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The Due Process of Bail

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The Due Process Clause is a central tenet of criminal law's constitutional canon. Yet defining precisely what process is due a defendant is a deceptively complex proposition. Nowhere is this more true than in the context of pretrial detention, where the Court has relied on due process safeguards to preserve the constitutionality of bail provisions. This Article considers the lay of the bail due process landscape through the lens of the district court's opinion in ODonnell v. Harris County *and the often convoluted historical description of pretrial due process. Even as the* ODonnell *court failed to characterize pretrial process as a substantive due process right – as countless courts before it had—the case offers a compelling possibility that such a charactization is in fact appropriate in defining due process in a pretrial setting. And so, this Article concludes by reimagining pretrial due process as procedural and substantive in nature.*

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I. INTRODUCTION

The Fifth Amendment guarantees that "[n]o person shall be deprived of life, liberty, or property without due process of law."[1] Also known as the Due Process Clause, it protects individuals against arbitrary governmental actions by promising procedural safeguards.[2] Defining when an act is arbitrary and what precisely are the safeguards due to an individual in the face of governmental action is a deceptively complex proposition. This is particularly so in the context of pretrial detention, where state and federal systems adopt a variety of procedures,[3] and the Supreme Court has provided little guidance. The guidance that does exist in Fourth, Fifth, Eighth, and Fourteenth Amendment jurisprudence is difficult to reconcile and is often unclear as to what the constitutional requirements are, if any, for proceedings beyond those specifically contemplated in the case at hand. "Due process" for bail proceedings is an elusive proposition at best, an illusory one at worst.

In the context of criminal pretrial detention, the Court has recognized that holding a person without an opportunity for release prior to conviction is a deprivation of liberty on the most fundamental level.[4] This is consistent with the Court's rulings on pretrial detention in other contexts. Considering a state regime that prohibited release for a mentally ill detainee, the Court noted in *Foucha v. Louisiana*[5] that the "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process

1. U.S. CONST. amend. V.
2. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992).
3. Many jurisdictions follow statutory regimes that designate categories of offenses for defendants ineligible for pretrial release and establish procedures for determination of release for the remainder. *See, e.g.*, 18 U.S.C. § 3142; D.C. CODE § 23-1322; FLA. STAT. § 907.041; FLA. R. CRIM. P. 3.132; MASS. ANN. LAWS ch. 276, § 58A (LexisNexis); N. J. STAT. ANN. § 2A:162-18 (West); WIS. STAT. § 969.035; Rule 5-209, NMRA; *see also Pretrial Release Eligibility*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 13, 2013), http://www.ncsl.org/ research/civil-and-criminal-justice/pretrial-release-eligibility.aspx; *Pretrial Detention*, NAT'L CONF. OF STATE LEGISLATURES (June 7, 2013), http://www.ncsl.org/ research/civil-and-criminal-justice/pretrial-detention.aspx. Many states, however, do not have similar regimes in place. Jessica Smith, *Bail Reform in North Carolina: Pretrial Preventative Detention*, UNC SCH. OF GOV'T: N.C. CRIM. L. (Apr. 17, 2019), https://nccriminallaw.sog.unc.edu/bail-reform-in-north-carolina-pretrial-preventative-detention/.
4. United States v. Salerno, 481 U.S. 739, 748–51 (1987).
5. 504 U.S. 71 (1992).

Clause from arbitrary governmental action."[6] In *Jennings v. Rodriguez*[7]—a case involving immigration detention without an opportunity for bail[8]—Justice Breyer noted in his dissent that "[t]he Due Process Clause foresees eligibility for bail as part of 'due process.'"[9] Citing *Stack v. Boyle*,[10] Justice Breyer noted that a process that allows bail is critical because pretrial release not only enables the defendant to prepare his defense, but also ensures that the state is not punishing the defendant prior to conviction.[11] In both *Stack* and *United States v. Salerno*,[12] the Court spoke of due process through the lens of the Eighth Amendment's prohibition on excessive bail—limiting impositions on the defendant's pretrial liberties beyond those needed to protect public safety[13] or to ensure the defendant's appearance at future proceedings.[14]

Regardless of their context, in each of these cases, the Court recognized pretrial detention as a source of government action that deprives a person of liberty, as well as the corresponding need for procedural safeguards to ensure that such deprivations are not arbitrary.[15] However, what those safeguards should be and how courts reviewing pretrial detention systems should recognize due process violations when they occur is less clear. As a result, legislative and judicial confusion around what process is due in the context of pretrial detention has reigned.[16]

As bail reform efforts have challenged bail regimes throughout the nation, an odd patchwork of procedural analysis has arisen both

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6. *Id.* at 80.

7. 138 S. Ct. 830 (2018).

8. I am using the term "bail" broadly in this piece to refer to both monetary and nonmonetary conditions of pretrial release.

9. *Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting) (first citing *Salerno*, 481 U.S. at 748–51; then citing Schilb v. Kuebel, 404 U.S. 357, 365 (1971); and then citing Stack v. Boyle, 342 U.S. 1, 4 (1951)).

10. 342 U.S. 1 (1951).

11. *See Jennings*, 138 S. Ct. at 862 (citing *Stack*, 342 U.S. at 4).

12. 481 U.S. 739 (1987).

13. *See id.* at 751.

14. *See Stack*, 342 U.S. at 4–5.

15. *See Jennings*, 138 S. Ct. at 836; *Salerno*, 481 U.S. at 742; *Stack*, 342 U.S. at 5.

16. Just as different jurisdictions have adopted different legislative approaches to bail, so too have different courts interpreted the constitutionally mandated process around bail differently. *See, e.g.*, Hill v. Hall, No. 3:19-cv-00452, 2019 WL 4928915, at *17 (M.D. Tenn. Oct. 7, 2019); Buffin v. City & Cnty. of S.F., No. 15-cv-04959-YGR, 2019 WL 1017537, at *15 (N.D. Cal. Mar. 4, 2019); Caliste v. Cantrell, 329 F. Supp. 3d 296, 312 (E.D. La. 2018), *aff'd on other grounds*, 937 F.3d 525 (5th Cir. 2019); Weatherspoon v. Oldham, No. 17-cv-2535-SHM-CGC, 2018 WL 1053548, at *8 (W.D. Tenn. Feb. 26, 2018), *recon. denied*, No. 17-cv-2535-SHM-CGC, 2018 WL 1884825 (W.D. Tenn. Apr. 19, 2018); *In re* Humphrey, 228 Cal. Rptr. 3d 513, 517 (Cal. Ct. App. 2018); Coleman v. Hennessy, No. 17-cv-06503-EMC, 2018 WL 541091, at *1 (N.D. Cal. Jan. 5, 2018); Rodriguez-Ziese v. Hennessy, No. 17-cv-06473-BLF, 2017 WL 6039705, at *3 (N.D. Cal. Dec. 6, 2017).

in the context of due process challenges and in the context of other constitutional claims—specifically in the context of equal protection violations. Most recently, the district court[17] and the Fifth Circuit[18] in *ODonnell v. Harris County*[19] struggled to make sense of what procedural standards should apply to a state and county bail system that—unlike those in *Salerno*, *Foucha*, or *Jennings*—did permit pretrial release but lacked a clear statutory process to accomplish this release. The struggle to define what process is constitutionally due in pretrial detention systems is not unique to *ODonnell*, though the case does provide a good vehicle to consider different due process approaches. In the face of rising pretrial detention rates[20] and increased litigation around the legitimacy of pretrial detention systems,[21] the question of what process is due to detainees pretrial is increasingly important.

The reality of pretrial detention systems today is increasingly one of detention based on wealth (or, more accurately, lack of wealth) than on danger or risk of flight.[22] As courts like *ODonnell* recognize this reality, they are left with little guidance for determining what process is required by the Constitution.[23] Existing bail jurisprudence is ambiguous at best as to whether the procedures found to be constitutionally sufficient in cases like *Salerno* are also constitutionally mandated.[24] Professors Kellan Funk and Sandra Mayson have raised the additional question: assuming *Salerno* does

17. ODonnell v. Harris County, 328 F. Supp. 3d 643, 654 (S.D. Tex. 2018); ODonnell v. Harris County, 321 F. Supp. 3d 763, 765 (S.D. Tex. 2018); ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1129–32, 1140–48 (S.D. Tex. 2017); ODonnell v. Harris County, 227 F. Supp. 3d 706, 726–33 (S.D. Tex. 2016).

18. ODonnell v. Harris County, 892 F. 3d 147, 155 (5th Cir. 2018); ODonnell v. Harris County, 882 F. 3d 528, 537 (5th Cir. 2018).

19. 882 F. 3d 528 (5th Cir. 2018).

20. *See* Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1652 (2020) (noting that while pretrial detention rates have risen, detention for misdemeanors in state systems is actually quite low). For general figures on detention rates, see BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 251774, JAIL INMATES IN 2017 6 tbl. 4 (2019), https://www.bjs.gov/content/pub/pdf/ji17.pdf.

21. *See Challenging the Money Bail System*, C.R. CORPS, https://www.civilrightscorps.org/work/wealth-based-detention (last visited Oct. 18, 2020) (listing challenges to bail systems across the United States).

22. *See* PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 59–62 (2017); Cynthia E. Jones, *Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention*, 82 ALB. L. REV. 1063, 1069–70 (2018–2019); Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 242, 257–68 (2018) (noting that bail, "by its very nature, discriminates based on wealth").

23. *See* Mayson, *supra* note 20, at 1655–56 (arguing that procedurally all pretrial detention—whether as a result of unavailable bail or unaffordable conditions—should be subject to the same safeguards).

24. The Eleventh Circuit Court of Appeals has declined this possibility, *see* Walker v. City of Calhoun, 901 F.3d 1245, 1262–63 (11th Cir. 2018), even as some lower courts have adopted it, *see, e.g.*, Caliste v. Cantrell, 329 F. Supp. 3d 296, 311–13 (E.D. La. 2018), *aff'd*, 937 F.3d 525 (5th Cir. 2019).

set a procedural constitutional requirement, does that requirement apply if pretrial release is possible but unattainable for the particular defendant?[25] Fourth Amendment jurisprudence that does create constitutional requirements in pretrial contexts, such as *Gerstein v. Pugh*,[26] *County of Riverside v. McLaughlin*,[27] and *Rothgery v. Gillespie County*[28] are internally discordant and seem at odds with increasingly long periods of pretrial detention and increasingly onerous (and liberty depriving) conditions of pretrial release. Similarly, procedural pretrial detention challenges in lower courts—whether as stand-alone procedural due process challenges or when coupled with other constitutional claims—are confusing and inconsistent at best.[29] Which leaves the lingering question: What exactly is the due process of bail?

This Article examines that question and posits a possible answer by exploring the district court's holding in *ODonnell*. Part II considers the *ODonnell* decision and maps the procedural safeguards it proposes for the Harris County, Texas pretrial system. Part III considers the lay of the pretrial detention system, including competing interests at play and the effects of pretrial detention on individuals, communities, and state actors. Finally, Part IV lays out the winding and convoluted trail of due process jurisprudence generally and as it relates to pretrial jurisprudence before offering a proposed pretrial process.

II. *ODONNELL* AND PRETRIAL DUE PROCESS

In *ODonnell*, District Court Judge Lee Rosenthal lamented that "[i]f the County complied with equal protection requirements, part of the plaintiffs' concerns about due process would be mitigated."[30] It is one line in a one hundred-plus page opinion, but it is telling. In this line, whether she meant to or not, Judge Rosenthal evoked the entwined nature of procedural and substantive claims, the modern judiciary's reluctance to rely on substantive due process claims, and the failure of the Supreme Court to articulate procedural requirements for pretrial detention hearings.

25. *See* Kellen Funk, *The Present Crisis is American Bail*, 128 YALE L.J.F. 1098, 1107 (2019) (calling this question beyond *Salerno*'s reach); Mayson, *supra* note 20, at 1678.

26. 420 U.S. 103 (1975).

27. 500 U.S. 44 (1991).

28. 554 U.S. 191 (2008).

29. *See* ODonnell v. Harris County, 892 F. 3d 147, 157–59 (5th Cir. 2018) (describing inconsistencies analysis); Funk, *supra* note 25, at 1113–20 (discussing various courts' interpretation of the due process and equal protection arguments).

30. ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1154 (S.D. Tex. 2017).

The plaintiffs in *ODonnell* challenged Harris County's monetary bail system for misdemeanor charges.[31] They alleged that the county's use of bail schedules, reliance on perfunctory hearings at which defendants lacked counsel, and failure to consider the defendants' ability to pay the imposed bails all resulted in pretrial detention that was not justified.[32] The plaintiffs argued that under Harris County's system, they were detained not because they posed a particularly high risk, but because they were too poor to bail out.[33] Wealthier defendants, charged with the same offenses and held under the same bail amounts, were able to gain their freedom by paying bail.[34] The plaintiffs claimed, and the court agreed, that pretrial detention based on wealth alone raised an equal protection concern.[35] In addition, the plaintiffs claimed that the county's bail system violated the Due Process Clause.[36] The plaintiffs' due process claim was murkier than the equal protection claim in some ways. While the plaintiffs arguably raised both substantive and procedural due process claims, the court only reached the procedural due process claim, requiring the county to institute particular procedural safeguards.[37] These safeguards, Judge Rosenthal reasoned, would prevent the bail system from creating a wealth-based detention classification.[38] Put another way, by providing process, the equal protection problem was solved.[39]

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31. *See id.* at 1063–64. The *ODonnell* plaintiffs were each charged with misdemeanor offenses in Harris County, Texas, were each indigent, and were each assessed a monetary bail he or she was unable to pay in order to gain pretrial release. *Id.* at 1062–64.

32. *Id.* at 1067.

33. *Id.*

34. *Id.* at 1067–68.

35. *Id.* at 1133–35. While wealth is not ordinarily a suspect class, in *San Antonio Independent School District v. Rodriguez*, the Court held that wealth-based classifications could create a suspect class and trigger heightened scrutiny when the state action based on wealth completely deprived the individual of liberty. 411 U.S. 1, 20 (1973). Relying on *Williams v. Illinois*, 399 U.S. 235 (1970) and *Tate v. Short*, 401 U.S. 395 (1971), the *Rodriguez* Court noted that "[t]he individuals, or groups of individuals, who constituted the class discriminated against . . . shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Id.* In *Rodriguez*, the wealth-based class did not qualify because the plaintiffs were not completely deprived of their public education based on poverty. *Id.* at 25. Some simply received a better resourced education because they could afford it. *Id.* In *ODonnell*, however, "[t]he claim [was] that misdemeanor defendants who can pay secured money bail are able to purchase pretrial liberty, while those who are indigent and cannot pay are absolutely denied pretrial liberty and detained by their indigence." *ODonnell*, 251 F. Supp. 3d. at 1135.

36. *ODonnell*, 251 F. Supp. 3d. at 1061.

37. *Id.* at 1138–41.

38. *Id.* at 1154.

39. *Id.*

Interestingly, and perhaps unsurprisingly, the plaintiffs in *ODonnell* did not raise an excessive bail claim under the Eighth Amendment.[40] The bail was clearly excessive within the ordinary meaning of the term—the plaintiffs' poverty literally rendered their pretrial freedom beyond their financial means. Given that the historical purpose of bail was not preventive detention but to ensure the defendant's return to court,[41] the unaffordable bail exceeded its purpose and served only as a means to detain the plaintiffs.[42]

Arguably, as a result, this bail was excessive under the Supreme Court's analysis in *Stack* as well.[43] There, the Court held that bail was excessive and violated the Eighth Amendment if it had been "set at a figure higher than an amount reasonably calculated" to ensure the defendant returned to court.[44] Yet, the *Stack* Court defined the Eighth Amendment's prohibition on excessive bail not in terms of the defendant's ability to pay, but in terms of the state's compelling interest in preventing pretrial flight.[45] As a result, the plaintiffs' claim that they were denied their liberty because they could not pay the set bail did not in and of itself trigger an excessive bail claim. Even if, as the *ODonnell* court noted, the county's hearing officers who set the bail seemed to give little thought to the utility of the bail they set, the set bail acted as a mechanism to achieve the state's articulated goal of preventing flight.[46]

The plaintiffs' failure to raise an excessive bail claim is not unique, even as it is disappointing.[47] This failure leaves intact the Court's allegiance to the *Stack* analysis that excessiveness is measured solely in terms of the state's goals and not the defendant's ability to comply.[48] This is problematic on two levels. First, it may ignore the original goals of the Excessive Bail Clause. As Professor Beth Colgan notes, in the context of the Excessive Fines Clause (the companion to the Excessive Bail Clause in the Eighth Amendment), the original meaning of "excessive" hinged on the defendant's ability to pay the fine and the consequences of his failure to do so.[49] While Professor Colgan's work does not address bail, her historical analysis might inform a similar reading of the Excessive Bail Clause. Such a

40. *See id.* at 1067.

41. *See* SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 18 (2018).

42. *See* Mayson, *supra* note 20, at 1653, 1655.

43. Stack v. Boyle, 342 U.S. 1, 5 (1951).

44. *Id.*

45. *Id.* at 4.

46. *See* ODonnell v. Harris County, 251 F. Supp. 3d. 1052, 1059, 1062, 1072–73, 1135 (S.D. Tex. 2017).

47. *See* Michael S. Woodruff, Note, *The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation*, 66 RUTGERS L. REV. 241, 274–76 (2013).

48. *Stack*, 342 U.S. at 4.

49. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 320–22, 324 (2014).

reading is supported by the Judiciary Act of 1789, a contemporary to the Eighth Amendment, which noted that "bail should be admitted, except where punishment is death."[50] This position, that bail and its corresponding pretrial freedom was the norm and detention unusual, was consistent with the Anglo and colonial treatment of bail that predated the Constitution.[51]

Second, given the plaintiffs' claim that the county's bail determination processes were near rote adherence to established bail schedules with little consideration of the particular risks the defendant posed or the ability of bail to mitigate that risk,[52] it would appear that the set bail *did* violate the Excessive Bail Clause as defined by *Stack*. There was no evidence that the figure set was no higher than "reasonably calculated" to achieve the state's goal of assuring appearance.[53] The plaintiffs asserted almost exactly this claim in the context of due process, arguing that the lack of process renders the imposition of bail arbitrary and therefore unconstitutional.[54] In this way, the Excessive Bail Clause claim, if it does exist, would be remedied by the court-ordered procedure—a hearing to determine the necessity of the bail for each defendant.[55] Still, the failure to raise this claim, though consistent with other litigation around bail, leaves intact a historically inaccurate interpretation of the Eighth Amendment and abandons a viable argument for plaintiffs in the face of the Court's prior unwillingness to treat the Eighth Amendment's provisions as designed to ensure that the accused could in fact gain their liberty through bail prior to conviction.

III. MODERN PRETRIAL DETENTION SYSTEMS

Modern pretrial detention systems vary significantly. Many jurisdictions follow a statutory framework that details detention procedures.[56] Despite these differences, Professor Mayson notes that

50. Act of Sept. 24, 1789, ch. XX, 1 Stat. 73, § 33 (1789) (establishing the Judicial Courts of the United States).

51. *See* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 530–31 (1983); Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920 (2013) (describing English and colonial practices of pretrial release on bail for all but a limited number of offenses).

52. ODonnell v. Harris County, 251 F. Supp. 3d. 1052, 1062–64 (S.D. Tex. 2017).

53. *Stack*, 342 U.S. at 5.

54. *Id.* at 6.

55. *See id.* at 6–7 (holding that the appropriate remedy for an unconstitutional detention of an individual following all exhaustible remedies in the criminal justice procedure is a petition of habeas corpus).

56. *See*, *e.g.*, 18 U.S.C. § 3142; D.C. CODE § 23-1322; FLA. STAT. § 907.041; FLA. R. CRIM. P. 3.132; MASS. GEN. LAWS ANN. ch. 276 § 58A (Lexis); N.J. STAT. ANN. § 2A:162-18 (West); WIS. STAT. § 969.035; Rule 5-209, NMRA

"there is a core of uniformity" among statutory jurisdictions.[57] Most states that adopt a statutory framework only permit pretrial detention after an adversarial hearing and following a judicial determination by clear and convincing evidence that "no less restrictive alternative is adequate to meet a compelling state interest."[58] The problem is that the majority of jurisdictions lack such a statutory framework. Without a clear constitutional standard in place, the process of pretrial detention systems can vary widely. This Part explores the lay of the pretrial landscape considering the competing interests and actors at play and the effect of pretrial detention.

A. The Lay of the Pretrial Landscape

The Constitution only mentions bail once, prohibiting excessive bail in the Eighth Amendment.[59] In *Stack*, the Supreme Court defined excessiveness in terms of the link between the bail amount and the state's interest.[60] Loretta Stack, a waitress and bookkeeper at the time of her arrest,[61] was a member of the Communist Party who, along with her eleven co-defendants, was accused of violating the Smith Act.[62] Their bail was set at $50,000.[63] Stack argued that the bail violated the Excessive Bail Clause both because it exceeded the amount ordinarily set for this type of offense (the maximum sentence was five years and a $10,000 fine) and because none of the defendants could afford to pay the bail.[64] The amount therefore did not serve to ensure their reappearance in court (the state's articulated interest in the bail) but was simply a mechanism to preventively

57. Mayson, *supra* note 20, at 1676.

58. *Id.* at 1676–77.

59. U.S. CONST. amend. VIII. Although the Eighth Amendment contains the only mention of bail, the Court has also discussed pretrial process in the context of the Fourth Amendment. While the Fifth and Fourteenth Amendments may govern due process, the Fourth Amendment also protects against "unreasonable . . . seizures." U.S. CONST. amend. IV. In a series of cases beginning with *Gerstein v. Pugh*, the Court sought to define the pretrial detention process for arrested and detained defendants awaiting charging. 420 U.S. 103, 105 (1975). The process defined by Fourth Amendment jurisprudence will be discussed in more depth in Part Three; however, it is sufficient to note that whatever procedure *Gerstein* contemplated was minimal. In the subsequent case of *Rothgery v. Gillespie County*, the Court, confronted with what appeared to be a more substantive hearing, created greater procedural requirements than those described in *Gerstein*, including a right to counsel. 554 U.S. 191, 213 (2008).

60. Stack, 342 U.S. at 4–5.

61. *See Loretta S. Stack; Prosecuted During 'Red Scare' of 1950s*, L.A. TIMES (Feb. 17, 2001), https://www.latimes.com/archives/la-xpm-2001-feb-17-me-26578-story.html. Stack was convicted, though ultimately the conviction was overturned. *Id.* After her conviction, she left the Communist Party and went on to work on movements to improve bus service and cooperative housing. *Id.*

62. *Stack*, 342 U.S. at 3.

63. *Id.*

64. *Id.* at 3, 5.

detain them.[65] The Court found the bail excessive and remanded to the Court of Appeals for reconsideration.[66] The basis of this finding is critical. The Court concluded that the bail amount was excessive because there was insufficient evidence to show that it promoted the state's interest.[67] As a result, Eighth Amendment excessiveness was detached from considerations of the defendant's ability to pay bail, or even the effect of high bail amounts as mechanisms of preventive detention, and reimagined instead in terms of the state's ability to demonstrate the necessity of the bail to mitigate the risk of the defendant's pretrial flight.

Despite its conspicuous absence from the Constitution's text, bail and its accompanying possibility of pretrial release were the norm at the time of the founding and beyond.[68] The Judiciary Act of 1789 stated that "bail shall be admitted, except where the punishment may be death."[69] Denying bail in non-capital cases was historically seen as a denial of the presumption of innocence.[70] The original purpose of bail was also limited. Bail was seen simply as a means to ensure the defendant's presence at future proceedings.[71] Time, and pretrial reform, expanded pretrial detention's consideration beyond mere risk of flight toward an analysis of the nature of the offense alleged, the strength of the evidence in support of the allegation, and the potential risk the defendant posed to the community if released pretrial.[72]

With this expansion, pretrial detention also expanded. Today, pretrial detainees make up 60–75 percent of the jail population, which the Vera Institute estimates represents a 433 percent increase since 1970.[73] The introduction of the additional state interest of safety of the community likely contributes to the increased pretrial population, though this explanation is incomplete.[74] As Professor Albert

65. *Id.* at 3.
66. *Id.* at 6–7.
67. *Id.* at 5.
68. *See* BAUGHMAN, *supra* note 41, at 20.
69. Act of Sept. 24, 1789, ch. XX, 1 Stat. 73, § 33 (1789).
70. *See* BAUGHMAN, *supra* note 41, at 20.
71. *See Ex Parte* Milburn, 34 U.S. 704, 710 (1835).
72. This shift began in earnest in the 1940s and progressed through the 1980s with the passage of the Bail Reform Act of 1984. *See* United States v. Salerno, 481 U.S. 739, 754–55 (1987) (acknowledging a compelling state interest in community safety); Schall v. Martin, 467 U.S. 253, 264 (1984) (recognizing a compelling state interest in community safety); BAUGHMAN, *supra* note 41, at 21.
73. *See* Leon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. OF JUST. (Apr. 2019), https://www.vera.org/publications/for-the-record-justice-denied-pretrial-detention; Todd D. Minton & Zhen Zeng, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 251774, JAIL INMATES IN 2015 (2016), https://www.bjs.gov/content/pub/pdf/ji15.pdf (providing additional information about pretrial detention populations).
74. *See* Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 548–550 (1986).

Alschuler observed thirty years ago, community safety likely already played a role in release determinations long before the Bail Reform Act of 1984 formalized its consideration.[75] Explaining the expansion of pretrial detention, thinking about the validity of that expansion, and determining what process might give pretrial considerations more nuance therefore requires consideration of the pretrial detention system itself.

Although judicial and academic discussions of the pretrial detention system tend to focus on legislative and judicial decision-making, in reality the system is driven by a variety of decision-makers, each of whom have varying levels of discretion to detain or release and different interests at stake in the decision. Early decision-makers include legislators, police, prosecutors, and judges. Legislators, through statutes, determine which behaviors or actors are criminalized and which defendants are eligible for pretrial release.[76] Legislators, county commissioners, or presiding courts may create bail schedules, which judicial actors may use to determine a bail amount based on a defendant's criminal history and pending charge.[77] Police make decisions about which neighborhoods to police and which suspects to arrest and detain.[78] Prosecutors make charging decisions that may affect detention.[79] Judges make pretrial detention decisions at initial appearance and/or arraignment.[80] Once a judicial detention decision is made, later actors affect pretrial detention decisions in their own right. County jail officials or sheriffs may decide to release or detain a defendant based on a myriad of factors including the overall jail populations, the defendant's medical needs, and the scarcity of county resources.[81] State or federal actors

75. *See id.* at 550.

76. *See, e.g.*, 18 U.S.C. §§ 3142(e)–(f)(1).

77. *See, e.g.*, Christine S. Scott-Hayward & Sarah Ottone, Essay, *Punishing Poverty: California's Unconstitutional Bail System*, 70 STAN. L. REV. ONLINE 167, 169–73 (2018) (describing California's bail system).

78. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 818–19 (2015) (describing the significance of policing decision-making). In some jurisdictions, police have the power to set bail or conditions of release following arrest. *See, e.g.*, CONN. GEN. STAT. § 54-63c (permitting police officers to set short term bail and/or conditions of release for arrestees).

79. Historically, charging a defendant with a capital offense precluded bail. *See* CAL. CONST. art. I, § 12(a); TEX. CONST. art. I, § 11; BAUGHMAN, *supra* note 41, at 20. However, states have expanded nonbailable offenses to include charges that carry life in prison sentences, and in some jurisdictions, domestic violence charges. *See, e.g.*, CAL. CONST. art. I, § 12(b); MO. CONST. art. I, § 32(2).

80. *See, e.g.*, Rothgery v. Gillespie County, 554 U.S. 191, 199–200 (2008) (describing such a process in Texas).

81. *See, e.g.*, Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 204–05 (2013); *Responses to the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/virus/virusresponse.html (last updated Sept. 11, 2020).

may implement policies designed to reduce jail populations or prioritize particular types of detainees.[82]

Each of these actors engage in decision-making with limited information and with varying degrees of influence from other actors. Legislators attempt to predict in the abstract what behavior requires regulation and which defendants present the greatest risk if released pretrial. In drawing these conclusions, they may seek input not only from the communities they represent but also from police, prosecutors, judges, or county officials.[83] For their part, police, prosecutors, and judges operate on an admittedly less abstract level, but they too attempt to predict the probability that any given defendant will return to court and will not harm the community if released pretrial.[84] And they too may expand or curtail their decisions based on other actors' decisions. Police, prosecutors, and judges—many of whom work day-to-day with one another—may all be influenced by each other's actions and decisions.[85] This shared comradery of the criminal trenches may drive decision-making in ways that nonformal actors, such as defendants or even their defense attorneys, cannot. Later actors may find themselves likewise constrained by the decisions of earlier actors, as well as by logistical limitations such as jail overcrowding, crowded court dockets, and/or financial considerations.[86] These constraints may drive their decisions as much as the entwined considerations of flight risk and future dangerousness.[87]

In thinking about due process and pretrial detention systems, recognizing the power and motivations of different actors is helpful. While procedural protections may only come into play in the context of a judicial hearing, the presence of the protection may serve to influence behavior outside of the courtroom.[88] Beyond this,

82. *See, e.g.*, Emily Allen, *Law to Reduce Pretrial Jail Population Takes Effect*, W. VA. PUB. BROAD. (June 5, 2020), https://www.wvpublic.org/post/law-reduce-pretrial-jail-population-takes-effect. Such decision making is occurring in the context of the COVID-19 crisis. *See, e.g.*, *Responses to the COVID-19 Pandemic*, *supra* note 81 (documenting release policies amid the COVID-19 crisis).

83. *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 618, 632 (2017).

84. *See* Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59, 61 (2017); Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 844 (2016); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 509 (2018).

85. *See* Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1755 (2017).

86. *See, e.g.*, Schlanger, *supra* note 81, at 204–05.

87. *See* Gouldin, *supra* note 84, at 892–93.

88. This may admittedly work with imperfect effect, but the requirement of *Miranda* warnings prior to suspect interrogation normalized police activity; i.e. police routinely give a warning now before questioning a detained suspect,

procedural protections serve as a check against potential failings in the pretrial detention system. In contrast, the absence of clear procedural requirements has rendered the system subject to both bias and inconsistency.

B. The Effects of Pretrial Detention

Before finally considering the due process of pretrial detention systems, one last detour is necessary—one that contemplates the effects of a pretrial system that skews toward detention rather than release. Pretrial decision-making not only carries embedded biases, it also has significant downstream consequences for defendants and their communities. This bias and the consequences of pretrial detention are not distinct—in many ways, they are products of one another and fuel one another. For the purposes of this Subpart, however, I will consider them separately.

1. The Bias of the System

Claims of bias in the criminal justice system are neither new nor unique to pretrial detention.[89] However, pretrial detention decisions are particularly susceptible to embedded biases within the system.[90] Over-policing and disproportionate rates of arrests and prosecutions of poor and minority populations contribute to higher rates of pretrial detention among these populations.[91] Coupled with increased convictions and inequity in sentencing, these translate into higher rates of pre- and post- trial detention among marginal populations.[92] Bias by early decision-makers, including police, prosecutors, and judges, contribute to these detention rates.[93]

In the 1960s, bail reformers attacked judicial bias in pretrial decision-making.[94] The Vera Institute and the Manhattan Bail

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regardless of whether or not their individual actions are ever likely to come before a court or if they did that a defendant would be vindicated. They do so because the presence of the procedural requirement carries with it the ever-present, and unknown, possibility of judicial review and consequences.

89. *See, e.g.*, Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 200–210 (2013); Edward Green, *Race, Social Status, and Criminal Arrest*, 35 AM. SOCIO. REV. 476, 477, 490 (1970); Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1175 (2011).

90. Discussions of bias in pretrial systems are numerous. For an excellent discussion, see Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L.J. 2218, 2233–38 (2019); Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 344 (2018).

91. *See* Baradaran, *supra* note 89, at 160–62; Sekhon, *supra* note 89, at 1185–90, 1198.

92. *See* Baradaran, *supra* note 89, at 162–63, 207.

93. *See* Baradaran, *supra* note 89, at 160–62; Sekhon, *supra* note 89, at 1180, 1221.

94. In the 1960s, the Vera Institute argued that judges in New York City were over-detaining poor and minority defendants based on miscalculations of

Project claimed that judges often failed to consider the ability of poor defendants to make bail and set unnecessary conditions of release that marginalized defendants could not meet.[95] In addition, these early advocates asserted that judges often detained based on bias rather than an actual risk the defendant might present.[96] As a result, judicial discretion increased detention rates among poor and minority defendants.[97] Early advocates argued that analysis of uniform and known factors such as criminal history and community ties could predict with reasonable accuracy the risk that any individual would violate the terms of his release.[98] Judges utilizing these factors would not only ensure that unnecessary conditions could be avoided and release rates would increase but judges would also avoid explicit and implicit biases that had marred prior pretrial detention decisions.[99] Using these factors, the Vera Institute and the Manhattan Bail Project successfully showed a correlation between identified factors and return to court (the only risk factor in New York bail statutes at the time of the Manhattan Bail Project).[100] Yet, despite the wide adoption of the Vera Institute bail model, rates of pretrial detention across the nation both continued to rise and to disproportionately affect poor and minority populations.[101]

Some of this bias is likely the product of other aspects of the criminal justice system. Bias in police or prosecutorial decision-making may place more poor and minority defendants before judicial decision-makers in the first place.[102] However, in response to concern about judicial bias at the point of pretrial detention decisions, jurisdictions adopted machine-based risk assessment tools as a means to reduce arbitrary and inaccurate calculations of pretrial risk by reducing the amount of discretion in pretrial release decisions.[103] These pretrial risk assessment tools utilize algorithms to consider a set of factors and generate a risk assessment score for each defendant

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the risk that they would fail to appear at future court dates. *See* WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 11 (1976).

95. *Id.*

96. Baradaran, *supra* note 89, at 161–62.

97. *Id.*

98. *See* THOMAS, *supra* note 94, at 11.

99. *See* Charles Ares et al., *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67, 76–86 (1963); Bernard Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes*, 43 TEX. L. REV. 319, 326–27 (1965); Marion C. Katzive, NEW AREAS FOR BAIL REFORM: A REPORT ON THE MANHATTAN BAIL REEVALUATION PROJECT 3 (June 1966 – Aug. 1967) (1968), https://www.vera.org/downloads/Publications/new-areas-for-bail-reform-a-report-on-the-manhattan-bail-reevaluation-project-june-1966-august-1967/legacy_downloads/1497.pdf.

100. Ares et al., *supra* note 99, at 72–86.

101. *See About Us*, VERA INST. OF JUST., https://www.vera.org/about (last visited Oct. 18, 2020).

102. *See supra* notes 89–93 and accompanying text.

103. *See* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 713 (2018).

that a court or legislature can use to set criteria for pretrial release.[104] Some tools forgo defendant interviews altogether in an effort to reduce bias in pretrial information gathering.[105] Others combine the defendant's interview assessment with the machine-based assessment to generate a final risk assessment score.[106]

Regardless of how the scores are generated, the effect is the same. Defendants with low risk assessment scores are deemed unlikely to pose either a risk of flight or danger to the community and so courts should grant them pretrial release.[107] In contrast, defendants who receive high risk assessment scores may pose a greater risk and merit pretrial detention.[108] In theory, shifting pretrial assessments away from judges and reducing discretion in decision-making should have reduced the bias that had long plagued pretrial detention processes.[109] Unfortunately, it did not.

Instead, pretrial risk assessment tools quickly displayed the same bias as the system they sought to improve.[110] In 2016, ProPublica reviewed one such tool, Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS"), and declared that the software was "biased against [B]lacks."[111] Unsurprisingly, the software's creator challenged ProPublica's conclusions.[112] The debate over COMPAS's decisional neutrality, however, failed to consider potential bias embedded in the system itself. Simply put, even if the COMPAS software was designed to overcome bias and lacks a bias construct itself, it nonetheless relies on biased inputs to produce the pretrial risk score thus recreating the same inequities it sought to unseat.[113] Such inputs—ranging from socioeconomic dependent data, like stability of housing or employment, to criminal focused data, such as prior arrests—are subject to and the products of racial and economic disparity, including that maintained and propagated by the criminal law.[114]

Even if the bias is minimal, the data may still have limited value in assessing the actual risk any given defendant poses pretrial.[115]

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104. *See* Mayson, *supra* note 84, at 2221–23.
105. *See* Stevenson, *supra* note 90, at 345–46.
106. *Id.*
107. *See* Gouldin, *supra* note 103, at 741–42.
108. *Id.*
109. *Id.* at 678–84.
110. *See* Mayson, *supra* note 84, at 494–97; Mayson, *supra* note 90, at 2296–97; Stevenson, *supra* note 90, at 376–77.
111. Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), http://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.
112. *See* WILLIAM DIETERICH ET AL., COMPAS RISK SCALES: DEMONSTRATING ACCURACY EQUITY AND PREDICTIVE PARITY 1, 2–3, 8–13 (2016) (claiming, contrary to ProPublica claims, that COMPAS was race neutral).
113. *See* Mayson, *supra* note 90, at 2227–28.
114. *Id.* at 2290.
115. *Id.* at 2227–30.

Given potential bias in policing, for example, data regarding the number of times a defendant has been arrested may signal career criminality, or it may signal residence in a highly policed neighborhood or racial, gender, or socioeconomic profiling by the police.

Reliance on pretrial-risk scores may create a secondary form of bias in decision-making, as judges could treat the same score differently depending on their own assessment of the underlying incidences of crime.[116] In the absence of an assigned meaning for pretrial determinations, each pretrial-risk score is subject to an individual judge's interpretation in much the same way that the factors the score sought to supplant were.

Pretrial risk assessment tools—like other pretrial decision-makers—may also fail to properly prioritize community perception of the alleged risk any defendant poses or the value a community places on release.[117] Such tools may counsel toward detaining a defendant whom a community might prefer released, either because they pose no real risk to the community or because their presence is more valuable to the community than any mitigation of risk that pretrial detention might offer.

Regardless of whether a decision to detain pretrial is based on machine-generated risk assessments or discretionary decisions by early actors, pretrial detention is more likely to occur among poor and minority defendant populations.[118] The bias of this system is not unique. But, given the significant downstream consequences of pretrial detention, it is particularly troubling here.

2. Downstream Consequences for the Detained

The downstream consequences of even brief periods of detention prior to conviction are well documented.[119] In custody prior to trial, the accused lose wages, homes, child custody, and the opportunity to meaningfully assist in their own defense.[120] Defendants detained prior to trial are less likely to receive mental health and addiction

116. *Id.* at 2254–55.

117. *See generally* Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. (forthcoming 2021).

118. Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. REV. 369, 374 (2020).

119. *See* BAUGHMAN, *supra* note 41, at 82–91; Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–14 (2017); Simonson, *supra* note 83, at 599–606; Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1416–29 (2017) (describing the bail fund movement that was formed in response to downstream consequences of pretrial detention on defendants and their communities).

120. *See* Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=1 (describing the consequences of pretrial detention on poor defendants in New York's criminal justice system).

treatment.[121] They may lose jobs or educational opportunities as a result of pretrial detention.[122] They are more likely to plead guilty and to receive longer sentences upon conviction.[123] As a result, pretrial detention contributes to a cycle of poverty and reincarceration.

Less able to assist in their defense, pretrial detainees are more likely to plead guilty than their released counterparts,[124] and are more likely to receive longer sentences.[125] In practical terms, a higher probability of conviction and longer sentence serve not only as barriers to future pretrial release but will potentially increase future sentencing ranges as the defendant's criminal history rises.[126]

For future pretrial release, courts routinely consider the suspect's criminal history in determining flight risk and potential for dangerousness.[127] As a statutory matter, a certain level of criminal history may preclude some defendants from even being eligible for pretrial release.[128] In addition, in jurisdictions that rely on bail schedules, prior criminal history may automatically or near-automatically increase the defendant's bail, making it more difficult for poor defendants to bail out of jail pretrial.[129] Defendants who choose to plead guilty as an expedient means to curtail pretrial detention suffer consequences beyond any sentence received—it can ensure future pretrial detention in the event of a new arrest.[130]

In the context of sentencing, the result is much the same. A conviction—whether by guilty plea or trial—for most offenses will score toward a defendant's criminal history. In some jurisdictions, some offenses may score multiple times toward criminal history for future offenses.[131] A defendant who is less able to defend against a charge or to negotiate the most favorable plea offer because of pretrial detention is also more vulnerable to higher consequence convictions. In sentencing guidelines, criminal history forms one axis of a

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121. *See* Heaton et al., *supra* note 119, at 722.

122. *Id.*; Yang, *supra* note 119, at 1423–24.

123. Heaton et al., *supra* note 119, at 714–15, 722; Yang, *supra* note 119, at 1423.

124. Heaton et al., *supra* note 119, at 714–15, 722; Yang, *supra* note 119, at 1423.

125. Yang, *supra* note 119, at 1419.

126. Patricia Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 631, 635 (1964).

127. *See About the Public Safety Assessment, How it Works*, APPR, https://www.psapretrial.org/about/factors (last visited Oct. 18, 2020) (describing the PSA tool and the data base it relies upon).

128. *See* Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 731–33 (2018).

129. *See, e.g.*, Scott-Hayward & Ottone, *supra* note 77, at 27.

130. *See About the Public Safety Assessment*, *supra* note 127.

131. Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessments*, 20 BERKELEY J. CRIM. L. 75, 97 (2015).

sentencing range calculation and seriousness of the current offense forms the other.[132] The higher the criminal history, the higher the sentencing range, even as the classification of the current offense stays constant.[133]

At a systematic level, a system that relies on guilty pleas as one form of relief from pretrial detention furthers a cycle of future reincarceration. While reliance on such pleas may further the efficiency of the system itself, it clearly undermines other systematic goals.[134] First, such pleas are incentivized not as a matter of legal proof of guilt or even factual guilt, but rather because a detainee was unable to gain freedom pretrial and as a result suffered downstream consequences that will only grow worse as the length of detention continues. Second, because pretrial detention is a driver for the plea process, the incentive will fall disproportionately on poor defendants who cannot afford to comply with conditions of release that carry a monetary cost. Third, a plea that results from inability to assist in one's own defense raises questions about the adequacy of other procedural safeguards within the system. Procedural protections such as the right to appointed counsel, the presumption of innocence, the right to call and cross-examine witnesses, and the right to trial have little meaning if they are inaccessible to those without the means to bail out of jail pretrial. In each of these, the criminal system not only furthers biased notions of dangerousness and culpability by relying on findings of guilt leveraged through pretrial detention, but it sets up a tiered system based not on concepts of "justice" or proof, but on poverty and degrees of desperation. It becomes a self-perpetuating system. Those who plead guilty to get out of jail pretrial and are then rearrested and recharged with new offenses are also more likely to suffer additional pretrial detention and longer sentences.[135] They "deserve" pre- and post-trial detention because they are the dangerous recidivists and even habitual offenders the system seeks to incapacitate with detention, even as the system renders them so with such detention.

This cycle of reincarceration also contributes to cycles of poverty. Pretrial detention and criminal conviction can preclude housing, educational, and employment opportunities.[136] Detained defendants may be unable to pay rent or a mortgage and so could suffer housing insecurity upon release. Detainees may lose placements in group

132. Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1, 9 (2015).

133. *See* Hamilton, *supra* note 131, at 113–14.

134. Assuming articulation of such goals are genuine, an admittedly contested proposition.

135. *See About the Public Safety Assessment*, *supra* note 127.

136. *See* Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 172–73 (2020).

homes, treatment facilities, and foster homes.[137] These consequences accrue regardless of the ultimate outcome of the case and can occur immediately or very quickly following arrest and detention.[138]

In jurisdictions with exclusion policies, a juvenile may be expelled from school upon arrest or will suffer expulsion when he fails to attend school as a result of pretrial detention.[139] Mandatory school attendance policies may result in a student detained for even a short period of time to be required to repeat a grade, regardless of how the student was performing prior to detention.[140] This, coupled with the lack of educational opportunities in county jail systems, may result in a pretrial detainee being unable to graduate high school.[141] The lack of a high school diploma results in reduced lifetime earning power.[142] For pretrial detainees beyond high school, colleges and universities may unenroll students who fail to attend as a result of pretrial detention.[143] If pretrial detention does in fact produce a conviction, a student may be ineligible to receive financial assistance as a result, including federal Pell grants and low-interest student loans and, in some cases, access to work study funding.[144] For poor students, this may signal the end of their educational opportunities.

Pretrial detainees may also lose wages and jobs as a result of pretrial detention and may likewise suffer unemployment if convicted. For defendants who earn wages rather than a salary, employers do not pay for shifts missed as a result of pretrial detention.[145] Even those who earn salaries might eventually lose them as a result of prolonged periods of pretrial detention. Employers may terminate employees, either as a result of an arrest and charge or as a product of pretrial detention. Employees who do not show up for work as a result of pretrial detention may be viewed as unreliable at best and dangerous at worst. Even when released after pretrial

137. *See* Yang, *supra* note 119, at 1423.

138. *See id.* at 1418, 1423.

139. *See* Emily Bloomenthal, *Inadequate Discipline: Challenging Zero Tolerance Policies as Violating State Constitution Education Clauses*, 35 N.Y.U. REV. L. & SOC. CHANGE 303, 306, 310 (2011).

140. *See* ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, HARV. UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 13 (2000), https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf.

141. *See* Bloomenthal, *supra* note 139, at 310–11.

142. *Id.*

143. *See, e.g.*, *Attendance Regulations*, N.C. STATE UNIV. (Nov. 30, 2010), https://policies.ncsu.edu/regulation/reg-02-20-03-attendance-regulations/ (stating that a student may be dropped from a course due to lack of attendance).

144. *See Students with Criminal Convictions Have Limited Eligibility for Federal Student Aid*, FED. STUDENT AID, https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions (last visited Oct. 18, 2020).

145. *See* Shima B. Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 5 (2017).

detention, detainees may not be rehired by a former employer and may have difficulty garnering positive references for future employers. In addition, if convicted—an outcome made more probable by pretrial detention[146]—defendants may be ineligible for certain jobs or risk employer bias towards those with criminal records.[147]

Each of these realities carry real and tangible consequences for a pretrial detainee including an increased probability of conviction, a lengthier sentence, and lost homes, jobs, wages, and educational opportunities.[148] Less tangible effects also result. Pretrial detention can be demoralizing and isolating. In jail, defendants miss the opportunity to socialize, build relationships, and support children and loved ones. This can carry mental health repercussions, and it can also result in denial of child custody and the erosion of relationships.[149] The lack of medical care in jails can also carry consequences for detainees. Those with preexisting conditions may not be able to continue with care as they had in the free world, and those who suffer illness while detained may not get treatment.[150] The recent COVID-19 pandemic has highlighted this reality in stark terms. Not only are infection rates higher in jails than in the free world, but inmates reported a lack of access to medical care and testing when symptoms presented.[151]

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146. *See* Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 234 (2018).

147. *See, e.g.*, *Jobs Affected by a Criminal Record*, MINN. STATE CAREERWISE, https://careerwise.minnstate.edu/exoffenders/find-job/jobs-criminal-record.html (last visited Oct. 18, 2020).

148. *See* Dobbie et al., *supra* note 146, at 202 ("[E]xcessive bail conditions and pretrial detention can disrupt defendants' lives, putting jobs at risk and increasing the pressure to accept unfavorable plea bargains.").

149. Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail,* 3 REFORMING CRIM. JUST.: PRETRIAL AND TRIAL PROCESS 21, 22 (Erik Luna ed., 2017).

150. *See, e.g.*, William J. Jefferson, *The Special Perils of Being Old and Sick in Prison*, 32 FED. SENT'G REP. 276, 277–79 (2020) (detailing how chronically unhealthy prisoners at the Oakdale Satellite Prison Camp were regularly denied treatment); *see also* Frank G. Runyeon, *Brooklyn Inmates Chronicle Pleas for Help as Virus Lurked*, LAW360 (June 15, 2020, 6:27 PM), https://www.law360.com/articles/1282632/brooklyn-inmates-chronicle-pleas-for-help-as-virus-lurked (noting that inmates and pretrial detainees at Brooklyn's Metropolitan Detention Center with symptoms of COVID-19 were unable to receive testing or treatment from the prison staff).

151. *See* Jonathan Stempel, *Rikers Island Jail Officers Union Sues New York City over Coronavirus*, REUTERS (Apr. 2, 2020, 7:18 PM), https://www.reuters.com/article/us-health-coronavirus-new-york-rikersisl/rikers-island-jail-officers-union-sues-new-york-city-over-coronavirus-idUSKBN21K3KR (noting that the Legal Aid Society of New York stated that "the 5.1% infection rate [in Riker's Island] was nine times higher than in all of New York City, 11 times higher than in Italy's Lombardy region, and 44 times

These downstream consequences of pretrial detention are not limited to the defendant alone. The community a defendant leaves behind during pretrial detention suffers its own effects.[152] In custody, defendants do not contribute to the economy of their communities. They don't buy consumer goods like clothes or gas. They don't buy food or pay rent. Communities suffer other, less tangible losses as well. In custody, defendants don't drive their children to school or act as good neighbors. They don't pick up trash from their porches or rake the leaves in their yards. They are absentee parents and partners. While detained, they cannot continue, or must continue in a limited capacity, whatever investment they made in their community prior to detention. They cannot participate in the myriad of everyday interactions that render a collection of people greater than the sum of its parts, that render it a family and community.

Admittedly, not all pretrial detainees suffer all of the effects described above and some suffer additional effects not described above. Nor do all pretrial detainees suffer these effects in equal force. In fact, bias embedded in the pretrial detention system ensures that marginalized defendants are more likely to be detained and are more likely to suffer these consequences and with greater impact.[153] The existence of these downstream consequences highlights the necessity for meaningful pretrial detention process.

3. Downstream Consequences for Counties

Broader communities also bear the burden of high pretrial detention rates. A recent study by the National Association of Counties found that increasing pretrial detention rates taxed already resource-deprived county systems.[154] The burden presented in different ways. At the most basic level, county jail facilities were often unable to accommodate large numbers of pretrial detainees.[155] In some jurisdictions, sheriffs could release some detainees either directly through their own determination that release was warranted or through provisions that allow detaining officials to value collateral for the purposes of bond.[156] The availability of discretionary decision-making by sheriffs, however, was not universal. Even in jurisdictions that permitted sheriffs to exercise discretionary release, rising pretrial detention rates—coupled with probation and parole violators and those sentenced to short terms—have caused jail populations to

higher than in China's Hubei province, all major areas for the coronavirus outbreak.").

152. *See* Simonson, *supra* note 83, at 599, 608.

153. *Id.* at 598–600.

154. *See* Natalie R. Ortiz, *County Jails at a Crossroads*, NAT'L ASS'N OF CNTYS. 2 (2015), http://www.naco.org/sites/default/files/documents/Final%20paper_County%20Jails%20at%20a%20Crossroads_8.10.15.pdf.

155. *Id.* at 7–9.

156. *Id.* at 7–8.

swell to a breaking point.[157] Overcrowding in county jails has prompted costly lawsuits and has most recently created public health crises.[158]

Overcrowding in turn has created strains on county budgets.[159] This too presents in different ways. Lack of budgetary resources can mean a higher ratio of detainees to pretrial guards, which can create safety concerns for vulnerable detainees.[160] It can also mean a reduction in services, both within the jail and in terms of reentry options and even preventative programs.[161] County jails faced with high detention populations may be unable to hire staff to provide basic services such as substance abuse treatment, mental health treatment, basic medical care, or educational services.[162] They may also be reluctant to accept volunteers to fill these positions because a lack of guard staff makes it difficult to ensure civilian safety within the jail population.[163] Sheriffs may also cut services for less than noble reasons. Recent scandals involving sheriffs buying substandard food, such as white bread and bologna, with state-provided per diem budgets for inmates, and then pocketing the surplus funds or, redirecting them to guards' salaries, appear on their surface to be stories of inhumanity and greed.[164] And likely in some part they are. However, they are also the product of a broken system. Failure to provide adequate food is consistent with a system in which inmates are treated inhumanely in all aspects. In county jails, inmates are denied adequate medical care, educational opportunities, spaces to live, the list goes on and on.[165] For their part, the staff who work in the facilities are often placed at risk themselves, a reality all too evident given COVID-19 infection rates among jail staff,[166] and they are often paid at a rate low enough to make recruitment challenging.[167]

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157. *Id.* at 8–10.

158. *Id.* at 9.

159. *Id.* at 7–9.

160. *See*, *e.g.*, U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN 5, 9, 17 (2019), https://www.justice.gov/opa/press-release/file/1150276/download.

161. *See* Ortiz, *supra* note 154, at 2, 9, 15.

162. *Id.* at 2, 9.

163. *See id.* at 15.

164. *See, e.g.*, Stephanie Taylor, *Pickens County Sheriff David Abston Admits Guilt in Jail Food Scam, Resigns*, TUSCALOOSA NEWS (June 15, 2019), https://www.tuscaloosanews.com/news/20190614/pickens-county-sheriff-david-abston-admits-guilt-in-jail-food-scam-resigns.

165. *See*, *e.g.*, U.S. DEP'T OF JUST. C.R. DIV., *supra* note 160, at 5, 8–9, 12–23, 26–27, 40–41, 45–47.

166. *See* Deanna Paul & Ben Chapman, *Rikers Island Jail Guards are Dying in One of the Worst Coronavirus Outbreaks*, WALL ST. J. (Apr. 22, 2020, 8:19 AM), https://www.wsj.com/articles/rikers-island-jail-guards-are-dying-in-one-of-the-worst-coronavirus-outbreaks-11587547801.

167. *See, e.g.*, U.S. DEP'T OF JUST. C.R. DIV., *supra* note 160, at 50.

The financial burdens of pretrial detention, even if no overcrowding exists, can place additional strains on county budgets.[168] Such budgets are finite and are often composed of state and federal grants and local tax revenue.[169] Such tax revenue may be the product of property taxes, but it also may be composed of state income taxes and sales taxes on consumer goods. Meaning, pretrial detention represents a double burden on counties. Not only must counties provide shelter and food for detainees, but detainees are not contributing to the free world economy because they are unable to purchase goods while detained. They are likewise often unable to pay their rent or earn income—further depleting county coffers.[170]

Just as pretrial detention can contribute to a cycle of poverty and reincarceration for detainees, pretrial detention can also contribute to this cycle at the county level. As noted above, pretrial detainees suffer a myriad of downstream consequences that can render them less economically secure. From housing insecurity to lack of educational and job opportunities, pretrial detention can strain county economies. This is true in urban settings, but it is particularly true in rural and already economically depressed economies.[171] Most obviously, pretrial detainees (and later those who are convicted) may contribute less to the county's economy than those not detained or convicted. Beyond this, the lack of educational, economic, and housing opportunities that detainees and those convicted suffer trigger a government response in the form of public food, medical, and housing assistance. Because county budgets are finite, providing such assistance will by necessity deplete funds for other services, including libraries, early education, and county-maintained green spaces to name a few.[172] Therefore, setting aside for a moment the staggering impact of pretrial detention on the individual detainee, pretrial detention also effects non-detainees who lose access to county services as limited funds are diverted to cover the downstream consequences of pretrial conviction.

The lack of libraries, pre-kindergartens, or parks is significant in and of itself, but its role in creating a cycle of poverty and reincarceration may not be readily apparent. Before drawing this

168. *See* Ortiz, *supra* note 154, at 2.

169. *See, e.g.*, Molly Messick, *How Your County Gets and Spends Money, and What That Means for Idaho's Personal Property Tax Debate*, STATEIMPACT (Jan. 31, 2013, 12:03 PM), https://stateimpact.npr.org/idaho/2013/01/31/how-your-county-gets-and-spends-money-and-what-that-means-for-idahos-personal-property-tax-debate/.

170. *See, e.g.*, Paula L. Dressel, . . . *And We Keep on Building Prisons: Racism, Poverty, and Challenges to the Welfare State*, 21 J. SOCIO. & SOC. WELFARE 7, 9–12 (1994).

171. *See* Aaron Littman, Lauren Sudeall & Jessica Pishko, *Protecting Rural Jails from Coronavirus* (Apr. 2020), http://filesforprogress.org/memos/rural-jails-coronavirus.pdf.

172. *See* Christian Henderson et al., *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, VERA INST. OF JUST. 10–16 (May 2015).

link, consider other county services that may be depleted as a result of an increased jail budget to accommodate pretrial detainees: mental health and substance abuse treatment centers. Without access to these services, coupled with a lack of economic and educational opportunities, even upon release pretrial detainees may suffer both victimization and an increased possibility of re-offense. In the same sense, redirecting county funds towards pretrial detention may result in the county's inability to fund other basic county services such as libraries, early education, and green spaces. These services may remain accessible to wealthier residents either directly or by equivalence as a result of their access to private resources. In this, pretrial detention not only burdens county budgets but it perpetuates a cycle in which the poor are denied access to the very services and amenities that might promote upward mobility, stability, or even survival. In short, pretrial detention contributes to the perpetuation of a norm that the poor stay poor and suffer as a result.

This may all sound extreme. A child who never sets foot in a library or a preschool or a park may still grow up to be a productive, law-abiding member of society. Likewise, a well-educated and wealthy child may grow up to be unproductive and a criminal. It is always possible. Yet even in the face of this possibility, it is difficult to see the net benefit of diverting county funds away from facilities that promote the welfare of the community toward a system that promotes the deprivation of certain members of the community—members more likely to be poor and minority—unless some competing interest outweighs the cost of the deprivation. Here, the necessity of adequate process become apparent—not only as a mechanism to promote fairness and equity in pretrial detention decisions, but as a means to ensure that the articulated goals *do* in fact outweigh the harms of pretrial detention and that the pretrial detention *does* in fact promote those goals.

IV. DEFINING PROCESS AND *SALERNO*

Having considered both the court's holding in *ODonnell* and the pretrial detention systems generally, the only question that remains is what process is due in such systems. The nuance of due process jurisprudence is complicated. In its most basic iteration, it is the process due to a person before the government can curtail their rights.[173] What precisely that "process due" entails, and whether it encompasses substantive components,[174] is another matter,

173. *Due Process*, BLACK'S LAW DICTIONARY (11th ed. 2019).

174. As John Hart Ely, no fan of substantive due process, noted:

> There is general agreement that the [Fifth Amendment Due Process Clause] had been understood at the time of its inclusion to refer only to lawful procedures . . . . Despite the procedural intendment of the original Due Process Clause, a couple of pre-Civil War decisions had

particularly in the context of pretrial detention in which the Court has offered little guidance and procedures may vary significantly from jurisdiction to jurisdiction.[175] In addition, other claims, such as equal protection and substantive rights claims are often entwined with due process claims.[176] Protecting these rights requires a process by which a court can ascertain the legitimacy of the government's infringement. This Part explores due process in four ways. First, it considers the concept of due process as defined by the Fifth and Fourteenth Amendments outside of the context of pretrial detention system. Second, it considers pretrial due process as defined by the Court in *Salerno*.[177] Third, it considers Fourth Amendment jurisprudence as a possible alternative source of pretrial due process. Finally, it contemplates possible coherent theories of due process in pretrial systems.

> construed the concept more broadly, as precluding certain substantive outcomes . . . I am by no means suggesting that with these decisions the path of the law had been altered, that by the time of the Fourteenth Amendment due process had come generally to be understood as possessing a substantive component. Quite the contrary: [these decisions] were aberrations, neither precedented nor destined to become precedents themselves.

JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 15–16 (1980). There has been pushback on Ely's position regarding the history of substantive due process. *See, e.g.*, James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320–27 (1999); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 594 (2008); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 946; *see also* McDonald v. City of Chicago, 561 U.S. 742, 862 (2010) (Stevens, J., dissenting) ("[T]he historical evidence suggests that, at least by the time of the Civil War if not much earlier, the phrase 'due process of law' had acquired substantive content as a term of art within the legal community.").

175. While State and Federal law regulate pretrial detention, individual jurisdictions may adopt varying procedures to meet such regulations. For example, *Gerstein v. Pugh*, 420 U.S. 103 (1975), read in conjunction with *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), requires probable cause hearings within forty-eight hours of arrest for detained suspects. While there is some debate as to whether or not *Gerstein* sets a procedural timeline for probable cause hearings only or pretrial detention more generally (the Court imprecisely uses both terms in the opinion), certainly nothing in the case prohibits a combined probable cause and bail hearing. Some jurisdictions may hold separate probable cause hearings from bail hearings, while others may hold hearings within twenty-four hours of arrest and detention on both probable cause and bail or either. *Riverside*, 500 U.S. at 58 ("[J]urisdictions may choose to combine probable cause determinations with other pretrial proceedings . . . .").

176. As Justice Rutledge noted in his dissent in *Cohen v. Beneficial Industrial Loan Corp.*, "[s]uffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible. But, even so, this fact cannot dispense with the necessity of making a distinction." 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting).

177. U.S. v. Salerno, 481 U.S. 739, 748, 755 (1987).

A. The Two Due Processes

Interpretation of the Due Process Clauses of the Fifth and Fourteenth Amendments are broken down into two categories: substantive and procedural.[178] Substantive due process recognizes that some rights are so fundamental that governmental actors cannot deprive individuals of these rights unless the state can show that the infringement is narrowly tailored to serve a compelling state interest.[179] As a general matter, substantive due process is less concerned with the process involved in the denial of the right in question[180] and more concerned with the nature of the right itself—whether it is fundamental—and the precision with which the government curtails the right.[181] Defining what is a fundamental right is challenging, however. The Court has characterized such a right as "implicit in the concept of ordered liberty,"[182] and "deeply rooted" in American tradition.[183] The vagueness of this definition has rendered substantive due process claims conceptually challenging and intellectually controversial.[184] It is substantive due process that has championed reproductive rights[185] and access to public benefits,[186] upheld "separate but equal" treatment based on race,[187] and struck down minimum wage and labor laws.[188] In the context of

178. Larry Solum offers the following conceptualization of the different forms of due process: "The idealization of a pure rule of procedure assumes that procedural rules regulate the sphere of adjudicative institutions. Similarly, the idealization of a pure rule of substance posits that the function of the substantive law is to regulate primary conduct—the whole of human activity outside adjudicative contexts." Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 215–16 (2004).

179. *See* Reno v. Flores, 507 U.S. 292, 302 (1993) (holding that substantive due process "forbids the government to infringe . . . 'fundamental' liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest."); *see also* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

180. *See* Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (arguing that substantive due process prohibits the government from curtailing fundamental freedoms except under the most limited circumstances "even [when] the fairest possible procedure" is observed).

181. *Glucksberg*, 521 U.S. at 721.

182. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

183. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

184. For a wonderful and in-depth discussion of substantive due process in all its controversial wonder, see Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 423–27 (2010).

185. *See* Roe v. Wade, 410 U.S. 113, 152–54 (1973); *see also* Griswold v. Connecticut, 381 U.S. 479, 481–85 (1965).

186. *See* Shapiro v. Thompson, 394 U.S. 618, 671–75 (1969).

187. *See* Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

188. *See* Adkins v. Child.'s Hosp., 261 U.S. 525, 553–55, 562 (1923) (striking down minimum wage requirements for women and children); Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (striking down federal regulation of child labor); Lochner v. New York, 198 U.S. 45, 57–61 (1905) (striking down regulations capping the number of hours bakers could work).

pretrial detention, a court recognizing a substantive due process claim would require the state to demonstrate that the detention sought was narrowly tailored to a compelling state interest.[189]

In contrast, procedural due process is concerned with the process by which the government curtails a right.[190] Procedural due process seeks to balance the interest of the individual against the state's interest.[191] Unlike its substantive counterpart, procedural due process does not require the state to demonstrate narrow tailoring.[192] It only requires an adherence to minimum procedures required to determine that the articulated governmental interest *actually* outweighs the individual's liberty interest.[193] Put another way, procedural due process requires that the government follow *fair* procedures, even as the government curtails rights.[194] In the context of pretrial detention, procedural due process merely requires the state to prove that the detention is necessary by clear and convincing evidence in an adversarial hearing.[195]

Arguably, there is a third possible source of process in the context of pretrial detention—that contemplated by a combination of Fourth and Eighth Amendment jurisprudence. These will be discussed further in Subpart C; however, it is worth noting here that this process is, as Professor Mayson notes, minimal. Under such a procedural analysis, according to Professor Mayson, "probable cause is sufficient to authorize detention through adjudication, and the state grants pretrial release wholly at its discretion."[196]

Modern pretrial detention challenges tend to arise as either equal protection claims or as procedural due process claims.[197] For their

189. *See, e.g.*, Buffin v. City & Cnty. of San Francisco, No. 15-cv-04959-YGR, 2019 WL 1017537, at *16 (N.D. Cal. Mar. 4, 2019) (order granting plaintiff's motion for summary judgement, denying CBAA's cross-motion for summary judgement, and denying plaintiff's motion to revoke CBAA's intervenor status); Caliste v. Cantrell, 329 F. Supp. 3d 296, 312 (E.D. La. 2018); *see also* United States v. Salerno, 481 U.S. 739, 747–51 (1987).

190. *See* Mathews v. Eldridge, 424 U.S. 319, 332–34, 349 (1976); Snyder v. Massachusetts, 291 U.S. 97, 137 (1934) (Roberts, J., dissenting) (noting that "[p]rocedural due process has to do with the manner of the trial [and] dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed.").

191. *Mathews*, 424 U.S. at 335 (providing a three part balancing test: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional . . . safeguards"; and (3) "the Government's interest, including" its "fiscal and administrative" efficiency interests).

192. *See, e.g.*, ODonnell v. Goodhart, 900 F.3d 220, 227–28 (5th Cir. 2018).

193. *See* ODonnell v. Harris County, 892 F.3d 147, 157–60 (5th Cir. 2018).

194. *See Snyder*, 291 U.S. at 116–17, 122–28, 137; Ann Overbeck, Note, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 U. CIN. L. REV. 153, 170–71 (1986).

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

196. *See* Mayson, *supra* note 20, at 1677.

197. Funk, *supra* note 25, at 1109.

part, courts tend to avoid substantive due process claims.[198] As will be discussed, all three types of claims are fertile grounds for litigation and all three implicate the precise procedures by which pretrial detention decisions are made.

B. Salerno *and Due Process*

In the context of pretrial detention hearings, the Supreme Court has provided little guidance regarding required process under the Fifth and Fourteenth Amendments, *Salerno* being the notable exception.[199] In *Salerno*, the Court considered preventive detention provisions of the 1984 Bail Reform Act.[200] As one scholar noted:

> "Fat Tony" Salerno was probably the least sympathetic defendant to litigate constitutional standards for pretrial detention. The boss of a New York mob family notorious for extortion, illegal gambling, and murder, Salerno was reputed to order hits by uttering a single word over the telephone. If broad segments of American society could agree that anyone ought to be detained pretrial without bail, it was Fat Tony.[201]

Yet Salerno argued that prior to his conviction he was entitled to at least the opportunity to maintain his freedom.[202] The Court did not agree, upholding the preventive detention provisions of the Act.[203] But the opinion is as significant for what it does not say as for what it did say.

As the Court contemplated Salerno's freedom, his presumption of innocence, and the significance of preventive detention to both, it purported to do so as a matter of procedural, not substantive, due process.[204] Yet it engaged in what appears to be a substantive due process analysis. The Court described pretrial liberty as "fundamental" and noted that it upheld the Bail Reform Act because the Act created "a carefully limited exception" to the "norm" of pretrial release.[205] The Act identified a small and limited set of "extremely serious offenses" that, having been specifically found by Congress to be especially dangerous, warranted preventive detention.[206] Beyond this, the Act, as interpreted by the *Salerno* Court, provided the defendant with a hearing in which a court had to find by clear and convincing evidence that the defendant presented "an identified and articulable threat to an individual or the community" and that "no conditions of release [could] reasonably assure the safety of the

198. *Id.*
199. *Salerno*, 481 U.S. at 746, 752.
200. *Id.* at 739.
201. Funk, *supra* note 25, at 1105.
202. *Salerno*, 481 U.S. at 744.
203. *Id.* at 755.
204. *Id.* at 746–48.
205. *Id.* at 751, 755.
206. *Id.* at 750.

community or any person" before he could be preventively detained.[207] At this hearing, the defendant was entitled to counsel, he could present evidence, and the court had to state on the record the factual basis for its findings.[208] Finally, the defendant was entitled to an expeditious appeal of the decision.[209] The narrow category of eligible offenses and the procedural protections embedded in the Act saved the Bail Reform Act even as it denied Tony Salerno his liberty.

Thus while Salerno might not have enjoyed a constitutional right to pretrial release, he was entitled to procedural protections to ensure that the impositions on his liberty promoted the government's interest and to a hearing in which a court could balance Salerno's own interests in pretrial release against the government's interest in detaining him. The Court concluded that the procedures guaranteed in the statute satisfied constitutional requirements.[210]

The question that lingered in the wake of the *Salerno* decision was whether this constitutionally sufficient process was also constitutionally necessary and, if so, to what extent? Did all bail hearings require appointment of counsel? Or a clear and convincing standard? Or an opportunity for the defendant to present evidence? Or a right to appeal? Or were these just provisions that were sufficient to survive a due process challenge—substantive or procedural? Could different procedures in different statutes—say state bail statutes or even district-based rules and regulations—also survive constitutional challenge even if they did not provide precisely the protections of the Bail Reform Act? Courts left to interpret the significance of *Salerno* became split on this question. As Professor Kellan Funk observed, some courts took a strong reading of *Salerno*, treating the described process as necessary, while others engaged in a weak reading of *Salerno,* acknowledging that the process was constitutionally sufficient but not necessary.[211]

Salerno raised a secondary question as well: Were all bail claims substantive due process claims even if the *Salerno* Court declined to call them as such? In many ways, the answer seems self-evident. Pretrial detention deprives a suspect of the most fundamental of all fundamental liberties: actual physical freedom. Beyond this, pretrial detention erodes the defendant's ability to defend himself and challenges the presumption of innocence, particularly as courts consider the strength of the evidence against the defendant in making pretrial release decisions. Yet, recent challenges to pretrial detention systems, including *ODonnell*, have not asserted substantive due process claims.[212] One possible explanation is a reluctance to do so in

207. *Id.* at 750–51 (citing 18 U.S.C. § 3142(f)).
208. *Id.* at 751–52.
209. *Id.* at 752.
210. *Id.* at 755.
211. *See* Funk, *supra* note 25, at 1107, 1109.
212. ODonnell v. Harris County, 882 F.3d 528, 540–45 (2018).

the wake of the *Salerno* decision. Another is the reality that such claims are complicated and disfavored as often by the judiciary as by litigants.

Substantive due process claims, after all, require narrow tailoring based on the fundamental nature of the defendant's interest.[213] Such claims are indifferent to the defendant's particular characteristics—the right is inherent to all persons. Seen in this light, a case like *ODonnell* that seeks to challenge the imposition of monetary bail amounts as a substantive due process claim is indifferent to the defendant's ability to pay. The imposition of bail that results in the denial of liberty is all that is required for the claim. But not all who face monetary bail under Harris County's scheme are unable to gain pretrial release.[214] Wealthy defendants simply pay the bail. Only poor defendants languish in jails.

This may suggest that a substantive due process claim is misguided. The bail system itself does not deny the defendant's liberty—it merely curtails it for some because they cannot pay the required amount for release. This in turn suggests that an equal protection claim—one of the claims the *ODonnell* plaintiffs in fact made[215]—is superior, as it addresses the deprivation at its core—the impact of a defendant's economic status on his pretrial liberty interests. And an equal protection claim offers the same relief as substantive due process—strict scrutiny and its accompanying narrow tailoring of the government action to the compelling state interest.[216]

The Supreme Court upheld a wealth-based equal protection claim in the context of post-conviction fines in *Bearden v. Georgia*.[217] In *Bearden*, the Court reviewed the defendant's claims that he had suffered a deprivation of liberty in the form of imprisonment when he was unable to pay a fine and make restitution upon conviction.[218] Finding wealth-based discrimination, the Court applied heightened scrutiny and concluded that the state may only imprison a defendant who failed to pay a fine after the state demonstrated that no

213. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 302 (1993) (describing strict scrutiny substantive due process analysis, which forbids government infringement on certain fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest).

214. HARRIS CNTY. PRETRIAL SERVS., 2019 ANNUAL REPORT 14 (2020) https://pretrial.harriscountytx.gov/Library/2019%20Annual%20Report.pdf (reporting 84.9 percent of misdemeanor defendants' bonds posted and 55.1 percent of felony defendants' bonds posted).

215. ODonnell v. Harris County, 892 F.3d 147, 161 (5th Cir. 2018).

216. *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005) (finding that when analyzing an equal protection claim "[u]nder strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests'" (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995))).

217. Bearden v. Georgia, 461 U.S. 660, 672–73 (1983).

218. *Id.* at 660, 672–73.

alternative means existed that was adequate to meet the state's interests.[219] The Court noted that due process required a "careful inquiry" into "the existence of alternative means for effectuating the purpose" of meeting the state's interests.[220] If the state could not demonstrate that Bearden had acted in bad faith in failing to pay his fine or had refused to pay despite an ability to do so, the State could not detain him.[221] Even if they could make this showing, the State was still required to show there was no other means to realize its interests besides detention.[222] In this, while not raising a substantive due process claim, the Court arrived at a similar procedural result through an equal protection claim.

Despite the success and attractiveness of such equal protection claims, abandoning the corollary substantive due process claim remains problematic. Substantive due process is, arguably, precisely the type of claim pretrial detention implicates. Certainly, statutory constructions or judicial decisions that base pretrial liberty on wealth by requiring either monetary bail or costly nonmonetary conditions of release may implicate the Equal Protection Clause—both in terms of wealth and in terms of disparate impact on minority defendants. However, the presence of this equal protection claim does not undo the reality that decisions to detain pretrial also represent an affront to fundamental liberty interests "implicit in the concept of ordered liberty." Such fundamental liberty interests include the presumption of innocence, the right to defend against criminal charges, and the freedom from deprivation of liberty prior to a finding of guilt. While unequal application of the law to the detriment of poor and minority defendants certainly warrants condemnation, so too does an untailored imposition on liberty of *any* person. As Professor Cary Franklin has argued, class-based deprivations of fundamental rights fueled the Warren Court's substantive due process revolution.[223] Professor Franklin admittedly considers these deprivations in the context of reproductive rights, but the argument itself would seem equally applicable to other fundamental liberties such as physical freedom or a presumption of innocence or a right of defense.

Second, substantive due process has long served as the champion of unarticulated or unencoded constitutional rights.[224] Given the Court's reading of the Excessive Bail Clause as not entitling a defendant to pretrial release as a constitutional matter, what the *Salerno* Court described as the norm of pretrial liberty must spring from other constitutional soil, much like rights to reproductive

219. *Id.* at 672.
220. *Id.* at 666–67 (quoting Williams v. Illinois, 399 U.S. 235, 260 (1970)).
221. *Id.* at 672.
222. *Id.*
223. *See* Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 2 (2018).
224. *See* Riggs, *supra* note 174, at 942.

freedom and public benefits must.[225] Admittedly, substantive due process claims enjoy a complicated and not altogether noble history. But their wholesale abandonment in this context seems odd, especially as it casts into further shadow the procedure due to a pretrial defendant.

C. Other Possible Sources of Process in the Pretrial Detention System

The Court's failure to distinctly define the process due in *Salerno* may indicate that the Court believed that other constitutional sources established minimal procedural requirements and that pretrial detention process would work in conjunction with those alternative sources. As discussed above, this certainly occurs in the context of equal protection and could occur in the context of a substantive or procedural due process claim. The Court's Fourth Amendment jurisprudence is another possible source.[226] In *Gerstein*, the Court held that a suspect arrested without a warrant must appear promptly before a neutral magistrate and that the state must prove probable cause to continue to detain him.[227] Later, in *Riverside*, the Court held that "promptly" as described in *Gerstein* meant within forty-eight hours.[228] The hearing the Court imagined in *Gerstein* had few procedural protections.[229] Under the Fourth Amendment's minimal process requirements, defendants were not entitled to appointed counsel and probable cause showings bore a low standard of proof.[230] The Court noted that states could improve procedural protections—either through their own state constitutional or statutory requirements or by combining probable cause hearings with other pretrial matters such as bail considerations.[231] What is less clear is if this expansion of the hearing would carry heightened scrutiny, or if these early hearings would continue to be subject to the procedural protections and minimal standards of review that Fourth Amendment jurisprudence required.

One way to read *Gerstein* is that expanded considerations in pretrial hearings—such as bail—also expand procedural protections, including a requirement that the state demonstrate a link between its articulated goal and the proposed deprivation of liberty for the suspect.[232] Such a reading would be consistent with the Court's earlier conceptualization of excessive bail in *Stack* and its later holding in *Rothgery*. *Rothgery* may be particularly instructive, given

225. United States v. Salerno, 481 U.S. 739, 755 (1987).
226. *See* Funk, *supra* note 25, at 1120–24.
227. Gerstein v. Pugh, 420 U.S. 103, 112, 126 (1975).
228. Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).
229. *Gerstein*, 420 U.S. at 114–15.
230. *Id.*
231. *Id.* at 123–24.
232. *See* Funk, *supra* note 25, at 1121–22.

that the Court required appointment of counsel in light of the extensive nature of Texas's early pretrial proceedings.[233] The Court in *Rothgery* noted that the hearing contemplated more than mere probable cause.[234] It signaled the initiation of the adversary process and so required heighted procedural protections.[235] The beginning of the state's commitment to prosecute bail proceedings at initial appearance and/or arraignment not only served to deprive a defendant of his liberty but signaled the adversarial stance between the individual and the state.[236] As a result, when coupled with accusations, such hearings required the procedural protections included in the Sixth Amendment's promise of counsel.[237] Despite this, the Court in *Rothgery* did not require heightened scrutiny.

This leaves open another possible reading of *Gerstein*: that Fourth Amendment protections against unreasonable seizures are distinct, and so require distinct—and relatively spare—procedural safeguards. Other constitutional protections will protect other interests and rights. As the suspect's liberty is increasingly put at jeopardy by the state, the accused's procedural protections will increase—culminating in trial protections as the now defendant faces potential conviction and sentencing. If a state were to combine probable cause and bail proceedings as Texas did, increased procedural protections would apply. Likewise, if such proceedings implicated the Equal Protection Clause or raised substantive due process concerns, strict scrutiny would apply. This view of Fourth Amendment jurisprudence constructs *Gerstein* and *Riverside* as cases that imagine the process required only for the most initial stage hearings—probable cause hearings for arrest. In this reading, *Rothegery* is not new ground, but just a logical extension of what the Court began in *Gerstein* and *Riverside*.

The problem with this limited reading is that the *Gerstein* Court does at times establish and reference procedures for "probable cause for detention," raising the possibility that the determination at stake is not just that which justifies the arrest—as in probable cause for arrest—but that which justifies the period of pretrial detention, no matter how long that period may extend. While at some point the period would extend so long that other procedural protections might be triggered, as the court described in *Barker v. Wingo*,[238] but in the days, weeks, or even months following arrest, this may not be the

233. *See* Rothgery v. Gillespie County, 554 U.S. 191, 204–05, 215–18 (2008).
234. *Id.* at 195–96.
235. *Id.* at 213.
236. *See id.*
237. *Id.* at 207.
238. 407 U.S. 514, 530–33 (1972).

case.[239] In this sense, as Professor Funk has noted, "[e]ven as it declared the Fourth Amendment only a 'threshold right,' the Court implied that this threshold right might govern the balance of interests between the state and the individual through the entire pretrial phase, 'including the detention of suspects pending trial.'"[240] As recently as 2017, the Court cited *Gerstein* and declared that "[t]he Fourth Amendment . . . establishes the standards and procedures governing pretrial detention."[241] While Professor Funk rejects this reading, he admits it is available and has been adopted by the Fifth and Eleventh Circuit Courts of Appeal.[242]

In *Walker v. City of Calhoun*,[243] the Eleventh Circuit held that for the first forty-eight hours after arrest, pretrial detention decisions are beholden to rational basis review—a standard met by adherence to Fourth Amendment requirements defined in *Gerstein* and beyond.[244] This is significant not only because it imagines a depleted standard of review in the context of early pretrial detention decisions but because in reaching this conclusion, the panel rejected an independent equal protection claim, holding that detention that occurred within the first forty-eight hours of arrest was not an absolute deprivation of liberty; thus, *Rodriguez* and *Bearden*, with their heightened standards of review, would not apply.[245] While the Eleventh Circuit contemplated a relatively short period of detention—one immediately post-arrest—studies of the downstream consequences for pretrial detainees suggest that even forty-eight hours of detention can yield long-term consequences for defendants. Given the reality that poor defendants often cannot bail out within this first forty-eight hour period, and given the impact of this period in a marginalized life, it would seem odd to preclude *both* meaningful process and alternative claims such as equal protection that might provide relief even where the Fourth Amendment is unsympathetic.

Beyond this, the decisions would appear to provide little instruction on procedural requirements beyond the first forty-eight hours following arrest. While the *Gerstein* court did not articulate so finite a period of detention, it did seem to contemplate a relatively short period of confinement, describing it at one point as "a brief period of detention to take the administrative steps incident to

239. While the Court in *Gerstein*, and *Salerno* for that matter, may have imagined pretrial detention as relatively short, modern pretrial detention is considerably longer. *See, e.g.*, Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1354 (2014) ("[D]espite speedy trial requirements, many defendants awaiting trial are detained for months.").

240. Funk, *supra* note 25, at 1121.

241. *Id.* at 1122 (citing Manuel v. City of Joliet, 137 S. Ct. 911, 914 (2017)).

242. *Id.* at 1122–23.

243. 901 F.3d 1245 (11th Cir. 2018).

244. *Id.* at 1262, 1265, 1279. The Fifth Circuit reached a similar conclusion in *ODonnell v. Goodhart*, 900 F.3d 220, 226–28 (5th Cir. 2018).

245. *Walker*, 901 F.3d at 1265, 1273, 1278.

arrest."[246] Such commonplace periods of detention in turn seem at odds with *Salerno*'s holding that the Bail Reform Act could preventively detain given its narrow category of non bailable offenses—a decision made within hours at the time of arrest and charging.[247]

I tend to agree with Professor Funk's conclusion that "despite the Supreme Court's inattentive generalizations implying that only the Fourth Amendment governs pretrial detention, federal courts must continue to apply the full range of constitutional protections to their review of state and municipal detention regimes . . . ."[248]

D. The Due Process of Bail

In the end, the Court's failure to articulate a definitive process due to pretrial detainees under the Fifth and Fourteenth Amendments has left lower courts, legislatures, and litigants to cobble together procedures that often appear inconsistent with the nature of the detention contemplated.

The process provided under Fourth Amendment doctrine appears patently insufficient for pretrial detention that exceeds forty-eight hours, and arguably also for periods of detention that are only forty-eight hours. Indeed, notwithstanding the Fifth and Eleventh Circuits, no other circuit has adopted this position.[249] The failure to provide counsel, the brevity of the hearing, and the significance of detention decisions all suggest an imbalance between the state's infringement on the detainee's liberty and the detainee's own interest in freedom.

Recognizing this imbalance seems to suggest that a *Mathews v. Eldridge*[250] style balancing is the appropriate standard for process pretrial. This is consistent with the current bail litigation strategy to pursue procedural due process challenges, in which the court must balance the competing interests of the defendant and the state. In responding to this type of claim, the state does not have to demonstrate that the proposed restriction on the detainee's liberty is narrowly tailored to a specific state goal, but merely that the risk of erroneous deprivation of the affected private interest is not outweighed by the government's own interest.[251] In short, that there are sufficient procedural protections to ensure that the right is not curtailed in error, but rather in the pursuit of some large state interest. The process must be fair but not necessarily precise.

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246. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).
247. United States v. Salerno, 481 U.S. 739, 750 (1987).
248. Funk, *supra* note 25, at 1123.
249. *Walker*, 901 F.3d at 1258, 1265, 1279; ODonnell v. Harris County, 892 F.3d 147, 160–61, 163 (5th Cir. 2018).
250. 424 U.S. 319 (1976).
251. *Walker*, 901 F.3d at 1261–62, 1265.

This treatment of pretrial detention as a question of procedural due process expands procedural safeguards beyond those allotted in Fourth Amendment proceedings. In addition, it is arguably consistent with the Court's treatment of the initiation of the adversarial process as described in *Rothgery*.[252] The appointment of counsel, the opportunity to call witnesses, and the notice of the hearing all suggest a recognition both that a significant liberty interest may be at stake and that heightened safeguards are necessary to prevent deprivations in error. Certainly, the court in *ODonnell* seems to arrive at some version of this conclusion in overturning the Harris County Bail System—holding that procedural protections will protect against other failings in the system.[253]

The conclusion, however, feels dissatisfying on several levels. First, it seems to ignore the fundamental nature of the liberty interest at stake—a liberty interest that not only implicates the physical freedom of the detainee but also the presumption of innocence[254] and the right to defend against charges brought by the state. These constitutional rights are consistent with substantive, not procedural, due process claims. As substantive due process claims, they would trigger both a heightened scrutiny analysis and a requirement that the impositions on the detainee's liberty be narrowly tailored to achieve the state's goals.[255] Without such narrow tailoring, conditions of release or detention itself are rendered arbitrary and likely punitive.

Second, adoption of a procedural due process type reading of pretrial detention systems creates puzzling results when coupled with the now common equal protection claims. The lower court in *ODonnell*, after all, found an equal protection violation, but then opted for a procedural due process remedy. It may be, as the court concluded, that with adequate process the equal protection challenge is resolved, but the result seems odd given that the claimants both proved the claim and then lost the heightened scrutiny that accompanied it. It is especially puzzling given that the court also seemed to contemplate a process that considered the defendant's indigency in setting bail—a consideration consistent with an equal protection concern.

Finally, a procedural due process treatment of pretrial detention systems is inconsistent with the Court's holding in *Salerno*. Admittedly the Court has never answered whether *Salerno* is an example of sufficient or necessary process, but the conclusion in *Salerno*—that the process must be sufficient to establish the nexus

252. Rothgery v. Gillespie County, 554 U.S. 191, 198, 213 (2008).

253. *ODonnell*, 892 F.3d at 157, 161–63.

254. Particularly if we view pretrial detention as punitive despite claims otherwise.

255. Washington v. Glucksberg, 521 U.S. 702, 720–721 (1997); Reno v. Flores, 507 U.S. 292, 301, 305, 316 (1993).

between the state's compelling interest and the liberty imposition—carries a certain internal logic in context of pretrial detention systems, a logic that is consistent with the fundamental nature of the liberty.[256]

E. One Last Thought on Imagining a New Process for Bail

Perhaps at their core, questions of due process and bail inevitably fail not only because the Supreme Court has done little to clarify the constitutional mandates around bail but because the processes most commonly contemplated—including in this Article—fundamentally misconceive the myriad of stakeholders present in any bail consideration. The now robust data on the consequences of even brief periods of pretrial detention reveal that previous considerations of safety and flight risk perhaps not only fail to weigh these state interests effectively but that they fail to consider competing notions of either. Safety in the community may be promoted by pretrial release—even of defendants with high pretrial risk scores—and flight risk may be diminished by allowing a defendant to remain free pretrial and maintain his community ties. This would suggest that traditional procedural solutions such as the right to counsel or to call witnesses, while beneficial, may not be sufficient to truly calibrate either the impact of detention or the nexus between the state's interest and the proposed imposition on the defendant's liberty. This is not to say that such procedural safeguards are not valuable or necessary to protect the liberty interests at stake, but it is to say that such safeguards may also fail to achieve meaningful reform if they must and do function within a system that fails to more accurately calibrate the interests at stake.

V. CONCLUSION

As bail reform seeks a path forward, questions about due process and pretrial detention decisions will undoubtedly linger. Without clear guidance as to the constitutional parameters of pretrial detention, legislators and courts will continue to piece together an uneven procedural terrain that benefits no one. *ODonnell* provides a lens through which to view this struggle and thus is informative, even as it arrives at its own inconsistent conclusion.

256. United States v. Salerno, 481 U.S. 739, 748 (1987).