of violence.<sup>229</sup> Because examples of these judicial (or systemic) failures are readily available, judges may “overestimate the likelihood” that a defendant on pretrial release will commit a violent crime or they may “ignore the low likelihood of the event and demand action to prevent

224. Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 221, at 107–08; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779–80 (2001) (reporting experimental evidence showing that judges are susceptible to heuristics and biases when making judgments).

225. Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 862 (2015).

226. *Id.* at 911.

227. Lauryn P. Gouldin, *When Deference is Dangerous: The Judicial Role in Material-Witness Detentions*, 49 AM. CRIM. L. REV. 1333, 1363 (2012) (quoting Tversky & Kahneman, *supra* note 220, at 1127); *see also* CASS R. SUNSTEIN, WORST-CASE SCENARIOS 54 (2007); KAHNEMAN, *supra* note 221, at 130–31; Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 162 (2005) (“In sum, an event is more available to an individual if she has previously personally experienced it, or if it is highly imaginable or is the subject of widespread and intense media coverage.”).

228. Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 67 (2002) (“Probability neglect is especially large when people focus on the worst possible case or otherwise are subject to strong emotions. When such emotions are at work, people do not give sufficient consideration to the [low] likelihood that the worst case will actually occur.”); *see also* SUNSTEIN, *supra* note 227, at 54, 63.

229. *See* Appleman, *supra* note 5, at 1359 (“Judges can have a tendency to be biased in favor of predicting dangerousness, in part because they will be responsible if they erroneously release a violent individual.”).

it.”<sup>230</sup> Separating flight risk and dangerousness would ensure both that evaluations of flight risk are not tainted by fears of dangerousness and that estimates of dangerousness are not inflated by concerns about flight.<sup>231</sup>

Risk assessment tools address some of these concerns by replacing reliance on subjective and intuitive judicial measures of risk with more objective data that is insulated from cognitive bias.<sup>232</sup> But these tools are generally pitched as a supplement to judicial decision-making, not as a substitute for it.<sup>233</sup> Most of the tools currently being used do not separate flight risk and dangerousness.<sup>234</sup>

Those risk assessment tools that separate more serious risks of violence from broader risks of nonviolent reoffending and separate both of these public safety risks from flight risk<sup>235</sup> will, of course, be more useful for judges identifying appropriate risk-specific conditions of release. These tools can also be expected to compel, or at least nudge judges to consider flight risk and dangerousness separately.<sup>236</sup> Studies have shown that judges who are required to follow intricate rules or make more nuanced calculations may be more deliberative.<sup>237</sup> When judges or risk assessment tools instead combine flight risk and

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230. Wells, *supra* note 227, at 162–63 (citing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)) (explaining that the “unknown” risks are also perceived as more serious).

231. Cf. Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 *IND. L.J.* 695, 703 (2015) [hereinafter Rachlinski, Wistrich & Guthrie, *Numeric*] (describing the problem of “anchoring” which occurs when “people construct numeric judgment from the surrounding context” and it can be a distorting influence when that context is “misleading and irrelevant”).

232. *Id.* at 699 (explaining that more objective tools like sentencing guidelines may “limit[] the degree to which erratic judgment might adversely affect outcomes”).

233. *But see* Wiseman, *Fixing Bail*, *supra* note 16, at 10 (advocating using risk assessment tools as the foundation for mandatory bail guidelines that would replace (not complement) judges’ risk measurement); cf. Rachlinski, Wistrich & Guthrie, *Numeric*, *supra* note 231, at 738 (observing that advisory guidelines “may leave too much room for discretion and hence for distortion”).

234. *See supra* Section I.D.3 (describing federal and state tools).

235. *See id.* (describing the Public Safety Assessment-Court tool that has been developed by the Arnold Foundation).

236. Guthrie, Rachlinski & Wistrich, *Blinking*, *supra* note 221, at 41 (explaining that “multifactor tests . . . possess the potential for mitigating cognitive error by nudging judges toward more deliberative processes”).

237. *Id.* at 27 (suggesting that the “highly intricate, rule-bound nature” of probable cause evaluations may “signal[] to judges that intuition might be inconsistent with the governing law” and thus “facilitate” more deliberative decision-making).

danger, the risk estimation problems already present in bail hearings are exacerbated and the calculation of each type of risk could be distorted or overestimated.

*B. Sharpening Distinctions to Provide Restraint and Cover*

Over-detention may not simply be a subconscious process. Pretrial release decisions can pose serious personal and institutional hazards for judges. Judges who perceive that they bear sole personal responsibility for a detention decision will deliberately err on the side of over-detention.<sup>238</sup> When judges release potentially dangerous individuals who subsequently inflict harm, “the error will be emblazoned across the front pages,” but when “a judge detains an individual who would not have committed any wrong had he been released, that error is invisible—and, indeed, unknowable.”<sup>239</sup> Although no judge wants his or her name associated with the crimes committed by defendants released before trial, this issue will be exaggerated, of course, for elected judges.<sup>240</sup>

Depending on the jurisdiction, the political pressure to detain may come from multiple constituencies. The public and the news media are clear sources of this pressure.<sup>241</sup> The bail bonding industry is also

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238. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 723 (2009); *see also* Wiseman, *Fixing Bail*, *supra* note 16, at 5 (“Judges . . . are wary of bearing public responsibility for crimes that go unpunished—and new crimes that are committed—because of an erroneous decision to release defendants prior to trial. Erroneous decisions to detain, on the other hand, produce no similar negative reputational consequences.”); Goldkamp & Vilcica, *supra* note 16, at 149 (“[T]he pretrial release decision is deceptively challenging for judicial decision-makers, with little upside and a large possible downside.”).

239. Cole, *supra* note 238, at 696. As one judge, who acknowledged that this was among his “biggest fears,” explained: “No judge wants to release someone and have that person commit a violent crime while on release.” Keith L. Alexander, *11 defendants on GPS monitoring charged with violent crimes in past year in D.C.*, WASH. POST (Feb. 9, 2013), [http://www.washingtonpost.com/local/11-defendants-on-gps-monitoring-charged-with-violent-crimes-in-past-year-in-dc/2013/02/09/9237be1e-6c8b-11e2-ada0-5ca5fa7ebe79\\_story.html](http://www.washingtonpost.com/local/11-defendants-on-gps-monitoring-charged-with-violent-crimes-in-past-year-in-dc/2013/02/09/9237be1e-6c8b-11e2-ada0-5ca5fa7ebe79_story.html) (quoting D.C. Superior Court judge).

240. Wiseman, *Fixing Bail*, *supra* note 16, at 5 (noting that this may be particularly problematic for elected judges).

241. *See* KY. DEP’T OF PUB. ADVOCACY, KENTUCKY PRETRIAL RELEASE MANUAL 14 (June 2013) (explaining that “judges need as much help as possible” because “they are easy targets for the media or for politicians”).

a notorious source of pressure for both elected judges and legislatures.<sup>242</sup>

Pretrial risk aversion is likely connected with judges' fear of regret. Regret has been described as being "accompanied by feeling that one should have known better . . . by thoughts about the mistake one has made and the opportunities lost . . . , and by wanting to undo the event and get a second chance."<sup>243</sup> The risk of regret leads individuals to favor risk-averse choices.<sup>244</sup> In the case of pretrial detention, the fear of regret triggers a tendency to fall back on the choice of detention.

If we retain a pretrial system where judges make release decisions,<sup>245</sup> addressing this problem of judicial will is perhaps the most important challenge facing modern bail reform efforts.<sup>246</sup> Risk assessment tools do some of this work by permitting judges to point to "objective" risk calculations as the justification for a release decision. These tools will carry more of the weight of pretrial decision-making, however, if they map onto existing statutory and constitutional provisions that call for separate risk analysis.<sup>247</sup> Indeed, for the reasons noted above, these tools may be able to highlight and reinforce existing constitutional and statutory requirements that are too often ignored by judges. A more clearly defined checklist, in which risks are divided and tools for managing the risks are appropriately considered, promises to provide greater cover as well.<sup>248</sup>

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242. *Id.* at 11–12.

243. KAHNEMAN, *supra* note 221, at 436.

244. *Id.* at 349.

245. Some scholars have offered intriguing proposals that would alleviate this problem by shifting discretion away from judges. Laura Appleman's proposal would distribute responsibility for release decisions among a group of community members serving as bail jurors. Appleman, *supra* note 5, at 1363–66. Sam Wiseman also advocates taking responsibility for release decisions away from judges. He would have a bail commission set mandatory guidelines based on risk assessment data. Wiseman, *Fixing Bail*, *supra* note 16, at 37–47.

246. The problem of political will has perennially thwarted reform efforts. *See* Simonson, *supra* note 9, at 35–36 (describing the need for "political will to release more defendants pretrial" and asserting the community bail funds "are in a unique position to chip away at the political obstacles to real change"); *cf.* Wiseman, *Detention*, *supra* note 26, at 1347–48 (explaining that increasing the use of electronic monitoring technology or "finding other ways of ensuring a non-dangerous defendant's presence at trial" are not questions "of ability, but of will").

247. *See supra* Part II.

248. *See infra* notes 262–263 and accompanying text.

*C. Isolating Risks to Improve Accountability and Legitimacy*

Other than cases where defendants on release commit violent offenses, judges receive little information about the outcomes of their bail decisions.<sup>249</sup> Given that the rare feedback they do receive is skewed toward the worst outcomes, judges are more “conservative” and “defensive” in making release decisions.<sup>250</sup> Improving the collection and communication of data about pretrial outcomes is therefore a priority for reform.<sup>251</sup>

Judges are also criticized for being inaccurate gauges of community preferences about bail and pretrial release. Judges generally lack information about or accountability for the financial costs of their release and detention decisions.<sup>252</sup> Laura Appleman, Sam Wiseman, and Jocelyn Simonson have each outlined bail solutions that help make judges more aware of and beholden to, community interests in pretrial decision-making. In theory, the bail commission that would draft Wiseman’s bail guidelines,<sup>253</sup> Appleman’s community

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249. Goldkamp & Vilcicā, *supra* note 16, at 127 (explaining that judges are not given data on “the many defendants who negotiate the adjudication process without problems during pretrial release,” but they do receive “negative” feedback because “the media will soundly criticize release decisions when one has gone wrong”).

250. *Id.*

251. *Id.* at 150 (recommending improvements to both judicial training and “systemic feedback”; otherwise, judges may default to bail and detention “rather than to experiment with what they perceive to be risky or undeveloped community release options”).

252. As Wiseman explains, a typical pretrial hearing is a venue with a classic and serious principal-agent problem because judges “bear blame” for defendants who fail on pretrial release. “And judges, unlike legislative bodies, are not responsible for increased jail budgets, lost tax revenues, and drains on social services resulting, directly or indirectly, from their decisions.” Wiseman, *Fixing Bail*, *supra* note 16, at 10.

253. Wiseman’s proposal for more influential bail commissions and guidelines could be a tool for improving data collection and better communicating that data and other community feedback to judges. He clearly envisions that the commission would have more awareness of, and concern for, the public fisc than judges have. *See id.* at 61.



bail jury,<sup>254</sup> and the community bail funds that Simonson analyzes<sup>255</sup> would each more accurately weigh the purported public safety benefits of detention against its financial expense and other costs to the community. Community members may also be more protective, on principle, of defendants' liberty interests.<sup>256</sup>

Building properly defined risk assessment tools with risk measures based on regularly updated or validated data about pretrial release outcomes<sup>257</sup> remedies many of these feedback and accountability problems. This data should be more available to judges interpreting risk measures as well. Strangely, many risk assessment tools that have been proposed gather separate data for those defendants who commit crimes on release<sup>258</sup> and for those who fail to appear, but then combine that data into a single prediction of "pretrial failure."<sup>259</sup> It is difficult for that feedback to be properly incorporated by judges, by those who will use outcome data to validate and update the quality of the risk assessment tools, and by others in the community who are analyzing the criminal justice system and bail reform efforts.<sup>260</sup> Isolating flight risk from dangerousness helps to identify the importance of each type of risk on its own.

Separate consideration of the risks should also facilitate more transparent and precise discussions of community priorities and fiscal

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254. Appleman focuses more on the community's superiority as a gauge of community safety threats and on the potential benefit of fostering greater community investment in, and understanding of, the criminal justice system. *See* Appleman, *supra* note 5, at 1355–58. She does, however, also describe the "local public[']s] . . . meaningful interest in uncovering the procedures involved in denying or granting bail, especially because so many taxpayer dollars are being used to incarcerate those who have not yet been determined guilty." *Id.* at 1364.

255. Simonson, *supra* note 9, at 6 ("[W]hen a "community" group posts bail, it calls into question the widespread assumption that the community and the defendant sit on opposite ends of a scale of justice.").

256. *See id.* at 47; *see also* Appleman, *supra* note 5, at 1365.

257. *See supra* Section I.D.3 explaining procedures for developing and refining risk assessment tools.

258. As noted above, most tools combine violent and nonviolent reoffending. *See id.* (distinguishing the Arnold Foundation's Public Safety Assessment-Court tool which separates risks of violent and nonviolent reoffending).

259. *See id.* (explaining that the Public Safety Assessment-Court is an exception and divides flight risk and dangerousness).

260. GOLDKAMP & GOTTFREDSON, *supra* note 16, at 43 (clarifying that feedback to judges is not the sole purpose of guidelines-type reforms: "[I]n large part, evolutionary change is expected to follow from the increased visibility of the decision itself, from public and professional comment and critique of the basis of bail decisions").

constraints.<sup>261</sup> A system that is known to have so much pretextual decision-making is not one that will be viewed as legitimate by the community. Clarity about the purposes of the law and the intentions of system actors has immediate potential value in enhancing the perceived legitimacy of the system. Of course, transparency may also force much-needed conversations about the problematic and troubling mismatch between our intentions or purposes in the bail context, and the oppressive processes of the pretrial system.

#### *D. Managing Flight and Danger Differently*

A particular defendant's level of flight risk or dangerousness is not a fixed number that exists in a vacuum—it must be assessed in reference to available conditions of release. In other words, the true task facing judges making release and detention decisions is not merely a risk *measurement* task; it is a risk *management* task.<sup>262</sup> The final policy-based reason that flight risk should be analyzed separately from dangerousness is because of differences in conditions of release: many of the conditions that judges can impose to manage or mitigate risk are suited to flight risk or dangerousness, but not to both.<sup>263</sup> By weighing the risks separately and considering them in light of the available risk management options, we can begin to engage more challenging questions. How effective are these conditions of release at managing flight risk or dangerousness? What degree of risk warrants the imposition of one of these conditions of release?<sup>264</sup> Research on these understudied questions will be essential.

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261. *Id.* (describing the promise of bail guidelines to “provide important feedback relevant to core policy concerns”).

262. *Cf.* Starr, *supra* note 152 at 806–07 (critiquing risk assessment tools for failing to predict how the court intervention—the sentencing decision—“will affect the defendant’s recidivism risk”). And it is a task that ought to be revisited during pretrial detention (although too often, it is not).

263. This argument is included here as a policy-based reason (and not previously as a statutory requirement) because federal and state statutes do not expressly limit the use of most conditions of release to manage either flight or danger. Under *Salerno*, however, a mismatch between the risks presented by a defendant (i.e., the government’s regulatory needs) and the conditions of release imposed would qualify as “excessive bail.” *See supra* notes 56–62 and accompanying text. With separated risks, these constitutional claims may be more successful than they have been to date.

264. *Cf.* Sandra Mayson, *Dangerous Defendants*, *supra* note 57, at 41–43 (arguing that increasing use of risk assessment tools requires clearer articulation of the risks that justify pretrial

The federal and state statutes analyzed in Part II provide some guidance to judges about how to organize and sequence the risk measurement and management tasks they must undertake when making pretrial release and detention decisions. Many of those statutes begin with presumptions favoring release, then move to available conditions of release, and close by providing limited circumstances in which detention may be ordered. Although, as noted above, those statutes include some explicit restrictions (e.g., dictating when and how flight risk and dangerousness may drive a detention order<sup>265</sup> and linking financial conditions to flight risk<sup>266</sup>), the statutes are not clear enough. Existing judicial checklists similarly neglect this important issue: although federal judges work from a benchbook that includes guidelines for making bail decisions, those guidelines include no direction about separating consideration of flight risk and dangerousness.<sup>267</sup>

### *1. Conditions that manage flight risk*

If a defendant poses a significant enough flight risk that release on recognizance is inappropriate, a judge must evaluate what flight-related conditions of release are necessary to manage that risk.<sup>268</sup> Although statutes generally do not designate conditions of release according to the risks that they mitigate, there are numerous conditions of release that are geared toward managing flight risk.<sup>269</sup> These include, most frequently, financial conditions like bail or secured bonds that are believed to incentivize defendants to return to

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detention or other pretrial restraints); *see also id.* at 42 (Those risks “should be expressed in terms of both the severity and the likelihood of the feared harm in a specified timespan.”).

265. *See supra* Section II.B.

266. *See supra* Section II.C.

267. *See* FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 1.3 (6th ed. 2013). A proposal to revise federal and state bail checklists is the focus of a separate work in progress.

268. As noted *supra*, if no conditions of release can adequately mitigate this risk, then a judge may order detention based on flight risk. Given cheap and effective electronic tracking options and other technological advances, however, flight-based detention should be rare. *See* Wiseman, *Detention*, *supra* note 26, at 1352; *see also supra* note 35 and accompanying text.

269. It bears repeating that for purposes of this Article, both the risk that a defendant will flee the jurisdiction and the risk that a defendant will fail to appear are encompassed by the term “flight risk.” Defining flight risk and nonappearance is the project of another work in progress. *See* Gouldin, *Defining Flight Risk*, *supra* note 25.

court instead of fleeing. They also include unsecured bonds, where defendants pay nothing up front but are penalized if they fail to return to court. As noted in previous sections, these financial conditions are entirely flight focused.

Judges are also empowered to prevent a defendant from fleeing the jurisdiction by making use of a range of supervision conditions. These conditions range from supervision by a designated custodian,<sup>270</sup> to regular reporting requirements to pretrial services (or some other agency),<sup>271</sup> to residency programs at halfway houses.<sup>272</sup> Some well-funded defendants have been able to negotiate release by paying for private security to monitor their home detention, but this costly self-funded release option is not available to the vast majority of defendants.<sup>273</sup> Sam Wiseman has written extensively about electronic monitoring technology and its potential to resuscitate the Excessive Bail Clause. As he explains, “[i]ncreasingly sophisticated remote monitoring devices have the potential to sharply reduce the need for flight-based pretrial detention.”<sup>274</sup> This type of monitoring would likely be more cost-effective than ordering detention based on flight.<sup>275</sup>

Courts concerned about flight can also impose various sorts of travel restrictions on defendants.<sup>276</sup> These restrictions include passport revocations and reliance on no-fly lists to prevent international travel. Travel can also be more tightly controlled in conjunction with electronic monitoring.

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270. *See, e.g.*, 18 U.S.C. § 3142(C)(1)(B)(i) (2012); N.J. STAT. ANN. § 2A:162-17(b)(2)(a).

271. *See, e.g.*, 18 U.S.C. § 3142(C)(1)(B)(vi).

272. VanNostrand et al., *supra* note 133, at 16.

273. *See, e.g.*, *United States v. Madoff*, 586 F. Supp.2d 240, 244 (S.D.N.Y. 2009) (approving release to home confinement monitored by private security paid for by defendant’s wife); *United States v. Sabhnani*, 493 F.3d 63, 78 (2d Cir. 2007) (release appropriate where defendants agreed to pay all costs associated with 24-hour private security). Courts have rejected the claim that defendants are entitled to fund this sort of supervision, however. *See, e.g.*, *United States v. Banki*, 369 F. App’x 152, 153–54 (2d Cir. 2010) (finding that it was not legal error to deny defendant the option of paying for home confinement because the government would incur additional costs associated with supervising privately-financed home confinement).

274. Wiseman, *Detention*, *supra* note 26, at 1347–48.

275. *Id.* at 1372–74 (explaining that more research on cost-effectiveness is needed but “the available data suggest that [electronic monitoring] can be at least as cheap and effective as money bail”).

276. *See, e.g.*, 18 U.S.C. § 3142(C)(1)(B)(iv); *United States v. Xulam*, 83 F.3d 441, 443 (1st Cir. 1996) (noting that government’s seizure of travel documents mitigated flight risk).

## 2. *Conditions that mitigate danger*

If concerns about dangerousness are the reason that release on recognizance is not appropriate, a judge can impose conditions of release that mitigate or manage dangerousness. There are a number of statutory conditions that are clearly intended to manage or mitigate dangerousness or related witness safety concerns. A few obvious examples include avoiding contact with alleged victims and witnesses,<sup>277</sup> complying with a curfew,<sup>278</sup> and refraining from possessing weapons.<sup>279</sup> Employment and education obligations<sup>280</sup> may mitigate flight risk by anchoring a defendant to the jurisdiction but those seem to be more promising as means of keeping released defendants out of trouble, thus managing danger.

Electronic monitoring technology can also be used to manage at least some public safety risks, including monitoring any defendant's home detention, tracking alleged sex offenders' whereabouts, and ensuring that defendants in domestic violence cases abide by stay-away orders.<sup>281</sup> This sort of monitoring, however, operates differently with respect to flight risk and danger. Wearing a GPS monitor hopefully dissuades alleged offenders from committing crimes (a deterrence argument), but it actually prevents a suspect from successfully disappearing, so long as the technology functions properly.

Judges are also empowered to require released defendants to "refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance"<sup>282</sup> or to obtain drug or alcohol

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277. *See, e.g.*, 18 U.S.C. § 3142(C)(1)(B)(v).

278. *See, e.g., id.* § 3142(C)(1)(B)(vii); N.J. STAT. ANN. 2A:162-17 (b)(2)(f).

279. *See, e.g.*, 18 U.S.C. § 3142(C)(1)(B)(viii); N.J. STAT. ANN. § 2A:162-17(b)(2)(g).

280. *See, e.g.*, 18 U.S.C. § 3142(C)(1)(B)(i); N.J. STAT. ANN. § 2A:162-17(b)(2)(b)-(c).

281. *See, e.g.*, EDNA EREZ ET AL., GPS MONITORING TECHNOLOGIES AND DOMESTIC VIOLENCE: AN EVALUATION STUDY i (June 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238910.pdf> ("GPS tracking seems to increase [domestic violence] defendants' compliance with program rules compared to those who are monitored but not tracked."); Peter M. Thomson, *A Comprehensive Strategy Targeting Recidivist Criminals with Continuous Real-Time GPS Monitoring: Is Reverse Engineering Crime Control Possible?*, 12 ENGAGE 23, 24 (Nov. 2011), <http://www.fed-soc.org/publications/detail/a-comprehensive-strategy-targeting-recidivist-criminals-with-continuous-real-time-gps-monitoring-is-reverse-engineering-crime-control-possible> (asserting that improvements in the precision and accuracy of GPS technology make possible broader uses to manage public safety risks).

282. *See, e.g.*, 18 U.S.C. § 3142(C)(1)(B)(ix).

treatment.<sup>283</sup> These conditions are arguably driven by both flight risk and danger but they clearly operate in different ways on those different risks. Judges may view defendants' substance abuse problems as increasing the risk that they will not appear for trial (i.e., sober defendants will be less likely to miss court dates) but they don't likely influence a defendant's inclination to flee the jurisdiction.<sup>284</sup> Courts also typically view drug or alcohol abuse as more directly increasing a more troublesome risk: that a defendant will engage in violent offenses.<sup>285</sup>

Given that judges have different ways of managing flight risk and dangerousness, they need to develop separate predictions for the two risks. Tools developed to assist judges with this task should separate flight risk and danger. Risk assessment tools that generate a cumulative risk of pretrial failure have limited utility. Instead, the merger of risks may reinforce or worsen other significant problems with pretrial decision-making.

#### CONCLUSION

Bail reform efforts, it turns out, are a sort of cyclical phenomenon in this country and this is our third time around. Questions of how to constrain judicial discretion or improve judicial risk assessment have puzzled each generation. Efforts around the country to reform or abandon money bail systems and to reduce the number of defendants detained before trial depend on clarification of the approach that judges must take to the measurement and management of pretrial risks.

When they published their study of bail guidelines in 1985, John S. Goldkamp and Michael R. Gottfredson described the problem this way: "Too much discretion without explicit goals or criteria produces decisions that are chaotic and, by definition, inequitable."<sup>286</sup> While

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283. See, e.g., *id.* § 3142(C)(1)(B)(x).

284. Here again, the distinction between a defendant who fails to appear because he is intoxicated on his court date poses a different sort of threat than one who flees the jurisdiction. Drug abuse seems much more likely to influence the former than the latter. For a more detailed discussion of the difference between the costs imposed by nonappearance and those imposed by true flight, see Gouldin, *Defining Flight Risk*, *supra* note 25.

285. Baradaran, *Drugs*, *supra* note 168, at 233, 254–58, 276–81 (collecting cases that describe this perceived "nexus" linking drugs and violence but concluding that there is insufficient empirical support for a causal link).

286. GOLDKAMP & GOTTFREDSON, *supra* note 16, at 29.

modern risk assessment tools certainly help to address some of these concerns by taking risk calculation work away from judges, many of these tools are flawed in ways that reinforce problematic judicial practices instead of correcting them. There are constitutional, statutory, and policy-based reasons that judges making pretrial release and detention decisions must disentangle flight risk from dangerousness. Although these constraints are not always evident in practice, reform efforts and tools must reflect them.