

ACCUSED AND UNCONVICTED: FLEEING FROM WEALTH-BASED PRETRIAL DETENTION

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*I, Miranda Lynn ODonnell, am a 22-year-old woman. I was arrested yesterday, May 18, 2016... for a misdemeanor offense [driving with an invalid license]. I was told by the Sheriff's deputies that my money bail is \$2500. I know that because I cannot afford to pay that amount, I have to stay in jail. I saw a TV judge this morning . . . He said my bail will stay at \$2500. . . I was never asked if I could afford my bail. A sheriff's deputy told me not to say anything during my hearing. It took about 60 seconds. I have a 4-year-old daughter. I receive [public] assistance . . . to support her. I can't afford rent so I stay with a friend. I just started working at a restaurant a few weeks ago. I live paycheck to paycheck. I'm worried about whether my job will still be there when I get out.<sup>1</sup>*

I. INTRODUCTION

Over thirty years ago the United States Supreme Court recognized that “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>2</sup> Today, the “norm” is pretrial detention for nearly 450,000 people across the country, many of whom are destitute but eligible for immediate release if they pay the money bail imposed by the court.<sup>3</sup> Throughout the history of

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<sup>1</sup> First Amended Class Action Complaint at 44–45, *O'Donnell v. Harris Cty.*, No. 16-CV-1414 (S.D. Tex. Sept. 1, 2016), <https://cdn.buttercms.com/R5BRcSFSvWo57Kr2Net1>.

<sup>2</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>3</sup> See ACLU CAMPAIGN FOR SMART JUSTICE, *SELLING OFF OUR FREEDOM* 18 (2017) [hereinafter *SELLING OFF OUR FREEDOM*]; CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., *MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM* 6 (2016) [hereinafter *MOVING BEYOND MONEY*] (“Nationwide, 34% of defendants are kept in jail pretrial solely because they are unable to pay a cash bond, and most of these are among the poorest third of Americans.”).

America,<sup>4</sup> money bail has been, and continues to be, the most significant barrier to pretrial freedom for those who are arrested but presumed innocent of criminal conduct.<sup>5</sup> For many arrestees, money bail works exactly as intended: it provides an expedient mechanism for pretrial release upon posting a sum of money to seal the defendant's promise to return to court for future hearings.<sup>6</sup> However, conditioning pretrial release on the payment of a sum of money results in *de facto* pretrial detention for indigent defendants because they will remain in jail until their case is resolved.<sup>7</sup> In some jurisdictions, the amount of money bail courts demanded for minor offenses can be as high as \$5,000,<sup>8</sup> effectively placing pretrial freedom far beyond the meager resources of the indigent. At the other end of the spectrum, many people languish in jail for weeks or months even when bail is set as low as a few hundred dollars or less.<sup>9</sup>

It is significant that money bail is imposed routinely in cases involving minor traffic infractions or petty regulatory offenses for which the maximum penalty upon conviction is a fine of a few hundred dollars, but no period of incarceration.<sup>10</sup> Likewise, pretrial

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<sup>4</sup> See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 30 (Henry Reeve trans., 1835) (“[Bail] is hostile to the poor and favourable only to the rich. The poor man has not always a security to pledge. . .”).

<sup>5</sup> See TIMOTHY R. SCHNACKE, NAT'L INST. OF CORRECTIONS, *FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 2* (2014).

<sup>6</sup> See COUNCIL OF ECON. ADVISORS, *FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 7* (2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) [hereinafter *FINES, FEES, AND BAIL*].

<sup>7</sup> See, e.g., *SELLING OFF OUR FREEDOM*, *supra* note 3, at 18 (finding a Prison Policy Initiative study also found that Black men aged 23-39 who were held in local jails earned a median income \$900 in the month prior to their arrest and black women in the same age group earned a median income of only \$568 in the month before detention); *FINES, FEES, AND BAIL*, *supra* note 6, at 6, 7 (citing a 2012 Virginia study that found that 92% of arrestees were unable to post a bail below \$5,000); Lael Henterly, *When Bail Is Set, the Rich Walk and the Poor Go to Jail*, SEATTLE WKLY. (Aug. 23, 2016), <https://www.seattleweekly.com/news/when-bail-is-set-the-rich-walk-and-the-poor-go-to-jail/> (discussing a 2015 study which found that 31% of misdemeanor detainees in Seattle, Washington, could not post the cash bail imposed).

<sup>8</sup> See *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1110–11 (S.D. Tex. 2017) (discussing the fact that the maximum bail that can be imposed for misdemeanor cases pursuant to the bail schedule in Harris County, Texas is \$5000).

<sup>9</sup> See *FINES, FEES, AND BAIL*, *supra* note 6, at 6; HUMAN RIGHTS WATCH, *THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 2*, 50 (2010) (finding that over a one-year period, 11,000 misdemeanor defendants were in pretrial detention in New York City because they could not afford to pay a bond of \$1,000 or less) [hereinafter *THE PRICE OF FREEDOM*].

<sup>10</sup> For example, in Georgia, an indigent disabled man was charged with public intoxication, a minor non-jailable offense that carried a maximum penalty of a \$500 fine, and was held in pretrial detention for six days on a secured money bail of \$160 that he could not afford to pay. See *Walker v. City of Calhoun*, No. 4:15-CV-0170, 2016 U.S. Dist. LEXIS 12305, at \*3, \*10 (N.D.

defendants can be held in pretrial detention on nonviolent misdemeanor charges which are punishable by up to a year in jail, but will likely result in either dismissal of the charges or, if convicted, a probationary sentence.<sup>11</sup> Moreover, the impact of weeks and months in pretrial detention is profound. Pretrial detainees are at risk of losing any stability they had prior to detention.<sup>12</sup> Even two or three days of pretrial detention causes indigent defendants who are already experiencing socioeconomic disadvantages (i.e., homelessness, mental health disorders, substance abuse) to suffer greater set-backs, including the loss of employment, public benefits, child custody.<sup>13</sup> Also, detainees are exposed to dangers of physical and sexual violence as well as disease and poor medical treatment in jail.<sup>14</sup>

The legitimacy of cash bail that results in de facto pretrial detention in low level criminal cases is questionable when there are readily available nonfinancial forms of pretrial release. Instead of secure money bail which requires the defendant to post a sum of money as a precondition of release,<sup>15</sup> courts could impose an unsecured money bail condition and require payment only if the defendant fails to return to court.<sup>16</sup> There are also a host of nonfinancial conditions of release that could be used to facilitate the defendant's release and reappearance.<sup>17</sup>

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Ga. Jan. 28, 2016), *vacated*, 682 F. Appx. 721 (11th Cir. 2017); GA. CODE ANN. § 40-6-95 (2019). Similarly, Leotha McGruder, an unemployed 22-year-old pregnant mother of two with a special needs child spent four days in jail on a \$5,000 bail following her arrest for failing to identify herself to a police officer. *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1063 (S.D. Tex. 2017), *aff'd in part and rev'd and vacated in part*, 892 F.3d 147 (5th Cir. 2018). Also, Donya Pierce who was charged with having a broken headlight, no proof of insurance, failure to produce driver's license, and having a suspended license was held in jail on \$800 money bail, later reduced to \$650, which she also could not afford to pay. *See Pierce v. City of Velda City*, No. 4:15-cv-570-HEA, 2015 U.S. Dist. LEXIS 176261 (E.D. Mo. June 3, 2015); Class Action Complaint at 3, *Pierce v. City of Velda City*, No. 4:15-cv-00570 (E.D. Mo. Apr. 2, 2015).

<sup>11</sup> *See e.g., ODonnell*, 251 F. Supp. 3d at 1062, 1063 (holding Ronald Ryan Ford on a \$5,000 secure money bond after he was charged with shoplifting).

<sup>12</sup> Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017).

<sup>13</sup> *See id.*; Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 134, 1356–57 (2014).

<sup>14</sup> *See Walker v. City of Calhoun*, No. 4:15-CV-0170, 2016 U.S. Dist. LEXIS 12305, at \*4 (N.D. Ga. Jan. 28, 2016), *vacated*, 682 F. Appx. 721 (11th Cir. 2017) (involving a pretrial detainee confined to a cell for twenty-three hours a day and not given prescribed medication for his mental disorder); JUST DETENTION INTERNATIONAL, VULNERABLE DETAINEES: SURVIVORS OF PREVIOUS SEXUAL ABUSE 1 (2013); *The Issue*, PENAL REFORM INT'L, <https://www.penalreform.org/priorities/pre-trial-justice/issue/> (last visited Apr. 10, 2019) (“People in pre-trial detention are particularly likely to suffer violence and abuse.”).

<sup>15</sup> *See SCHNACKE, supra* note 5, at 2.

<sup>16</sup> *See id.* at 11, 12.

<sup>17</sup> Nonfinancial release conditions range from release on personal or signature bond

The overuse and abuse of money bail by state courts in cases involving nonviolent indigent defendants, particularly those charged with petty offenses, is at the center of the national bail reform movement and the current wave of federal civil rights litigation on behalf of indigent pretrial detainees. Currently there are over a dozen state and federal cases challenging wealth-based pretrial detention.<sup>18</sup> In addition, bail reform measures have been proposed or adopted in more than fifty local jurisdictions, and there are several state-wide legislative measures under consideration to reduce or eliminate the use of money bail.<sup>19</sup>

This article explores the constitutionality and necessity of the use of money bail in cases involving nonviolent indigent defendants charged with low-level offenses. Part II explores the legal challenges that have been raised and discusses the standards and safeguards that federal courts have imposed to prevent wealth-based pretrial detention. Part III whether discusses money bail is actually needed to secure the defendant's reappearance at future court dates, and whether there are equally effective alternatives that courts can utilize to accomplish the goal of preventing failure to appear.

## II. THE CONSTITUTIONALITY OF WEALTH-BASED PRETRIAL DETENTION

Misdemeanor arrestees are often . . . people "living on the

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(commonly referred to as personal recognizance, "PR" or "ROR"), which allows the defendant to be released based on the personal promise to return for future court proceedings. CRIMINAL JUSTICE SECTION, ABA, FREQUENTLY ASKED QUESTIONS ABOUT PRETRIAL RELEASE DECISION MAKING PROCESS 1 (2016), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=25187>. The court could also impose conditions of release designed to prevent an FTA, including requiring regular check-ins, surrender passport, electronic monitoring, house arrest, and curfew. *See id.* at 1 n.2. These conditions are usually monitored by Pretrial Services Agencies in numerous jurisdictions around the country. *See generally* 2018 NAPSA Regions and Regional Directors, RTS. NAT'L ASS'N PRETRIAL SERVS. AGENCIES, <https://napsa.org/eweb/DynamicPage.aspx?Site=NAPSA&WebCode=2018Regions> (breaking the United States into six regions that NAPSA serves).

<sup>18</sup> *See Challenging the Money Bail System*, C.R. CORPS, <https://www.civilrightscorps.org/work/wealth-based-detention> (last visited Apr. 12, 2019) (referencing multiple challenges to wealth-based detention cases across the United States).

<sup>19</sup> *See* Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 538 (2016) (noting bail reform measures in New Jersey, Kentucky, Colorado, Maryland, New Mexico, California, and New York); *see also* Lexi Churchill, *Bail Will Go Down in Missouri Courts Under New Reform Plan*, ST. LOUIS POST-DISPATCH (Jan. 31, 2019), [https://www.stltoday.com/news/local/crime-and-courts/missouri-supreme-court-chief-justice-fischer-announces-reform-of-bail/article\\_09e3a26d-2c1a-57c2-b796-68bbf7aa1930.html](https://www.stltoday.com/news/local/crime-and-courts/missouri-supreme-court-chief-justice-fischer-announces-reform-of-bail/article_09e3a26d-2c1a-57c2-b796-68bbf7aa1930.html) ("The new [Missouri] rules . . . limit how long a defendant can be detained . . . [and] limit a court's ability to order payments in the first place.").

edge at the point in their lives that intersects with getting involved in an arrest.” . . . [T]hey may be homeless. They may lack family, friends, and [resources]. Some are, no doubt, of bad reputation and present a risk of nonappearance or of new criminal activity. But they are not without constitutional rights to due process and the equal protection of the law.<sup>20</sup>

### A. *The Bail Determination Process*

The current constitutional challenges to money bail practices in state courts begin with the dysfunction in the initial setting of bail by the court.<sup>21</sup> While the bail-setting process varies,<sup>22</sup> bail hearings from jurisdiction to jurisdiction are fairly consistent.<sup>23</sup> Bail determinations have devolved into a purely informal processing function in the criminal adjudication process.<sup>24</sup> The initial bail hearing in most places takes less than five minutes.<sup>25</sup> Frequently, the amount of money bail imposed has been rigidly established by a pre-set bail schedule that assigns a dollar amount to each criminal charge.<sup>26</sup> Too often when bail is initially set, the defendant does not have a lawyer,<sup>27</sup> there is no judge presiding over the bail hearing,<sup>28</sup> and the defendant watches the hearing on a television screen from the jail.<sup>29</sup> In many jurisdictions the information on the defendant’s background and criminal history—critical facts needed for courts to make an informed decision on whether the defendant poses a risk of flight—is

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<sup>20</sup> *O'Donnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1167 (S.D. Tex. 2017).

<sup>21</sup> See Q&A: *Pretrial Incarceration, Bail and Profile Based Risk Assessment in the United States*, HUM. RTS. WATCH (June 1, 2018), <https://www.hrw.org/news/2018/06/01/q-pretrial-incarceration-bail-and-profile-based-risk-assessment-united-states> (asserting that informal and rapid bail hearing procedures often lead to unsound and biased determinations).

<sup>22</sup> See Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL 21, 28 (Erik Luna ed., 2017), [http://academic.myforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice\\_Vol\\_3.pdf](http://academic.myforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_3.pdf).

<sup>23</sup> See *id.* at 25–26.

<sup>24</sup> See *id.* at 23.

<sup>25</sup> See, e.g., *O'Donnell*, 251 F. Supp. 3d at 1092 (stating that most bail hearings take one to two minutes); Auerlie Ouss & Meghan T. Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail* 6 (George Mason Legal Studies Research Paper No. LS 19-08, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3335138](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138) (discussing bail hearings in Philadelphia conducted via video conference with a magistrate who is not a lawyer, as well as non-lawyer representatives of the DA’s office and the public defender office and lasted one to two minutes).

<sup>26</sup> See Stevenson & Mayson, *supra* note 22, at 25.

<sup>27</sup> See *O'Donnell*, 251 F. Supp. 3d at 1093; Stevenson & Mayson, *supra* note 22, at 25.

<sup>28</sup> See Stevenson & Mayson, *supra* note 22, at 25.

<sup>29</sup> See *O'Donnell*, 251 F. Supp. 3d at 1092 (involving a hearing officer who connects via video with prosecutor’s office and the county jail where the defendant is brought before the camera when the case is called); Stevenson & Mayson, *supra* note 22, at 25.

simply not available at the time bail is set<sup>30</sup> because often there is no pretrial services agency to gather this information and present it to the court prior to the bail determination.<sup>31</sup> Thus, little to no time is expended making an individualized determination of whether the defendant is a flight risk.<sup>32</sup> Likewise, there is no discussion or consideration of whether the defendant has the ability to pay the money bail or whether there are non-financial alternatives that will assure the defendant's appearance at future court hearings.<sup>33</sup> This indifference to the fact that the money bail imposed could result in weeks and months of pretrial detention for someone facing very minor charges continues during the subsequent perfunctory judicial review of bail days later when the judge could, but usually does not, make an individualized assessment of whether the defendant is a flight risk and reduce or eliminate the cash bail.<sup>34</sup>

Courts have a legitimate basis for imposing pretrial detention when there is evidence that a defendant is violent and poses a risk of danger to the community.<sup>35</sup> In cases where the defendant poses no risk of danger to the community, however, the only legal basis for imposing money bail is securing the defendant's appearance at future court hearings, or reducing the risk that that the defendant will flee the jurisdiction.<sup>36</sup> Thus, the blanket use of secure money bail as a release condition for all defendants unfairly assumes that each and every person arrested is automatically a flight risk and will not return to court when ordered without an upfront payment of cash bail.<sup>37</sup>

The long term impact the bail decision are potentially significant because the outcome of the bail hearing could determine the outcome of the entire case. There is also a growing body of empirical data which shows that those subjected to pretrial detention suffer harsher

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<sup>30</sup> See *id.* at 932.

<sup>31</sup> See *id.*

<sup>32</sup> See, e.g., Cynthia E. Jones, *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparity in the Criminal Justice System: "Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 932, 933 (2013).

<sup>33</sup> See *id.* at 932.

<sup>34</sup> See *id.* at 934, 935–36.

<sup>35</sup> See THE PRICE OF FREEDOM, *supra* note 9, at 2.

<sup>36</sup> *Bandy v. United States*, 81 S. Ct. 197, 197 (1960) (quoting *Reynolds v. United States*, 80 S. Ct. 30, 32 (1959)) (“[T]he purpose of bail is to insure the defendant’s appearance and submission to the judgment of the court.’ It is assumed that the threat of forfeiture of one’s goods will be an effective deterrent to the temptation to break the conditions of one’s release.”).

<sup>37</sup> See *O'Donnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1103 (S.D. Tex. 2017) (conveying a Harris County judge testified that even if she learned that secured money bail provides no financial incentive to comply with the conditions of release, it would not change her subjective belief that secured money bail is better).

outcomes in their pending criminal cases than do defendants released pretrial.<sup>38</sup> In *ODonnell v. Harris County*, a federal civil rights lawsuit brought on behalf of indigent pretrial detainees, the judge found that defendants in pretrial detention are pressured to plead guilty by the prosecution in exchange for quick release from jail and threatened with sentencing enhancements if they do not accept the plea.<sup>39</sup> The court also noted that the case dismissal rate is 13% for pretrial detainees, but 32% for those released pending trial.<sup>40</sup> Moreover, the court found that detainees are 25% more likely to be convicted and 43% more likely to be sentenced to a period of incarceration than those released pretrial, and the sentences imposed on detainees are twice as long as released defendants with the same criminal charges and criminal history and background.<sup>41</sup> The court concluded:

[T]housands of misdemeanor defendants each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention. This Hobson's choice is, the evidence shows, the predictable effect of imposing secured money bail on indigent misdemeanor defendants.<sup>42</sup>

Without consideration of the defendant's ability to pay the cash bail or consideration of whether non-financial conditions of release could be imposed to secure the defendant's reappearance, the cash bail practices in state courts allow defendants with means to purchase their pretrial freedom, while indigent defendants are forced into pretrial detention. As discussed in more detail below, bail reform advocates have successfully argued that this use of cash bail results in unconstitutional wealth-based detention.

### *B. The Constitutional Crisis in Money Bail*

By 2015, ten class actions lawsuits were filed on behalf of indigent pretrial detainees in eight states throughout the South, including

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<sup>38</sup> See, e.g., Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 512–13 (2016); Heaton et al., *supra* note 12, at 786–87; Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 472 (2016); Cynthia E. Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 936–37 (2013).

<sup>39</sup> *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1104–05 (S.D. Tex. 2017), *aff'd in part and rev'd and vacated in part*, 892 F.3d 147 (5th Cir. 2018).

<sup>40</sup> *Id.* at 1105.

<sup>41</sup> *Id.* at 1106.

<sup>42</sup> *Id.* at 1107.

counties and cities in Alabama, Louisiana, Missouri, Mississippi, Georgia, and Tennessee.<sup>43</sup> By 2017, additional bail reform lawsuits were filed in California, Texas, Illinois, and Massachusetts.<sup>44</sup> In some of these cases the federal court has enjoined the challenged money bail practices.<sup>45</sup> Other cases have been resolved by a settlement agreement that ushered in sweeping changes to bail practices, including the elimination of money bail for petty offenses.<sup>46</sup>

The central issue that emerges from the bail reform litigation is what constitutional protection exists when courts, solely to assure reappearance, impose cash bail that predictably results in pretrial detention only for indigent defendants who are unable to pay for their pretrial freedom. These state and federal cases have focused almost exclusively on indigent defendants facing very petty offenses. The government does not contend that pretrial detention was warranted because the defendant is violent or poses a risk of danger to the community. Thus, in each case the court focused on how to balance the state court's compelling interest in assuring reappearance with the defendant's fundamental interest in pretrial freedom. What has emerged from the litigation is a constitutional framework and a set of mandated safeguards that constrain the ability of courts to impose cash bail that will result in wealth-based pretrial detention.

### 1. Prohibition Against Wealth-Based Detention

A trio of United States Supreme Court cases provide the foundation for challenging wealth-based pretrial detention.<sup>47</sup> The first case is *Williams v. Illinois*.<sup>48</sup> In *Williams*, the defendant was convicted of theft, sentenced to the maximum penalty of one year in prison, and assessed \$505 in fines and court costs.<sup>49</sup> By statute, if the financial obligation was not satisfied at the expiration of his imprisonment, the defendant would be required to remain in prison to work off the debt

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<sup>43</sup> PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 60–61 (2017).

<sup>44</sup> *Id.* at 61.

<sup>45</sup> See, e.g., *O'Donnell v. Harris Cty.*, 321 F. Supp. 3d 763, 765, 778 (S.D. Tex. 2018), *aff'd in part and rev'd and vacated in part*, 892 F.3d 147 (5th Cir. 2018); *Schultz v. Alabama*, 330 F. Supp. 3d 1344, 1365, 1376 (N.D. Ala. 2018).

<sup>46</sup> See CTR. FOR ACCESS TO JUSTICE, GA. STATE UNIV. COLL. OF LAW, MISDEMEANOR BAIL REFORM AND LITIGATION: AN OVERVIEW 10 (2017).

<sup>47</sup> See *Bearden v. Georgia*, 461 U.S. 660 (1983); *Tate v. Short*, 401 U.S. 395 (1971); *Williams v. Illinois*, 399 U.S. 235 (1970).

<sup>48</sup> See *Williams*, 399 U.S. at 236.

<sup>49</sup> See *id.*

at a rate of \$5 per day.<sup>50</sup> The Court ruled that the aggregate imprisonment cannot exceed the maximum period fixed by statute due to involuntary nonpayment of a fine or court costs.<sup>51</sup> This, the Court stated, would constitute “impermissible discrimination that rests on ability to pay.”<sup>52</sup> The Court recognized that in making the length of sentence “contingent upon one’s ability to pay, the State has visited different consequences on two categories of persons.”<sup>53</sup> The Court ruled that the Equal Protection Clause of the Fourteenth Amendment prohibits this form of differential treatment based on “economic status.”<sup>54</sup> The Court also stated that “[s]ince only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to” extended imprisonment.<sup>55</sup>

In *Tate v. Short*, the Court addressed whether an indigent defendant unable to pay the fines imposed for non-jailable traffic offenses could be sent to a municipal prison farm to work off his debt.<sup>56</sup> Citing *Williams*, the Court reaffirmed the principle that a person cannot be imprisoned solely because of his impecuniness.<sup>57</sup> The Court ruled that, consistent with the Equal Protection Clause, the State cannot “limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine.”<sup>58</sup>

Finally, in *Bearden v. Georgia*, an indigent defendant was placed on probation and assessed fines and restitution as a condition of probation.<sup>59</sup> When Bearden lost his job and was unable to pay the outstanding balance owed, his probation was revoked.<sup>60</sup> The Court found that the state court’s action in revoking probation was “no more than imprisoning a person solely because he lacks funds to pay the fine, a practice we condemned in *Williams* and *Tate*.”<sup>61</sup>

Although the holdings in *Williams* and *Tate* were both rooted in the Equal Protection Clause, the *Bearden* Court found that “Due process and equal protection principles converge in the Court’s

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<sup>50</sup> *See id.*

<sup>51</sup> *See id.* at 240–41.

<sup>52</sup> *Id.* at 241.

<sup>53</sup> *Id.* at 242.

<sup>54</sup> *Id.* at 244.

<sup>55</sup> *Id.* at 242.

<sup>56</sup> *See Tate v. Short*, 401 U.S. 395, 396–97 (1971).

<sup>57</sup> *See id.* at 397–98 (citing *Williams*, 399 U.S. 235).

<sup>58</sup> *Tate*, 401 U.S. at 399.

<sup>59</sup> *See Bearden v. Georgia*, 461 U.S. 660, 662 (1983).

<sup>60</sup> *See id.* at 662–63.

<sup>61</sup> *Id.* at 674.

analysis in these cases” because the Court generally analyses “the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.”<sup>62</sup>

## 2. Application of Wealth-Based Detention Standards to Pretrial Detention

Post-*Bearden*, the Court’s analysis of post-conviction wealth-based detention has been extended to the pretrial context. Thus far, only two federal circuit courts—the Fifth Circuit and the Eleventh Circuit—have applied the *Bearden* analysis to pretrial detention based on inability to pay cash bail.

In the Fifth Circuit, the first case to rule on the constitutional protection for pretrial detainees was *Pugh v. Rainwater*.<sup>63</sup> In *Pugh*, indigent pretrial detainees unable to pay money bail asserted that the bail laws in the State of Florida violated their right to equal protection secured by the Fourteenth Amendment.<sup>64</sup> The United States Court of Appeals for the Fifth Circuit acknowledged the heavy burden pretrial confinement places on “one who is accused but not convicted,”<sup>65</sup> and found that “imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.”<sup>66</sup> The bail procedures in place at the time the plaintiffs were detained were replaced by court rule during the pendency of the litigation.<sup>67</sup> The court found that the newly-adopted bail procedures effectively cured the constitutional deficiencies by mandating alternatives to money bail, requiring the court to make individualized assessments of each defendant, and mandating that judges consider six different types of pretrial release, including personal recognizance, unsecured money bail, third-party custody, and other non-financial community supervision alternatives.<sup>68</sup>

In the most recent case from the Fifth Circuit, *O'Donnell v. Harris County*, misdemeanor pretrial detainees sought injunctive relief to

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<sup>62</sup> *Id.* at 665 (first citing *Griffin v. Illinois*, 351 U.S. 12, 17 (1956); then citing *Ross v. Moffitt*, 417 U.S. 600, 608–09 (1974)).

<sup>63</sup> *See Pugh v. Rainwater*, 572 F.2d 1053, 1055–56 (5th Cir. 1978).

<sup>64</sup> *See id.*

<sup>65</sup> *Id.* at 1056.

<sup>66</sup> *Id.* (first citing *Williams*, 399 U.S. 235; then citing *Tate*, 401 U.S. 395).

<sup>67</sup> *See Pugh*, 572 F.2d at 1055, 1059.

<sup>68</sup> *See id.* at 1055 n.2.

halt the manner in which secure money bail was imposed in misdemeanor cases in Harris County, Texas.<sup>69</sup> After the United States District Court held an eight-day evidentiary hearing where numerous fact and expert witnesses testified and the court reviewed hundreds of exhibits and thousands of recordings of Harris County bail hearings, the court issued an exhaustive 120-page order enjoining Harris County's secure money bail practices.<sup>70</sup> The O'Donnell court framed the issues as: "Can a jurisdiction impose secure money bail on misdemeanor arrestees who cannot pay it, who would otherwise be released, effectively ordering their pretrial detention? If so, what do due process and equal protection require for that to be lawful?"<sup>71</sup> The court held that when the government is only using secure money bail to facilitate reappearance and not punishment or community safety, the government's interest deserves less deference when balanced against the liberty interests of defendants who are only charged with misdemeanors, do not pose a safety risk to the community, and are presumed innocent.<sup>72</sup>

The court held that "Harris County has a . . . policy and practice of imposing secured money bail as de facto orders of pretrial detention in misdemeanor cases."<sup>73</sup> The court also found that neither the hearing officers nor the judges who review bail determinations make individualized assessments of the particular circumstances for each defendant as demanded under federal law.<sup>74</sup> The court found that although equal protection challenges based on wealth-based classifications are generally evaluated on a rational basis standard, when the wealth-based classification results in detention, heightened scrutiny is required.<sup>75</sup> Applying *Bearden*, the court held that when imposing a secured money bail that results in pretrial detention in misdemeanor cases, the state must make a finding that the defendant has the ability to pay and make a finding that there are no other reasonable alternatives for accomplishing the State's compelling interest in assuring reappearance.<sup>76</sup>

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<sup>69</sup> See *O'Donnell v. Harris Cty.*, 892 F.3d 147, 152 (5th Cir. 2018); *O'Donnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1058, 1059, 1067, 1080 (S.D. Tex. 2017), *aff'd in part and rev'd and vacated in part*, 892 F.3d 147 (5th Cir. 2018).

<sup>70</sup> See *O'Donnell*, 892 F.3d at 152, 153; *O'Donnell*, 251 F. Supp. 3d at 1067, 1068.

<sup>71</sup> *O'Donnell*, 251 F. Supp. 3d at 1059.

<sup>72</sup> See *id.* at 1136.

<sup>73</sup> See *id.* at 1060.

<sup>74</sup> See *id.* at 1107–08, 1130.

<sup>75</sup> See *id.* at 1134, 1138 (citing *Pugh v. Rainwater*, 557 F.2d 1189, 1197 (5th Cir. 1977), *rev'd*, 572 F.2d 1053 (5th Cir. 1978)).

<sup>76</sup> See *O'Donnell*, 251 F. Supp. 3d at 1140 (citing *Bearden*, 461 U.S. at 674). The District Court concluded that plaintiffs showed a likelihood of success on the merits because, among

The court ruled that “secured money bail may serve to detain indigent misdemeanor arrestees only in the narrowest of cases, and only when . . . due process safeguards” are in place to protect the rights of the accused.<sup>77</sup> The court found that Harris County’s bail practices did not comply with procedural due process standards for the denial of the fundamental right to pretrial liberty.<sup>78</sup> The *ODonnell* court held that procedural due process requires:

- (1) notice that the financial and other resource information its officers collect is for the purpose of determining the misdemeanor arrestee’s eligibility for release or detention;
- (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence;
- (3) an impartial decision maker; and
- (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee’s appearance at [future] hearings.<sup>79</sup>

The court also mandated that the detention hearing occur within twenty-four hours.<sup>80</sup>

On appeal, the Fifth Circuit upheld the lower court’s ruling on equal protection, but overruled two aspects of the district court’s ruling on procedural due process standards.<sup>81</sup> The Fifth Circuit held that the 24-hour rule for detention hearings and the requirement of written findings was too onerous.<sup>82</sup> Instead, the appellate court allowed up to 48 hours post-arrest for the court to make the ability to pay determination, and permitted the court make oral, not written, findings following detention hearings.<sup>83</sup>

Similarly, in *Walker v. City of Calhoun*, the Eleventh Circuit

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other reasons, there are a panoply of alternatives to the use of secured money bail that are as good or more effective to address the government’s reappearance goal, including unsecured bond and nonfinancial conditions of release. *See ODonnell*, 251 F. Supp. 3d at 1140, 1152–53. Since the government admitted that secured money bond in misdemeanor cases was not imposed to address the problem of future dangerousness, the court rejected the government’s contention that secured money bail was the only way (or the best way) to assure the defendant would return to court. *See id.* at 1140, 1152–53.

<sup>77</sup> *See id.* at 1059.

<sup>78</sup> *See id.* at 1059–60.

<sup>79</sup> *Id.* at 1145.

<sup>80</sup> *See id.* at 1060.

<sup>81</sup> *See ODonnell v. Harris Cty.*, 892 F.3d 147, 152 (5th Cir. 2018).

<sup>82</sup> *See id.* at 160 (citing *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974)).

<sup>83</sup> *See ODonnell*, 892 F.3d at 152, 160 (affirming and incorporating the findings of the lower court that the secured bail practices of Harris County violate both due process and equal protection rights of misdemeanor defendants).

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reviewed plaintiffs' § 1983 civil rights challenge to the use of secured money bail that resulted in their de facto pretrial detention in Calhoun, Georgia.<sup>84</sup> As in *ODonnell*, the indigent *Walker* plaintiffs sought injunctive relief on the grounds that the bail laws created unconstitutional wealth-based detention in violation of their rights to equal protection and due process secured by the Fourteenth Amendment to the United States Constitution.<sup>85</sup> Under the bail policies in existence at the time of arrest, indigent defendants in Calhoun were required to post secure money bail and, if unable to pay, remain in jail until a court hearing four to five days later. A few months after plaintiffs filed suit, a new standing order on bail was issued. Under the new bail order, indigent defendants unable to pay secure money bail are brought to court within forty-eight hours for a counseled adversarial hearing for the court to make an individualized determination on bail and provide an opportunity for the accused to object to the bail amount and assert a claim of indigency. Also, if the court finds the accused to be indigent, the new bail order mandates that the accused be released on personal recognizance without paying the secured bail amount.<sup>86</sup> The district court ruled that "[t]he bail policy under which Plaintiff was arrested clearly is unconstitutional. Further, although the Standing Order attempts to remedy the deficiencies of the earlier bail policy, it simply shortens the amount of time that indigent arrestees are held in jail to forty-eight hours."<sup>87</sup>

The federal district court enjoined the defendants from keeping indigent arrestees in jail solely because they cannot afford to pay secured money bail amounts and subsequently ordered defendants, as soon as possible following arrest, to ascertain pretrial defendants' ability to pay through use of an affidavit of indigency.<sup>88</sup>

On appeal, the Eleventh Circuit reversed, finding that the City of Calhoun's newly-adopted standing order on bail complied with the due process and equal protection rights of pretrial detainees.<sup>89</sup> The court found that 48-hour detention, as opposed to 24-hour detention, was constitutional, and found that the district court's proscribed affidavit of indigency was not constitutionally-required because the

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<sup>84</sup> See *Walker v. City of Calhoun*, 901 F.3d 1245, 1251–52, 1256 (11th Cir. 2018); *id.* at 1274 (Martin, J., dissenting).

<sup>85</sup> See *id.* at 1251–52, 1269.

<sup>86</sup> *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2016 U.S. Dist. LEXIS 12305, at \*12, \*14–15 (N.D. Ga. Jan. 28, 2016). The standing order also provided that, if charged with traffic or city ordinance offenses, the accused will be release on unsecured bond. See *id.* at \*15, \*16.

<sup>87</sup> *Id.* at \*36.

<sup>88</sup> See *id.* at \*13.

<sup>89</sup> See *Walker*, 901 F.3d at 1262, 1266, 1268–69, 1272.

City could, pursuant to the Standing Order, simply hold a hearing 48-hours after detention to determine indigency.<sup>90</sup>

### 3. Analysis

#### *i. Constitutional Standards Post-Walker and ODonnell*

While plaintiffs in *Walker* and *ODonnell* mounted a number of constitutional arguments against the procedures used to impose secure cash bail,<sup>91</sup> the equal protection challenges raised in both cases have created a conflict among the two federal circuit courts that may eventually be resolved by the United States Supreme Court.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states that “*No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.*”<sup>92</sup> Laws that divide people into separate classes and either confer a benefit or impose a burden on one group can run afoul of the Equal Protection Clause if the government classification is not tailored to meet the government objective.<sup>93</sup> In the context of wealth-based pretrial detention, the equal protection classification was framed by the Fifth Circuit in *ODonnell* as follows:

[T]ake two . . . arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent . . . . One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart.<sup>94</sup>

The Supreme Court has developed a three-tiered analysis for evaluating discrimination claims under the Equal Protection Clause: strict scrutiny (generally reserved for race-based and “suspect class”

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<sup>90</sup> See *id.* at 1266–67, 1269.

<sup>91</sup> See generally, Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J. 1098, 1102–10 (discussing substantive due process and procedural due process challenges to pretrial detention).

<sup>92</sup> U.S. CONST. amend. XIV.

<sup>93</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 642–44 (2d ed. 2002).

<sup>94</sup> *ODonnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018).

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classifications); intermediate scrutiny (primarily applied to gender-based classifications); and rational basis scrutiny, (the default or “catch-all” standard for all other classifications).<sup>95</sup> The conflict among the Fifth and Eleventh circuits that has emerged from the bail reform litigation involves whether strict scrutiny or rational basis scrutiny should be applied to challenges to wealth-based pretrial detention.

a. Strict Scrutiny

Strict scrutiny, the most exacting review, places the burden on the government to show that the classification is “necessary” to achieve a “compelling” government interest.<sup>96</sup> The government bears the burden of showing that there are no other less discriminatory alternatives to achieve its objective.<sup>97</sup> The *ODonnell* court was very found that a “heightened” scrutiny applied to the equal protection challenges to money bail mounted by pretrial detainees, but the court never stated clarified whether it was applying intermediate scrutiny or strict scrutiny. In demanding that government demonstrate that secure cash bail was the most effective way to accomplish its objective, the *ODonnell* it appears that the applied strict scrutiny.<sup>98</sup> In fact, the *ODonnell* court found that that, while economic distinctions are generally subject to a much less demanding level of review and justification, wealth-based classifications that impact the fundamental right to liberty demand heightened scrutiny.<sup>99</sup>

Professor Kellen Funk agreed with the *ODonnell* court and reasoned that either strict or “heightened” scrutiny is the most appropriate:

If heightened scrutiny, narrow tailoring, and a substantive finding of necessity protect convicted indigent defendants, they surely ought to apply in the pretrial context, where the presumption of innocence and a defendant’s ability to prepare for trial are most vulnerable. . . . municipal systems that detain forty

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<sup>95</sup> See CHEMERINSKY, *supra* note 93, at 645–46.

<sup>96</sup> See *id.* at 645.

<sup>97</sup> *Id.*

<sup>98</sup> See *ODonnell*, 892 F.3d at 161–62, 164 (first quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973); then quoting *Doe v. Veneman*, 380 F.3d 807, 818 (5th Cir. 2007)).

<sup>99</sup> See *ODonnell*, 892 F.3d at 161–62 (quoting *Carson v. Johnson*, 112 F.3d 818, 821–22 (5th Cir. 1997)).

percent of misdemeanor defendants until the termination of their proceedings—as Harris County did—should at a minimum be subjected to heightened review.<sup>100</sup>

Under the strict scrutiny microscope, it is extremely unlikely that the secured money bail practices under review in *ODonnell* and *Walker*—and common throughout the country—would survive an equal protection challenge. Even though the government’s interest in court reappearances is compelling, the government would not be able to meet its burden of showing that secure money bail is “necessary,” nor could they establish that there are no other alternatives to cash bail that would assure reappearances and not subject indigents to pretrial detention. As discussed more fully in Part III, below, numerous non-financial alternatives to secure cash bail exist and have been successfully implemented in jurisdictions across the country without any decrease in reappearances rates.

#### b. Rational Basis

The lowest level of scrutiny for equal protection claims is rational basis. Under rational basis scrutiny the aggrieved party—not the government—bears the burden of showing that the government classification is arbitrary or not a rational means to achieve the government objective.<sup>101</sup> Under a rational basis analysis, the oft-stated contention that secure money bail provides a financial incentive for pretrial defendants to return to court would likely be enough of a rational justification for the use of money bail to pass muster. Secure money bail—even if it results in unwarranted pretrial detention of indigents—is rationally related to the government’s goal of assuring the defendant’s reappearances at future court hearings.

The *Walker* court, confronted with virtually the same equal protection challenge raised in *ODonnell*, expressly rejected the notion that any level of heightened scrutiny should be applied.<sup>102</sup> The court reasoned that “differential treatment by wealth is constitutionally impermissible only where it results in an absolute deprivation of a benefit *because of poverty*.”<sup>103</sup> The court found that because indigent

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<sup>100</sup> Funk, *supra* note 91, at 1118.

<sup>101</sup> CHEMERINSKI, *supra* note 93, at 645–46.

<sup>102</sup> See *Walker v. City of Calhoun*, 901 F.3d 1245, 1260 (11th Cir. 2018).

<sup>103</sup> *Id.* at 1261, 1262 (emphasis in original) (citing *Rodriguez*, 411 U.S. at 20).

detainees would be eligible for release on personal recognizance or unsecured money bail after 48 hours of pretrial detention, they suffered only a “mere diminishment”—as opposed to an absolute deprivation— of a right to pretrial release. The court reasoned that indigent detainees “must merely wait some appropriate amount of time to receive the same benefit as the more affluent.” Specifically, the court stated that the Equal Protection Clause did not prohibit the government from offering “comparatively speedier release” to those able to pay the money bail.<sup>104</sup>

c. “Heightened Rational Basis” Scrutiny

While the Supreme Court has held fast to the notion that there are only three levels of scrutiny applied to equal protection claims, legal scholars and jurists have long recognized a fourth tier of scrutiny, sometimes referred to as rational basis “with bite.”<sup>105</sup> Legal scholars have described this unofficial “fourth tier” of scrutiny as “upgrading” rational basis by “reducing the deference” that the court normally accords to the government’s justification and requiring more than mere rationality.<sup>106</sup> The Supreme Court overtly and covertly applied heightened rational basis scrutiny in cases that did not fit neatly into either of the three levels of scrutiny. In *Plyler v. Doe*, a Texas statute mandated de-funding the public education of children who were not “legally-admitted” into the United States.<sup>107</sup> The state’s proffered justification was the desire to preserve limited resources for the education of lawful residents.<sup>108</sup> The Court held:

In determining the rationality of [the statute] we may take into account its costs . . . to the innocent children who are its victims. In light of these countervailing costs, the discrimination

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<sup>104</sup> *Walker*, 901 F.3d at 1272. The court repeatedly analogizes pretrial detention of indigents based on their inability to pay bail to other commercial transactions that citizens voluntarily engage in with the government, i.e., paying tuition at a state school or paying extra money at the post office for express mail. *Id.* at 1263–64. These comparisons to voluntary commercial transactions with the government for optional goods and services is vastly different from being locked in a cage for two days because you are too poor to purchase your pretrial freedom. Unlike the perks that a person is not otherwise entitled to receive from the government, pretrial liberty is a fundamental right that should not be available only to those who can afford to purchase it.

<sup>105</sup> CHEMERINSKY, *supra* note 93, at 647.

<sup>106</sup> Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO L.J. 161 (1984).

<sup>107</sup> *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

<sup>108</sup> *Id.* at 209.

contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State.<sup>109</sup>

The Court's command that the statute further a "substantial goal" of the state is a far greater standard than simple rationality. In fact, the language of the Court is must more akin to the strict scrutiny standard that requires the government action to be "necessary" to advance an "important" objective.

The Court has also applied a heightened rational basis analysis in prohibiting the government from denying food stamps to unrelated persons who lived together,<sup>110</sup> and in rejecting the State of Alaska's plan for distributing greater dividends from government oil revenues to some residents of the state who had lived in the state for a longer period of time.<sup>111</sup> In each case, the Court demanded more than a mere "rational" justification. Moreover, Justice Marshall, in lamenting the rigidity of the three tiered analysis, applauded opinions of the Court that "adjusted" the level of scrutiny when justice demanded application of a more nuanced approach.<sup>112</sup>

Based on the bail reform litigated over the past five years, federal courts are struggling with setting the level of scrutiny for equal protection challenges to wealth-based pretrial detention. Thus far, several courts have skirted the issue by applying an undefined "heightened" scrutiny and requiring the government to provide more than a mere rational justification for the use of cash bail procedures that result in de facto pretrial detention for the indigent.<sup>113</sup> At the other end of the spectrum, in order to make wealth-based pretrial detention fit into a rational basis tier, *Walker* court engaged in a strained analysis that focused exclusively on the economic classification that stemmed from the defendant's inability to pay the money bail, yet disregarded the constitutional significance of the loss of pretrial liberty suffered pretrial detainees.

*Bearden* provides the foundation to deviate from a traditional basis or strict scrutiny dichotomy and analyze pretrial detention under the analytical framework better suited for this issue. While *Bearden*

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<sup>109</sup> *Id.* at 224.

<sup>110</sup> U.S. Dep't of Agric. v. Moreno, 457 U.S. 202 (1982).

<sup>111</sup> Zobel v. Williams, 457 U.S. 55 (1982).

<sup>112</sup> See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 109–10 (1973) (Marshall, J., dissenting) ("...this court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification.").

<sup>113</sup> *E.g.*, O'Donnell v. Harris Cty., 892 F.3d 147, 154 (5th Cir. 2018).

would not “pigeonhole” its analysis into strict scrutiny or rational bases, the court’s analysis exceeds the bounds of rational basis scrutiny. The *Bearden* Court did not give deferential treatment to the justifications advanced by the court. Instead, the court scrutinized and expressly rejected each of the state’s articulated reasons for the classification.<sup>114</sup> The Court also detailed a series of less restrictive alternatives to incarceration. At a minimum, the *Bearden* Court applied a heightened level of rational basis scrutiny that extended well beyond the characteristic deference to the government under a rational basis analysis.

In the context of indigency-based pretrial detention, this “heightened” rational basis scrutiny could provide a comfortable doctrinal solution for the judicial discomfort with strict scrutiny and provide a stronger foundation for the proper analysis of pretrial detention based on secure money bail. If courts demand more than any rational justification from the government, the existence of alternatives to secure money bail will become significant. The growing body of research and empirical studies from jurisdictions across the country, discussed in Part III, provide ample evidence that there are less restrictive alternatives to imposing money bail to secure reappearance, especially in cases involving low-level offenses.

*ii. The Constitutional Standards for Wealth-Based Pretrial Detention*

Post-*Walker* and *ODonnell*, city and county courts must scrutinize whether the exclusive reliance on cash bail as a condition of pretrial release functions as wealth-based detention for indigent defendants who cannot pay cash bail.<sup>115</sup> While neither court prohibited the use of cash bail or the use of fixed bail schedules to establish the amount of bail for each crime, both courts imposed safeguards designed to prevent low-level defendants from being subjected to pretrial detention solely because they are poor. The minimum constitutional safeguards approved by both courts should serve as a guide to state and local courts in evaluating and reforming how secure money bail is used in setting pretrial release conditions.

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<sup>114</sup> *Bearden v. Georgia*, 461 U.S. 660, 670–72 (1983).

<sup>115</sup> *See ODonnell*, 892 F.3d at 154.

a. No Exclusive Reliance on Secure Money Bail

Secure money bail should be one of many options available to the court in setting pretrial release. In *Walker*, it was the existence of non-financial alternatives in the new standing order that the court relied on in finding that the post-standing order bail practices were constitutional.<sup>116</sup> Similarly, in *ODonnell*, one factor that the court relied heavily upon in condemning the state court's bail practices was the fact that the judicial officers automatically imposed secure money bail without any consideration of alternatives or whether the money bail would result in the defendant's detention.<sup>117</sup>

b. Making an "Ability to Pay" Finding

Both the Fifth and Eleventh Circuits ruled that courts are required to make an ability to pay determination within 48 hours if secure money bail results in pretrial detention for an indigent defendant.<sup>118</sup> While both courts permitted the initial bail determination to be made without a finding that the defendant was able to pay, the routine perfunctory judicial review of bail that generally occurs at some unspecified later date in the case will no longer suffice under the constitutional standards set forth in *Walker* and *ODonnell*.<sup>119</sup> Both courts mandate that within 48 hours of detention, a finding is made regarding whether the defendant is indigent and whether the defendant has the ability to pay the secure money bail imposed. At a minimum, courts will have to develop a process for making this determination. Some suggestions discussed in the district court and circuit court opinions in *Walker* and *ODonnell* included an indigency affidavit, information collected by the pretrial services workers, or using federal indigency standards.<sup>120</sup> Finally, while neither court mandated that counsel be provided, the standing order on bail upheld by the court in *Walker* provided for a counseled hearing.<sup>121</sup>

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<sup>116</sup> See *Walker v. City of Calhoun*, 901 F.3d 1245, 1260 (11th Cir. 2018) (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1057, 1058 (5th Cir. 1978)).

<sup>117</sup> See *ODonnell v. Harris Cty.*, 882 F.3d 528, 541 (5th Cir. 2018), *withdrawn*, 892 F.3d 147 (5th Cir. 2018).

<sup>118</sup> See *Walker*, 901 F.3d at 1260 (quoting *Bearden*, 461 U.S. at 661); *ODonnell*, 892 F.3d at 153.

<sup>119</sup> See *ODonnell*, 882 F.3d at 541, 543.

<sup>120</sup> See *Walker*, 901 F.3d at 1252; *ODonnell*, 882 F.3d at 546; *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1153, 1168 (S.D. Tex. 2017), *aff'd in part and rev'd and vacated in part*, 892 F.3d 147 (5th Cir. 2018).

<sup>121</sup> See *Walker*, 901 F.3d at 1252.

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### c. Alternative Release Options Based on the Inability to Pay

If the court finds that the defendant is indigent and does not have the ability to pay the secure money bail imposed, the court must consider whether reasonable alternatives exist to achieve the court's goal of assuring reappearances. Neither opinion states that an inability to pay finding requires that the indigent defendant be released. However, the revised bail scheme adopted in Calhoun during the *Walker* litigation provided for release on unsecured bail if the defendant was unable to pay.

Courts could avoid the burden of implementing these constitutional safeguards by simply eliminating the use of secure money bail based solely on securing reappearances, and not safety. This would effectively eliminate the use of money bail in all minor traffic and petty misdemeanor offenses and allow low-risk defendant to be granted non-financial release. Unsecured money bail would also alleviate the courts of the requirement to comply with the constitutional safeguards mandated when secured cash bail is used to set conditions of release. Alternatively, as in the District of Columbia, courts could adopt a rule which provides that financial conditions of release cannot be imposed solely to secure reappearances if it will result in pretrial detention.<sup>122</sup>

## III. MONEY BAIL AND FLIGHT RISK

The Supreme Court has found that securing the defendant's presence at court proceedings is a compelling government interest.<sup>123</sup> Each criminal court proceeding requires coordination by several different government agencies—the court, the defense, the prosecutor, the police, the clerk's office—to supply information, evidence, and resources to advance or resolve the case.<sup>124</sup> A missed court date, regardless of the reason, unduly disrupts this process<sup>125</sup> and causes the case to be rescheduled on another day when the court

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<sup>122</sup> D.C. CODE § 23-1321(c)(3) (“A judicial officer may not impose a financial condition . . . to assure the safety of any person or the community, but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person . . .”).

<sup>123</sup> See *Luis v. United States*, 136 S. Ct. 1083, 1106 (2016) (Kennedy, J., dissenting).

<sup>124</sup> See, e.g., *Steps in a Criminal Case*, MONROE COUNTY MICH., [https://www.co.monroe.mi.us/officials\\_and\\_departments/officials/prosecuting\\_attorney/steps\\_in\\_a\\_prosecution.php](https://www.co.monroe.mi.us/officials_and_departments/officials/prosecuting_attorney/steps_in_a_prosecution.php) (last visited Apr. 19, 2019).

<sup>125</sup> See Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 690, 690 n.60 (2018).

calendar is already backlogged and congested,<sup>126</sup> requires the prosecutor and the defense attorney to coordinate their trial schedules once again and re-subpoena witnesses to come back to court on the new court date.<sup>127</sup> This entire process could result in months-long delay in the resolution of the case. Thus, the court's interest in judicial efficiency and respect for the tribunal demand the defendant's strict compliance with orders to return to court. The court's heavy reliance on money bail to accomplish this goal, however, is both heavy-handed and unjust when viable alternatives exist.

The money-based bail systems in state courts unfairly and unjustifiably proceeds on the assumption that, if released, all arrestees will not return for future court dates unless they have a vested financial interest in their pretrial release. Starting from this premise, state courts adopt policies and procedures to automatically and reflexively impose money bail conditions on all pretrial defendants. The flawed assumption that money bail is the needed and effective to prevent failure to appear has been restated and perpetuated as a bedrock principle without any empirical evidence or data.<sup>128</sup> In fact, there is a growing body of empirical evidence which establishes that: (A) money bail is not necessary to manage pretrial release and reappearances;<sup>129</sup> (B) other existing legal consequences that flow from the failure to appear provide strong incentive to return to court; and (C) the use of money bail does not incentivize the indigent or address the actual causes of failure to appear among low-level offenders.<sup>130</sup>

#### A. *Money Bail Is Not Necessary to Assure Reappearance*

In several diverse jurisdictions across the country where money bail is either not used, rarely used, or significantly de-prioritized among pretrial release options, there is significant empirical evidence that there is a low failure to appear rate among defendants

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<sup>126</sup> See *id.*; Wayne A. Logan, *Policing Police Access to Criminal Justice Data*, 104 IOWA L. REV. 620, 642 (2019).

<sup>127</sup> See NANCY VER STEEGH, 10 STEPS FOR PRESENTING EVIDENCE IN COURT 6 (2016); *How Do Criminal Defense Attorneys Prepare for Trial?*, MAREIN AND BRADLEY, <http://www.mareinandbradley.com/how-do-criminal-defense-attorneys-prepare-for-trial/> (last visited Apr. 19, 2019); USAO, *Trial*, U.S. DEPT JUSTICE, <https://www.justice.gov/usao/justice-101/trial> (last visited Apr. 19, 2019).

<sup>128</sup> See Spurgeon Kennedy, *Freedom and Money—Bail in America*, PRETRIAL SERVS. AGENCY, <https://www.psa.gov/?q=node/97> (last visited Apr. 17, 2019).

<sup>129</sup> See Gupta et al., *supra* note 38, at 478, 496.

<sup>130</sup> See MODEL PENAL CODE § 242.8 (AM. LAW INST. 2019).

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released with non-financial conditions.<sup>131</sup>

### 1. Washington, D.C.

In Washington, D.C., for nearly thirty years, the pretrial release process has operated without using secured money bail.<sup>132</sup> Nearly all defendants charged with low-level misdemeanor offenses and nonviolent felony offenses are released into the community on nonfinancial conditions (e.g., curfew, stay-away, drug testing) and 88-90% of all defendants on pretrial release reappear for all future court dates.<sup>133</sup> This remarkably low FTA rate has been consistent over a number of years.<sup>134</sup> One study found that during the six-year period from 2007-2012, 88% of all defendants on pretrial release subsequently returned to court when ordered.<sup>135</sup> The D.C. Pretrial Services Agency sends court notifications to each defendant a few days before each court date to remind the defendant when and where they are required to report for court.<sup>136</sup>

### 2. New Jersey

The State of New Jersey issued a 2019 report on the impact of the statewide bail reform legislation that took effect in January 2017.<sup>137</sup> One of the factors that led to the new bail law was a 2013 study which revealed that 40% of the New Jersey jail population consisted of pretrial defendants who were unable to pay cash bail.<sup>138</sup> Of those pretrial detainees, 12% remained in jail because they could not afford to pay \$2,500 or less.<sup>139</sup> The new bail law significantly de-prioritizes money bail in favor of an assessment of whether the defendant is a flight risk or safety risk. Non-monetary conditions of release are imposed by the court for low risk defendants under the supervision of the state's pretrial services agency.<sup>140</sup> The report found that more

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<sup>131</sup> See CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 15 (2016) [hereinafter MOVING BEYOND MONEY].

<sup>132</sup> See CHRISTINE BLUMAUER ET AL., NAACP, ADVANCING BAIL REFORM IN MARYLAND: PROGRESS AND POSSIBILITIES 33 (2018).

<sup>133</sup> See MOVING BEYOND MONEY, *supra* note 131, at 15; Kennedy, *supra* note 128.

<sup>134</sup> See MOVING BEYOND MONEY, *supra* note 131, at 15.

<sup>135</sup> See Kennedy, *supra* note 128.

<sup>136</sup> See CLIFFORD T. KEENAN, PRETRIAL SERVS. AGENCY FOR THE D.C., THE GUIDE TO PSA'S PROGRAMS AND SERVICES 6 (4th ed. 2016).

<sup>137</sup> GLENN A. GRANT, N.J. COURTS, 2018 REPORT TO THE GOVERNOR AND LEGISLATURE (Apr. 2019), <https://njcourts.gov/courts/assets/criminal/2018cjrannual.pdf?c=dSE>.

<sup>138</sup> *Id.* at 6.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 31.

than 24,000 lower-risk pretrial defendants released under the new law than would have been eligible for release under the State's prior cash bail system.<sup>141</sup> In total, in 2017 approximately 139,000 lower risk pretrial defendants were granted release without money bail and over 89% returned to court as ordered.<sup>142</sup>

### 3. Philadelphia, Pennsylvania

Another 2019 study found that eliminating secure money bail resulted in no increase in the failure to appear rate.<sup>143</sup> In 2018, the newly-elected progressive prosecutor in Philadelphia, Larry Krasner, announced that his office would no longer seek money bail for defendants charged with a range of misdemeanor and nonviolent felony cases.<sup>144</sup> In announcing the policy Krasner stated: "There is absolutely no reason why someone who will show up for court, is not a flight risk, and is no threat to their neighbors and community, needs to sit in jail for days because they can't post a small amount of bail. It's simply not fair. We don't imprison the poor for poverty."<sup>145</sup> The announcement included a list of twenty-four misdemeanor and nonviolent felony charges that Krasner instructed his prosecutors not to seek cash bail for at bail hearings, including various property offenses, food stamp fraud, identity theft, possession of marijuana, possession of drug paraphernalia, receiving stolen property, prostitution, and trespass.<sup>146</sup> Though only judges have the power to set bail conditions, as anticipated, the court largely did not impose a secure money bail condition when not requested by the prosecutor.<sup>147</sup> The study examined over 47,000 cases filed during a 20-month period from 2017-2018 and found a 22% decrease in the number of pretrial detainees in jail in Philadelphia and "no detectable evidence that the decreased use of monetary bail, unsecured bond, and release on conditions had adverse effects on appearance rates or recidivism."<sup>148</sup>

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<sup>141</sup> *Id.* at 18.

<sup>142</sup> *Id.* at 14.

<sup>143</sup> See Ouss & Stevenson, *supra* note 25, at 11–12.

<sup>144</sup> See *id.* at 2; Phila. Dist. Attorney's Office, *Larry Krasner Announces End to Cash Bail in Philadelphia for Low-Level Offenses*, PHILA. DISTRICT ATT'YS OFF. (Feb. 21, 2018), <https://phillyda.wordpress.com/2018/02/21/larry-krasner-announces-end-to-cash-bail-in-philadelphia-for-low-level-offenses/>.

<sup>145</sup> Phila. Dist. Attorney's Office, *supra* note 144.

<sup>146</sup> See *id.*

<sup>147</sup> See Ouss & Stevenson, *supra* note 25, at 4, 9.

<sup>148</sup> *Id.* at 7, 13; Samantha Melamed, *Philly DA Larry Krasner Stopped Seeking Bail for Low-Level Crimes. Here's What Happened Next.*, PHILA. INQUIRER (Feb. 19, 2019), <https://www.philly.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform->

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A similar study examined data from criminal cases in Philadelphia from 2010-2015 and found that while “the goal of money bail is to assure appearance at trial . . . [o]ur results suggest that money bail has a negligible effect or, if anything, *increases* failures to appear.”<sup>149</sup>

#### 4. Allegany County (Pittsburg)

According to a 2017 report prepared by the Allegany County Pretrial Services Agency, from October 2016 through November 2017, of the 3,584 low risk defendants screened by the office, 97% were released with nonfinancial conditions. The agency sent court reminders for all hearings using a combination of text messages, email and voice calls, and only 6% failed to return on the scheduled court date.<sup>150</sup>

#### 5. Cook County, Illinois (Chicago)

A 2019 report published by the Circuit Court of Cook County examined the impact of bail reform measures in the county.<sup>151</sup> In contrast to most bail reform measures, the Cook County initiative focused on felony cases.<sup>152</sup> The report detailed, among other things, the Model Bond Court initiative implemented in late 2017 to foster greater pretrial release among those pending felony charges.<sup>153</sup> Under the revised bail procedures, in lieu of secure money bail, nearly double the number of felony pretrial defendants were released on a personal recognizances (“I-Bond”).<sup>154</sup> Notably, despite the drastic increase in non-financial release, there was no corresponding increase in the failure to appear rate.<sup>155</sup> Both before and after the new reforms ushered in a massive expansion of pretrial release for those

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incarceration-20190219.html.

<sup>149</sup> Gupta et al., *supra* note 38, at 478, 496 (emphasis added).

<sup>150</sup> See *id.*; see also ALLEGHENY CTY. PRETRIAL SERVS. DEP’T, FIFTH JUDICIAL DIST. OF PA., 2015 ANNUAL REPORT 9 (2015) (“The court reminder system, for which Pennsylvania Commission on Crime and Delinquency (PCCD) funding was received in 2013, was completed in 2015 with reminders for all hearing types added to the system. Messages are sent via email, text, or landline following internal business rules.”).

<sup>151</sup> STATE OF ILL. CIRCUIT COURT OF COOK CTY., BAIL REFORM IN COOK COUNTY: AN EXAMINATION OF GENERAL ORDER 18.8A AND BAIL IN FELONY CASES (May 2019), <http://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20%20Published%2005.9.19.pdf>.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 4.

<sup>154</sup> See *id.* at 4; *Id.* at 27 (finding that the I-Bond rate of 36.3% rose to 61.8% after comprehensive bail reform measures were instituted).

<sup>155</sup> *Id.* at 30–31 (reporting that 82.5% reappearance rate before the bail reform initiative, and 83.2% reappearance rate among those released under the reform bail procedures).

pending felony charges, the reappearance rate remained steady at approximately 80%. Also, the overall impact of the reform measures resulted in a reduction of the jail population from 11,486 people to 5,799—a fifty percent decrease.<sup>156</sup>

## 6. New York City

A 2019 report, “Pretrial Release Without Money,” was released by the New York City Criminal Justice Agency.<sup>157</sup> The report examined pretrial release practices in New York City over the thirty-year period from 1987-2018. During this time, courts reduced the use of money bail and increased the number of people released with nonfinancial conditions by over 25%.<sup>158</sup> The report also found that over roughly the same time period that the nonfinancial release, “the rate of reappearance increased in all crime severity categories.”<sup>159</sup> Overall, the court reappearance rate rose from 84% to 86%.<sup>160</sup> The report concluded that “New York City has shown it’s possible to release a greater percentage of defendants with minimal conditions and improve court attendance at the same time.”<sup>161</sup>

## 7. Colorado

A 2013 pretrial release study was conducted in Colorado to determine, among other things, the failure to appear rate for low-risk defendants released on secured money bail and failure to appear rate for low-risk defendants released on unsecured bail.<sup>162</sup> The study examined nearly 2,000 new criminal cases filed during a 16-month period from 2008-2009.<sup>163</sup> The cases were drawn from ten Colorado counties (covering 80% of the population).<sup>164</sup> The study concluded that low-risk pretrial defendants who were required to pay a secured money bail were not more likely to return to court than were low-risk

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<sup>156</sup> *Id.* at 36.

<sup>157</sup> AUBREY FOX & STEPHEN KOPPEL, PRETRIAL RELEASE WITHOUT MONEY: NEW YORK CITY, 1987-2018 (Mar. 2019), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=15ad6f0e-b18c-d8d8-ec60-156090d88968&forceDialog=0>.

<sup>158</sup> *Id.* at 2 (stating: that the rate of release without money rose from a low of 50% of pretrial defendants in 1990 to 76% by 2018).

<sup>159</sup> *Id.* at 9.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 10.

<sup>162</sup> See MOVING BEYOND MONEY, *supra* note 131, at 7; MICHAEL R. JONES, PRETRIAL JUSTICE INST., UNSECURED BONDS: THE AS EFFECTIVE AND MOST EFFICIENT PRETRIAL RELEASE OPTION 3 (2013).

<sup>163</sup> See JONES, *supra* note 162, at 3, 6.

<sup>164</sup> See *id.* at 6.

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defendants who were released on an unsecured.<sup>165</sup> Thus, secured money bail did not provide any greater incentive or yield any better results in flight risk, the only relevant consideration for the court in setting bail in cases involving petty crimes.<sup>166</sup>

## 8. Kentucky

Perhaps an even more startling study on the impact of secured money bail is a 2013 published report which shows that the increased length of pretrial detention, especially for low-risk detainees, *increases* the likelihood of missed court hearings.<sup>167</sup> Using data from over 150,000 defendants booked into jails in Kentucky in 2009 and 2010, the study found that when compared to defendants released within a day, bailable low-risk defendants detained for as few as two to three days were 22% more likely to miss future court hearings.<sup>168</sup> This finding directly undermines the singular goal of bail for low level nonviolent defendants.

Collectively, the empirical evidence and comprehensive studies of pretrial release and reappearance in diverse jurisdictions across the country illustrate the fallacy of any perceived link between the financial incentive of money bail and preventing failure to appear.<sup>169</sup> Overwhelmingly, pretrial defendants granted release without financial conditions can and do return to court when ordered. Moreover, as discussed below, there are other more effective ways courts can proactively impact reappearance rates.

### *B. FTA, Forfeiture, and Bail Jumping*

In addition to the fact the overwhelming majority of pretrial defendants return to court without the financial incentive of money bail, money bail is also not needed because existing legal consequences for failure to appear—including arrest, detention, new criminal charges—are more dire and “incentivizing.”<sup>170</sup> While every

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<sup>165</sup> *See id.* at 3.

<sup>166</sup> *See id.*

<sup>167</sup> *See* CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 4, 10 (2013).

<sup>168</sup> *See id.*

<sup>169</sup> *See, e.g.,* ODonnell v. Harris Cty., 251 F. Supp. 3d 1052, 1131–32 (S.D. Tex. 2017), *aff'd in part and rev'd and vacated in part*, 892 F.3d 147 (5th Cir. 2018); MOVING BEYOND MONEY, *supra* note 131, at 15.

<sup>170</sup> *See, e.g.,* Iowa v. Williams, 445 N.W.2d 408, 410 (Iowa Ct. App. 1989); Alan J. Tompkins et al., *An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court*, 48 CT. REV. 96, 98 (2012).

state allows for forfeiture of the money bail for failure to appear in court,<sup>171</sup> in addition, the court will likely issue a bench warrant which subjects the defendant to immediate arrest if the defendant does not voluntarily surrender.<sup>172</sup> Second, the missed court date provides grounds for the court and revoke pretrial release and send the defendant to jail for the duration of the case.<sup>173</sup> Most significantly, nonappearance at a scheduled court date subjects the defendant to a new criminal charge, commonly, Criminal Failure to Appear (FTA) or “bail jumping.”<sup>174</sup> While generally the new FTA charge is only a misdemeanor offense if the defendant failed to report to court in a misdemeanor case, in some jurisdictions, regardless of whether the original charged offense was a misdemeanor or a felony offense, the defendant faces a felony FTA charge if there is evidence that the defendant absconded to evade prosecution or if the defendant does not return to court to surrender within a specified period of time after missing the court date.<sup>175</sup> Although sentences vary for FTA offenses, generally these offenses carry a year or more in addition to any sentence imposed on the original criminal charge, and the defendant can be convicted of FTA even if acquitted of the original crime.<sup>176</sup> In

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<sup>171</sup> See, e.g., N.Y. CRIM. PROC. § 540.10(1) (McKinney 2019) (“If, without sufficient excuse, a principal does not appear when required or does not render himself amenable to the orders and processes of the criminal court wherein bail has been posted, the court must enter such facts upon its minutes and the bail bond or the cash bail, as the case may be, is thereupon forfeited.”); Nat’l Conference of State Legislatures, *Pretrial Release Violations & Bail Forfeiture* (June 28, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/bail-forfeiture-procedures.aspx>.

<sup>172</sup> See 8A AM. JUR. 2D *Bail and Recognizance* § 175 (2019); Nirej Sekhon, *Dangerous Warrants*, 93 WASH. L. REV. 967, 978–79 (2018); e.g., *Louisiana v. Perry*, 13-566, p. 2 (La. App. 3 Cir. 12/11/13); 127 So. 3d 1064, 1065–66.

<sup>173</sup> See *Tennessee v. Huskey*, 177 S.W.3d 868, 886 (Tenn. Crim. App. 2005); *Vermont v. Quist*, No. 08-336, 2008 Vt. Unpub. LEXIS 293, at \*3–4 (Vt. Sept. 16, 2008); Nat’l Conference of State Legislatures, *supra* note 171.

<sup>174</sup> E.g., MODEL PENAL CODE § 242.8 (AM. LAW INST. 2019); GA. CODE ANN. § 16-10-51(b) (2019) (“Any person who has been charged with or convicted of the commission of a misdemeanor and has been set at liberty on bail or on his own recognizance upon the condition that he will subsequently appear at a specified time and place commits the offense of misdemeanor-bail jumping if, after actual notice to the defendant in open court or notice to the person by mailing to his last known address or otherwise being notified personally in writing by a court official or officer of the court, he fails without sufficient excuse to appear at that time and place. A person convicted of the offense of misdemeanor-bail jumping shall be guilty of a misdemeanor.”); see also Nat’l Conference of State Legislatures, *supra* note 171 (stating nearly every state has a criminal punishment for bail jumping); Karen L. Ellmore, *State Statutes Making Default on Bail a Separate Criminal Offense*, 63 A.L.R.4TH 1064 § 1(a) (noting multiple jurisdictions make “bail jumping” a criminal offense).

<sup>175</sup> See Nat’l Conference of State Legislatures, *supra* note 171; 8A AM. JUR. 2D *Bail and Recognizance* § 175 (2019).

<sup>176</sup> See Amy Johnson, *The Use of Wisconsin’s Bail Jumping Statute: A Legal and Quantitative Analysis*, 2018 WIS. L. REV. 619, 621 (2018); Nat’l Conference of State Legislatures, *supra* note 171.

the long run, conviction for bail jumping will undoubtedly justify a judge denying pretrial release in any future criminal case and could indicate to a judge that the defendant is a poor candidate for a probationary sentence that could have been imposed on the original low-level misdemeanor charge.<sup>177</sup>

A 2018 behavioral science study provides support for the fact that the threat of arrest and criminal sanctions are effective in incentivizing low-level offenders to return to court when ordered.<sup>178</sup> The study focused on reducing the high FTA rate in New York City courts among low-level offenders that received a citation or summons to appear in court for traffic and regulatory violations (i.e., littering and drinking alcohol in public).<sup>179</sup> The study found that, while sending text messages are helpful in reminding offenders to make their court date, the most significant impact on the FTA rate was the result of text messages that coupled the court reminder with a reminder of the negative legal consequences of failure to appear: “Remember, you have court tomorrow at 9:30AM. Tickets could be dismissed or end in a fine (60 days to pay). Missing court . . . can lead to your arrest.”<sup>180</sup> The study found that this version of the text message reduced the FTA rate among low-level offenders by 26%.<sup>181</sup> Thus, without using money bail to incentivize low level offenders, leveraging the existing adverse criminal consequences for nonappearance can provide a powerful incentive for defendants to return to court when ordered.

### C. Disentangling Attendance Risk from Evading Prosecution

The term “flight risk” conjures up images of a fleeing fugitive “on the run,” intentionally trying to escape prosecution and punishment for misdeeds. This dire image bears little resemblance to the actual reasons that defendants charged with low-level, nonviolent offenses miss court dates.<sup>182</sup> Generally the failure to appear rate among low level offenders is more attributable to personal life struggles than a

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<sup>177</sup> See Ethan Corey & Puck Lo, *The ‘Failure to Appear’ Fallacy*, APPEAL (Jan. 9, 2019), <https://theappeal.org/the-failure-to-appear-fallacy/> (“This single-minded focus on so-called failure-to-appear (FTA) rates obscures the fact that most people who miss court aren’t on the run.”).

<sup>178</sup> See BRICE COOKE ET AL., USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT 4 (2018).

<sup>179</sup> See *id.*

<sup>180</sup> *Id.* at 13.

<sup>181</sup> *Id.* at 16.

<sup>182</sup> See Corey & Lo, *supra* note 177 (“[T]his single-minded focus on so-called failure-to-appear (FTA) rates obscures the fact that most people who miss court aren’t on the run.”).

willful effort to abscond or avoid the legal consequences that flow from the pending charge. In fact, these low level offenders have the least incentive to flee or evade prosecution because they have the least to lose if convicted. The potential criminal sanction for low-level misdemeanor and traffic offenses is generally a fine or probation.<sup>183</sup>

Moreover, due to their impecunity, this population of pretrial defendants lack the financial resources to flee the jurisdiction. Similarly, as a practical matter, money bail will not incentivize indigent people to come to court because they do not have (and cannot acquire) money to post the bail.<sup>184</sup> Thus, the financial incentive of avoiding forfeiture simply does not exist.<sup>185</sup>

Significantly, many low-level offenders suffer from a range of social disadvantages, including mental health disorders, drug addiction, alcoholism, unemployment, homelessness, or some combination of these challenges.<sup>186</sup> Many are, therefore, consumed with daily struggles over where to get their next meal; where they will sleep at night; whether they will be injured or abused on the street or in a shelter; whether they will be able to receive the medicine they need; and how they can care for their children.<sup>187</sup>

Against this backdrop of persistent crisis, it can be challenging to navigate returning to court for future court appearances.<sup>188</sup> Because the next court date is usually weeks or months after the date of initial release, many low-level offenders simply forget court dates in the interim.<sup>189</sup> Other common reasons for missing court include: “*I could not find my court papers, so I did not know what day I was supposed to show up*”; “*I thought court was next week*”; “*I did not have money for the bus*”; “*I did not have child care*”; “*I had to go to work or lose my job*”; and “*I came to court but I could not figure out what courtroom*”

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<sup>183</sup> See Paul Bergman, *Felonies, Misdemeanors, and Infractions: Classifying Crimes*, NOLO, <https://www.nolo.com/legal-encyclopedia/crimes-felonies-misdemeanors-infractions-classification-33814.html> (last visited Apr. 19, 2019).

<sup>184</sup> See Jamiles Lartey, *TV Made America's Bail System Famous. Now Reformers Want to End It*, GUARDIAN (Aug. 30, 2017), <https://www.theguardian.com/us-news/2017/aug/30/new-jersey-bail-reform-criminal-justice-bond-money>.

<sup>185</sup> See *id.*

<sup>186</sup> See Corey & Lo, *supra* note 177.

<sup>187</sup> See Suzanne M. Spencer-Wood & Christopher N. Matthews, *Impoverishment, Criminalization, and the Culture of Poverty*, 45 ARCHAEOLOGIES OF POVERTY 1, 1 (2011).

<sup>188</sup> See Meagan Flynn, *Harris County Bail System Offers Little Help to Defendants Who Most Need It, Cases Reveal*, HOUSTON CHRON. (Jan. 22, 2018), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-bail-system-shortchanges-defendants-12516456.php> (finding that the high rate of failures to appear in Houston post-*ODonnell* results from a disproportionate number of people suffering from mental illness and homelessness).

<sup>189</sup> See COOKE ET AL., *supra* note 178, at 6, 9.

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to go to.”<sup>190</sup>

For this population of offenders, in lieu of imposing a money bond that results in pretrial detention, courts should adopt alternative conditions of release that focus more directly on the root causes of failure to appear. To that end, jurisdictions across the country have adopted the practice of sending court notifications or court date reminders to those on pretrial release.<sup>191</sup> This simple proactive approach to preventing failure to appear is endorsed by the American Bar Association<sup>192</sup> and mirrors the common approach used by doctors assure that patients remember to report for scheduled medical appointments.

The empirical evidence from jurisdictions around the country demonstrate that these court notifications—sent via text message, email, automated voice calls, written letters, and even using volunteers to make telephone calls<sup>193</sup>—are very effective in getting defendants to return for court dates.<sup>194</sup> A 2005 study in Jefferson County, Colorado, found that calling the defendant’s home and leaving a message reduced the FTA rate from 21% to 13%.<sup>195</sup> The study also found that speaking to the defendant directly reduced the FTA rate to 8%.<sup>196</sup> A 2006 study in Multnomah County, Oregon found that court reminders sent via an automated telephone dialing system reduced the failure to appear rate by 31%.<sup>197</sup>

Another 2006 study in Coconino County, Arizona, focused on the high FTA rate among those who had been issued police citations and subsequently ordered to appear in court.<sup>198</sup> The researchers sent telephone notifications to one group of 245 people and the FTA rate was 12.9%.<sup>199</sup> The control group of 244 people received no court

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<sup>190</sup> See *Case Studies in Court Reminders*, SAFETY & JUSTICE MATTERS (John D. & Catherine T. MacArthur Found., Chi., Ill.), Sept. 6, 2018.

<sup>191</sup> See JENNIFER ELEK ET AL., USE OF COURT DATE REMINDER NOTICES TO IMPROVE COURT APPEARANCE RATES 1 (2017), <https://www.ncsc.org/~media/Microsites/Files/PJCC/PJCC%20Brief%2010%20Sept%202017%20Court%20Date%20Notification%20Systems.ashx>.

<sup>192</sup> See STANDARDS FOR PRETRIAL RELEASE § 10-1.10(k) (AM. BAR ASS’N 2017).

<sup>193</sup> See MOVING BEYOND MONEY, *supra* note 3, at 16; PRETRIAL JUSTICE INST., USING TECHNOLOGY TO ENHANCE PRETRIAL SERVICES: CURRENT APPLICATIONS AND FUTURE POSSIBILITIES 16 (2012) [hereinafter USING TECHNOLOGY].

<sup>194</sup> PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 57 (2017).

<sup>195</sup> See USING TECHNOLOGY, *supra* note 193, at 14.

<sup>196</sup> See *id.*

<sup>197</sup> See *id.* at 15.

<sup>198</sup> See PRETRIAL JUSTICE INST., RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS 31 (2012) [hereinafter RATIONAL AND TRANSPARENT BAIL DECISION MAKING].

<sup>199</sup> See *id.*

notification and the FTA was 25.4%, nearly double.<sup>200</sup> The study found that the FTA dropped to 5.9 percent when the defendant received the automated call directly.<sup>201</sup> Similarly, in 2009-2010, researchers in Nebraska conducted a study of nearly 8,000 defendants in fourteen different counties and found that they were able to reduce the FTA rate by sending court date reminders.<sup>202</sup>

Most recently, a 2018 court notification study conducted by the University of Chicago found that the FTA rates in New York City dropped 32% one month after implementing a notification system.<sup>203</sup> Other studies have achieved similar results.<sup>204</sup> Moreover, in the last two years several additional jurisdictions have initiated court notification programs as part of larger bail reform efforts.<sup>205</sup>

As discussed in Part II, *infra*, the clear constitutional imperative for imposing cash bail on indigents is an ability to pay determination and consideration of reasonable alternatives for accomplishing the state's purpose in preventing failure to appear. While no research studies show that use of money bail is the *only* means of achieving the state's compelling interest in reappearance, there is now a wealth of research and empirical data which concludes that release on nonfinancial conditions and the use of court reminders is an effective approach to ensuring reappearance without the deprivation of pretrial defendants occasioned by the use of money bail.<sup>206</sup>

#### IV. CONCLUSION

The bail reform litigation that is currently underway across the country has fundamentally changed bail practices in several jurisdictions and has prompted reform in many others. The reform has involved significant changes to the bail determination process

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<sup>200</sup> *See id.*

<sup>201</sup> *See id.*

<sup>202</sup> *See* Mitchell N. Herian & Brian H. Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, in 9 PUBLICATIONS OF AFFILIATED FAC. 11, 11–12, 13 (2010).

<sup>203</sup> *See* COOKE ET AL., *supra* note 178, at 4.

<sup>204</sup> *See e.g.*, Brian H. Bornstein et al., *Reducing Courts' Failure-to-Appear Rate by Written Reminders*, 19 PSYCHOL., PUB. POL'Y, & L. 70, 71 (2013).

<sup>205</sup> *See Case Studies in Court Reminders*, *supra* note 190. In 2018, Charleston, South Carolina launched their court reminder initiative; Pima County, Arizona expanded their voice notification system to include text messages; and other jurisdictions that are in the process of implementing court reminder systems include New Orleans, Louisiana; Cook County, Illinois; New York, New York; Spokane, Washington; Ada County, Idaho; and Lucas County, Ohio. *See id.*

<sup>206</sup> *See, e.g.*, COOKE ET AL., *supra* note 178, at 4; RATIONAL AND TRANSPARENT BAIL DECISION MAKING, *supra* note 198, at 31; USING TECHNOLOGY, *supra* note 193, at 14; Bornstein et al., *supra* note 204, at 71; Herian and Bornstein, *supra* note 202, at 11–12, 13.

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and changes in the manner and extent to which courts use secure money bail, especially in cases of low-level, nonviolent misdemeanor and traffic offenses.<sup>207</sup> The changes in bail practices have resulted in dramatic reductions in the pretrial jail population.<sup>208</sup> As other state courts grapple with whether to continue imposing money bail, especially for low-risk defendants, the bail reform that has been successfully implemented in jurisdictions around the country preclude the blanket assumption that money bail is necessary for all defendants to assure reappearances. If nearly 90% of defendants granted pretrial release without money bail return to court when ordered there should be no need for courts to impose money bail and risk subjecting indigent pretrial defendants to unwarranted pretrial detention. Likewise, the continued use of money bail cannot be justified as the only means of achieving the courts compelling interest in preventing failures to appear. There is now empirical evidence that other approaches are at least as effective and exact a far less toll on the life and liberty of those who are presumed innocent.

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<sup>207</sup> *See supra*, Section III.A.

<sup>208</sup> *See id.*