



School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia
School of Law

Scholarly Works

Faculty Scholarship

1-1-2020

Detention by Any Other Name

Sandra G. Mayson

Assistant Professor of Law *University of Georgia School of Law*, smayson@uga.edu

University of Georgia School of Law

Research Paper Series

Paper No. 2020-07



Repository Citation

Sandra G. Mayson, *Detention by Any Other Name*, 69 Duke L.J. 1643 (2020),
Available at: https://digitalcommons.law.uga.edu/fac_artchop/1330

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#)
For more information, please contact tstriepe@uga.edu.

DETENTION BY ANY OTHER NAME

SANDRA G. MAYSON†

ABSTRACT

An unaffordable bail requirement has precisely the same effect as an order of pretrial detention: the accused person is jailed pending trial. It follows as a logical matter that an order requiring an unaffordable bail bond as a condition of release should be subject to the same substantive and procedural protections as an order denying bail altogether. Yet this has not been the practice.

This Article lays out the logical and legal case for the proposition that an order that functionally imposes detention must be treated as an order of detention. It addresses counterarguments and complexities, including both empirical and normative ambiguity in the concept of “unaffordable” bail. It explains in practical terms what it would entail for a court system to treat unaffordable bail as a detention order. One hurdle is that both legal and policy standards for pretrial detention are currently in flux. Recognizing unaffordable bail as a detention order foregrounds the question of when pretrial detention is justified. This is the key question the bail reform movement must now confront.

Copyright © 2020 Sandra G. Mayson.

† Assistant Professor of Law, University of Georgia School of Law. This Article was developed as a contribution to a symposium, “Fees, Fines, Bail and the Destitution Pipeline,” sponsored by the *Duke Law Journal* and Bolch Judicial Institute at Duke Law School in September 2019. The Article benefitted tremendously from the input of other symposium participants, especially current and former members of the judiciary. The Article also draws on arguments presented in an amicus brief that I co-authored with Kellen Funk, Associate Professor of Law at Columbia Law School, on behalf of “National Law Professors of Criminal Law, Criminal Procedure, and Constitutional Law,” originally filed in *In re Humphrey*, 228 Cal. Rptr. 3d 513, 517 (Ct. App. 2018), *review granted*, 417 P.3d 769 (Ca. 2018), and in several other cases thereafter. I am indebted as well to Shima Baughman, Josh Bowers, Maron Deering, Kellen Funk, Tim Schnacke, Terry Schuster, Jocelyn Simonson, Megan Stevenson, Sam Wiseman, Andrea Woods, and Erica Zunkel for very helpful comments on drafts, and to the editors of the *Duke Law Journal* for their meticulous and thoughtful editing.

TABLE OF CONTENTS

Introduction.....	1644
I. The Paradox in Bail Practice.....	1649
A. Strict Limits on the Explicit Denial of Bail	1649
B. No Limits on the Functional Denial of Bail	1652
II. Unaffordable Bail as Denial of Bail	1654
A. The Logical Case	1655
B. The Legal Case.....	1656
C. Obstacles and Counterarguments.....	1660
1. <i>Conflicting Case Law</i>	1661
2. <i>Practical Counterarguments</i>	1663
3. <i>The Conceptual Counterargument</i>	1665
III. Treating Unaffordable Bail as a Detention Order.....	1670
IV. What Standards for Detention?	1676
Conclusion	1679

INTRODUCTION

There is a paradox at the heart of American bail practice. We rarely deny release on bail and yet we routinely deny release on bail. Our law strictly limits the outright denial of release on bail; simultaneously, it has imposed essentially no limit on unaffordable bail amounts that functionally deny release.

On the one hand, we extol the right to bail as the guarantor of pretrial liberty. “Unless this right to bail before trial is preserved,” the Supreme Court has explained, “the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”¹ “This traditional right to freedom before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction.”² Both the states and the federal government have therefore sought to protect the right to pretrial freedom since the nation’s founding.³ The colonies enshrined a broader right to bail in their state constitutions than had existed at common law.⁴ Almost half retain that original right; the rest strictly limit the

1. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

2. *Id.*

3. *See infra* Part I.A.

4. *See infra* note 22.

circumstances in which courts can order an accused person detained.⁵ The federal Constitution also presumes that pretrial liberty is the norm and that detention without bail must be a “carefully limited exception.”⁶ Federal statutory law requires a full adversarial hearing and a finding of necessity before a court can order an accused person held pending trial.⁷

On the other hand, courts functionally deny bail as a matter of course by setting money bail conditions that people cannot afford.⁸ Magistrates announce bail amounts utterly beyond the capacity of the accused to meet in two-minute, uncounseled hearings, squinting at the accused on a videolink or in a crowded courtroom, one after the other, day in and day out. There are few limits and little process in these proceedings. While the law proclaims pretrial detention a carefully limited exception, the system casually detains millions of people each year on bonds they cannot pay.⁹

This Article argues that it is time to correct the paradox. Courts and legislatures should recognize that an order imposing unaffordable bail is an order of pretrial detention. It has precisely the same effect: the accused person sits in jail.¹⁰ A grant of release contingent on an

5. See WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY J. KING, 4 CRIM. PROC. § 12(3)(b) (4th ed. 2018) (“Because shortcomings in this regard [lack of procedural protections] can lead to the invalidation of preventive detention schemes on federal due process grounds, state courts are likely to judicially engraft such protections onto the applicable provisions in the state constitutions, statutes and court rules to forestall such an event.”).

6. United States v. Salerno, 481 U.S. 739, 755 (1987).

7. See *id.* at 750.

8. Although there is conflict among the courts, most federal courts that have considered the question have held that unaffordable bail is not a *per se* violation of the Eighth Amendment Excessive Bail Clause. See Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 605–10 (2018) (tracking and evaluating relevant case law).

9. In 2017, the most recent year for which data is available, “jails reported 10.6 million admissions, a 19% decline from 2007.” ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2017, at 1 (2019), <https://www.bjs.gov/content/pub/pdf/ji17.pdf> [<https://perma.cc/NGG5-VGA3>]. If even half of those admissions are for new charges, the best available data on rates of pretrial detention on secured bond suggest that the number of people so detained each year likely reaches into the millions. See *infra* notes 45–46 and accompanying text (noting that reported rates of pretrial detention on money bond range from 32 to 53 percent).

10. The term “bail,” as a historical matter, referred to the process by which an accused person was released pending adjudication of a criminal charge, generally on the basis of an unsecured pledge by a third party to assure the accused’s appearance at trial. *E.g.*, *Holland v. Rosen*, 895 F.3d 272, 290 (3d Cir. 2018) (considering the history of bail and defining bail as “a means of achieving pretrial release from custody conditioned on adequate assurances”), *cert. denied*, 139 S. Ct. 440 (2018). In the recent past, the American bail system has come to rely heavily on a secured money bond, or “cash bail,” as a condition of release. See Megan Stevenson & Sandra

impossible condition is not a grant of release at all. It follows that the legal system should treat an order imposing unaffordable bail as a de facto denial of bail. This is not to say that unaffordable bail is per se unlawful. It should simply be subject to equivalent protections for individual liberty as an order of detention.

The central point here is not new. Courts and commentators have long observed, in passing, that unattainable bail is functionally equivalent to no bail.¹¹ Civil rights litigators challenging money-bail systems are increasingly making this argument in their pleadings and briefs.¹² Yet the principle deserves much greater attention than it has received. Only a small handful of courts have taken it seriously. The weight of the doctrine, not to mention pretrial practice, fails to treat unaffordable bail as a denial of bail. There has been no scholarship dedicated exclusively to this point.

The principle that unaffordable bail is a de facto detention order is also important to the future of bail reform. Thus far, reform campaigns have mostly framed the problem with money-bail systems in terms of equality: money bail discriminates against the poor.¹³ That

G. Mayson, *Pretrial Detention and Bail*, in *ACADEMY FOR JUSTICE: A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 22–27* (Erik Luna ed., 2017), <https://ssrn.com/abstract=2939273> [<https://perma.cc/2QKD-GBRV>] (charting the history of bail in the U.S. criminal justice system). Courts charged with “setting bail” typically order release conditional on the accused person providing security in a given amount, in the form of either cash, property, or a commercial surety. *Id.* at 24. If the accused is able to satisfy this condition, he is released. If not, he remains in jail.

11. *See infra* notes 55–57.

12. *E.g.*, Complaint at 29–30, *Allison v. Allen*, No. 1:19-cv-01126 (M.D.N.C. Nov. 12, 2019); *Hill v. Hall*, No. 3:19-CV-00452, 2019 WL 4928915, at *14 (M.D. Tenn. Oct. 7, 2019) (“As in *Weatherspoon*, the argument in this case is that the state court’s order setting bail at an amount Hill had no ability to raise is effectively an order of detention, but that the state court did not make the individualized findings necessary to justify the detention.”); Complaint at 23–25, *Dixon v. City of St. Louis*, No. 4:19-cv-00112 (S.D. Mo. Jan. 28, 2019); Complaint at 24, *Mock v. Glynn County*, No. 2:18-cv-00025-LGW-RSB, (S.D. Ga. Mar. 9, 2018).

13. *See, e.g.*, *Thompson v. Moss Point*, No. 1:15cv182LG–RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015) (“No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond.”); *Jones v. City of Clanton*, No. 2:15cv34–MHT, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) (“The Fourteenth Amendment prohibits ‘punishing a person for his poverty,’ and this includes deprivations of liberty based on the inability to pay fixed-sum bail amounts.” (citation omitted)); *Cooper v. City of Dothan*, No. 1:15–CV–425–WKW [WO], 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015) (recognizing “the unconstitutionality of a pretrial detention scheme whereby indigent detainees are confined . . . solely due to their inability to tender monetary amounts in accordance with a master bond schedule”); *Pierce v. City of Velda City*, No. 4:15–cv–570–HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) (“No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond.”); *accord* Statement of Interest of the

is certainly true, and there is now widespread agreement that courts must consider a person's "ability to pay" when setting conditions of release. The problem is that equality is an amorphous concept.¹⁴ No one knows exactly how much equality the Constitution requires between people with resources and those without.¹⁵ If a magistrate considers a person's resources but concludes that there is no other way to ensure his future appearance in court, for instance, can she impose unaffordable bail? Is any additional process necessary? Does it matter if the offense is a misdemeanor or a felony?¹⁶ Recognizing unaffordable bail as a detention order, on the other hand, clarifies core questions of due process: Is detention justified here? What are the substantive and procedural criteria for incarcerating a person before trial?

Failure to recognize unaffordable bail as a denial of bail, moreover, will endanger the new systems of pretrial detention and release that reformers are working so hard to create. During the "second generation" of bail reform, in the 1980s and 1990s, a number of states authorized pretrial detention outside of capital cases but enacted procedural and substantive rules to guide and constrain these detention regimes, consonant with the general principle that pretrial detention should be a carefully limited exception.¹⁷ Because these states also retained cash bail without meaningful limits, however, courts continued to set unaffordable bail in cases they felt might warrant detention, ignoring the procedures of the detention regimes.¹⁸

United States Department of Justice at 1, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, ECF Doc. 26 (M.D. Ala. Feb. 13, 2015) ("Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment.").

14. See generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (arguing that "equality," by itself, is an ideal devoid of substance).

15. See Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J. F. 1098, 1113–19 (2019) (describing federal litigation challenging wealth-based pretrial detention as having prompted a "crisis of scrutiny" as different courts adopt different degrees of scrutiny to assess equivalent claims).

16. See generally Shima Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. (forthcoming) (manuscript), <https://ssrn.com/abstract=3358662> [<https://perma.cc/RTT4-K4AE>] (arguing that bail practice should indeed treat misdemeanor charges differently than felonies).

17. See generally John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1 (1985) (describing and analyzing this wave of new bail statutes).

18. See, e.g., TIMOTHY R. SCHNACKE, CTR. FOR LEGAL AND EVIDENCE-BASED PRACTICES, "MODEL" BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION 30 (2017) [hereinafter SCHNACKE, "MODEL" BAIL LAWS], http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf [<https://perma.cc/46J7-AADK>] ("In many states, leaving money in the system allows a convenient (albeit unlawful)

If cash bail remains an option without constraints on functional detention, bail-setting courts are likely to use it as an end-run around pretrial detention provisions.

For both of these reasons, courts, legislatures, and advocates should recognize that an unaffordable bail condition is tantamount to a denial of bail and should ensure that it is treated as such. This change in practice will have to surmount several hurdles. The status quo exerts powerful inertia, and the fact is that courts generally have *not* treated unaffordable bail as a detention order. One explanation is inadvertence. Bail-setting courts do not always realize that bail is unaffordable.¹⁹ To the extent the problem is practical, it can be addressed by procedures requiring ability-to-pay determinations and second-look bail reviews. The deeper argument against equating unaffordable bail with a denial of bail is that a court can *never* know when bail becomes unaffordable because “unaffordability” is not an objective quality. This argument highlights the complexity of tethering bail to one’s ability to pay. But determining unaffordability is not impossible. Although the determination may require a policy judgment, there is a threshold at which unaffordable bail conditions amount to a detention order and should be treated as one.

This Article is not a roadmap for bail reform. It does not purport to identify the highest priority for reform, and it should not be read to suggest that treating unaffordable bail as a de facto detention order is sufficient to produce a just pretrial system. There is a live debate underway across the country as to whether money has *any* legitimate place in the pretrial system. In jurisdictions that eliminate money bail entirely, the point here is moot. Even where money bail does persist, moreover, treating unaffordable bail as a detention order is meaningless unless there are real constraints on detention orders.²⁰ The

means of efficiently detaining defendants without the bother of a due process hearing.”); *id.* at 30 n.36 (reporting author’s experience that courts in Colorado and Wisconsin routinely use money to detain, ignoring the detention procedures established in those states); *infra* notes 70–73 and accompanying text.

19. Bail magistrates may also lack information about how many defendants wind up detained on unaffordable bail. State courts often lack effective data infrastructure and feedback loops. *Cf.* Stevenson & Mayson, *supra* note 10, at 33 (suggesting “information and feedback” to bail-setting courts as one mechanism for reform).

20. The federal pretrial system is a cautionary tale. The system has evolved quite permissive standards for detention in practice. *See Hearing on “The Administration of Bail by State and Federal Courts: A Call for Reform” Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. of the Judiciary*, 116th Cong. 1 (2019) (testimony of Alison Siegler, Clinical Professor of Law and Director of the Federal Criminal Justice Clinic) (noting that “the

aim of this Article is simply to explain one prerequisite for coherence in pretrial systems that retain some role for money bail.

The Article proceeds as follows. Part I describes the current incoherence in bail practice: we carefully limit the explicit denial of bail but impose no limits on the functional denial of bail. Part II lays out the logical and legal case for the proposition that an unaffordable bail condition must be treated as a denial of bail and considers counterarguments. Part III explains what this would entail in practice, drawing on both existing statutory regimes and new model statutes for illustration. Part IV confronts the fact that legal standards for pretrial detention are themselves in flux. Treating unaffordable bail as a detention order foregrounds the question of what substantive and procedural protections must attend a detention order. This Article does not solve that issue; that is the challenge ahead for the courts, legislatures, and advocates striving to rationalize the pretrial system.

I. THE PARADOX IN BAIL PRACTICE

The denial of bail is both an extraordinary and a routine event. The *explicit* denial of bail is extraordinary. The *functional* denial of bail is routine. This paradox defines pretrial practice in those jurisdictions—the vast majority—that have not yet undertaken comprehensive bail reform.

A. *Strict Limits on the Explicit Denial of Bail*

Anglo-American law has long restricted the explicit denial of bail. Beginning with the Statute of Westminster of 1275, English law stipulated a right to bail for most offenses.²¹ The American colonies expanded the right further, exempting only capital offenses “where proof is evident or the presumption great.”²² The first U.S. Congress

federal system detains people at an astronomical rate” and opining that “the federal pretrial detention system is in crisis”).

21. Statute of Westminster of 1275, 3 Edward I, ch. 15; *see also* TIMOTHY R. SCHNACKE, NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, FUNDAMENTALS OF BAIL 21–40 (2014) [hereinafter SCHNACKE, FUNDAMENTALS OF BAIL] (providing a broad history of the practice in Anglo-American jurisprudence).

22. SCHNACKE, FUNDAMENTALS OF BAIL, *supra* note 21, at 31; *see also* State v. Brown, 338 P.3d 1276, 1284–88 (N.M. 2014) (chronicling the history of bail in the United States); June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 531–32 (1983) (“[T]he Pennsylvania provision [providing that ‘all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great’] became the model for almost every state constitution adopted after 1776.”); Matthew J. Hegreness, *America’s Fundamental*

followed suit in the Judiciary Act of 1789.²³ As the Supreme Court has recognized, a broad right to bail is fundamental to our constitutional order.²⁴

The right to bail has eroded somewhat in recent decades, especially in the federal system.²⁵ In 1984, responding to a perceived rise in pretrial crime, Congress revised federal bail law to permit the pretrial detention of accused persons deemed to present an unmanageable threat or flight risk.²⁶ The Bail Reform Act of 1984 authorized detention for defendants charged with an array of noncapital offenses.²⁷ A number of states also amended their constitutional right-to-bail provisions to provide for preventive detention regimes.²⁸

Even in these jurisdictions, however, the law on the books at least purports to limit the denial of bail to extraordinary circumstances. Upholding the preventive detention provisions of the federal Bail Reform Act of 1984 against constitutional challenge, the Supreme Court reasoned that the regime limited detention eligibility to those

and Vanishing Right to Bail, 55 ARIZ. L. REV. 909, 912 (2013) (“In state constitutions, from the Founding through the Nixon era, the right to bail was automatic and inalienable for all crimes not punishable by death.”).

23. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91; *see also* *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail.” (citations omitted)).

24. *See Stack*, 342 U.S. at 4 (“This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right . . . is preserved, the presumption of innocence . . . would lose its meaning.”).

25. *See generally* Hegreiness, *supra* note 22 (arguing that Bail Reform Act, which authorized detention without bail in certain circumstances, violates a traditional right to bail that should be understood as fundamental to the American constitutional order).

26. Bail Reform Act of 1984, Pub. L. No. 98-473, title II, § 203(a), 98 Stat. 1837 (codified as amended at 18 U.S.C. §§ 3141–50 (2018)); *United States v. Salerno*, 481 U.S. 739, 742 (1987) (“Responding to ‘the alarming problem of crimes committed by persons on release, Congress formulated the Bail Reform Act of 1984 as the solution to a bail crisis in the federal courts.” (citations omitted)).

27. 18 U.S.C. § 3142(e); *see also* Goldkamp, *supra* note 17, at 41–46 (describing the features of the Bail Reform Act of 1984, including the detention of defendants deemed to constitute a danger to the community).

28. This was the “second generation” of bail reform. Goldkamp, *supra* note 17, at 15–16 (“By 1978, twenty-three states in addition to the District of Columbia had laws addressing defendant danger as an aspect of bail or pretrial detention decisionmaking. . . . [T]en states revised their laws through constitutional amendments.”).

charged with an “extremely serious” federal offense.²⁹ The Court further noted that the federal regime permitted detention only after the trial court had found, by clear and convincing evidence adduced through a full adversary hearing, that an individual defendant presented a “demonstrable danger” that no lesser intervention could manage.³⁰ Any detention order is subject to immediate appeal.³¹ The Bail Reform Act thus limits detention through a charge-eligibility net and a strict individual-dangerousness standard, with robust procedural requirements to minimize the risk of unnecessary detention.³²

State preventive detention regimes are similarly circumscribed. The state constitutions that permit pretrial detention beyond capital cases also limit detention through either a charge-eligibility net, a dangerousness standard, or both.³³ The Illinois Constitution, for instance, permits detention only when the charge is a felony offense that carries a mandatory sentence of incarceration and “release of the offender would pose a real and present threat to the physical safety of any person.”³⁴ The Vermont Constitution limits detention eligibility to charged offenses involving violence where “the court finds, based upon clear and convincing evidence, that the person’s release poses a substantial threat of physical violence to any person.”³⁵ Some states have enacted statutory procedural regimes for detention decisions that mirror the protections of the federal regime.³⁶ In others, courts have required such protections as a matter of due process.³⁷

29. *Salerno*, 481 U.S. at 750–55 (noting that the Bail Reform Act authorizes detention only for “extremely serious offenses” and in “carefully limited” circumstances).

30. *Id.* at 750 (“In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.” (citation omitted)).

31. 18 U.S.C. § 3145.

32. *But see* Hearing on “*The Administration of Bail by State and Federal Courts: A Call for Reform*” Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. of the Judiciary, 116th Cong. 1 (2019) (written statement of Alison Siegler, Clinical Professor of Law and Director of the Federal Criminal Justice Clinic) (reporting that courts do not understand or adhere to these standards in practice).

33. *See* LAFAVE ET AL., *supra* note 5, § 12.3(b) (4th ed. 2018) (surveying pretrial preventive detention practice in the states).

34. ILL. CONST. art. I, § 9.

35. VT. CONST. ch. II, § 40(2).

36. *E.g.*, WIS. STAT. ANN. § 969.035 (2005).

37. *See* LAFAVE ET AL., *supra* note 5, § 12(3)(b) (“Because shortcomings in this regard [lack of procedural protections] can lead to the invalidation of preventive detention schemes on federal due process grounds, state courts are likely to judicially engraft such protections onto the applicable provisions in the state constitutions, statutes and court rules to forestall such an event.”).

Bail practice reflects this legal landscape. The explicit denial of bail is uncommon. An analysis of state-court data from felony cases in the nation's seventy-five largest urban jurisdictions between 1990 and 2004 found that only 6 percent of defendants were detained without bail.³⁸ The federal system is another story; after decades on the rise, the detention rate has exceeded 70 percent.³⁹ But the federal system is only a small sliver of the criminal legal system as a whole,⁴⁰ the average federal charge is significantly more serious than the average state charge, and a sizable proportion of federal charges are unlawful reentry offenses that courts may perceive to involve heightened flight concerns.⁴¹ At the other end of the spectrum are state misdemeanor cases, which represent about three-quarters of state-court criminal caseloads.⁴² Rates of detention without bail in these cases are vanishingly low.⁴³

As a whole, then, the law on the books and the practice on the ground reflect the traditional limits on the outright denial of bail. As the Supreme Court has affirmed: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."⁴⁴

B. No Limits on the Functional Denial of Bail

Simultaneously, courts *functionally* deny bail to significant proportions of accused people every day. The sequence, by now, is

38. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 2 (2007).

39. Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 FED. PROBATION 13, 13 (2018).

40. WENDY SAWYER & PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2019 (2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/9HWR-ABWZ>].

41. *Id.* at 13 n.3, 14 fig.3 (showing that in the twelve-month period ending March 31, 2018, the detention rate for immigration charges was 95 percent); Thomas H. Cohen & Amaryllis Austin, *Examining Federal Pretrial Release Trends over the Last Decade*, 82 FED. PROBATION 3, 5–6 fig.1 (reporting federal pretrial detention rate of 53 percent in 2017 after excluding undocumented residents from dataset and noting that "[i]f illegal aliens were included," the detention rate would be 72 percent in 2017).

42. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 746 (2018).

43. Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors By the Numbers*, 61 B.C. L. REV. (forthcoming 2020) (manuscript at 32–33) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374571 [<https://perma.cc/5S8K-JEN2>] (reporting, on the basis of case-level court records from eight jurisdictions, that all misdemeanor defendants were either released without having to post a secured bond or were assigned a monetary bail amount).

44. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

familiar. A magistrate makes bail determinations in hurried hearings with extremely limited information, often just a police report of a few sentences and the accused person's criminal record. The magistrate announces a sum of money, sometimes by consulting a fixed bail schedule, and moves on to the next case. The accused person does not have access to that sum of money. The accused person stays in jail.

This routine has led to widespread pretrial detention of the poor. Between 1990 and 2004, a combined 32 percent of felony defendants in the nation's seventy-five largest urban jurisdictions were held until trial on a secured-bond requirement they presumably could not meet.⁴⁵ In some jurisdictions, rates of detention on money bond are even higher, including for minor offenses. Between 2013 and 2016 in Harris County, Texas, for instance, 53 percent of misdemeanor defendants were detained for inability to post bond.⁴⁶ That rate does not appear to be anomalous. In Kentucky and Philadelphia during 2013, more than 40 percent of misdemeanor defendants with bail set at only \$500 remained jailed for at least three days; at higher bond amounts, the detention rates were substantially higher.⁴⁷ The contemporaneous rate of misdemeanor pretrial detention on a monetary bond was reportedly around 25 percent in New York City and 50 percent in Baltimore.⁴⁸ As these somewhat random data points suggest, the state of pretrial release and detention data in state systems is exceedingly poor; the data mostly range from inaccessible to nonexistent. But what data do exist suggest that detention on unaffordable bail is a common event across the nation.

The structural causes of this state of affairs are not mysterious. A magistrate has powerful incentives to err on the side of caution when setting release conditions, lest she be held responsible for the release

45. COHEN & REAVES, *supra* note 38, at 2 tbl.1. The lower rate of detention-on-bond in felony cases than in the available misdemeanor data, see *infra* notes 46–48 and accompanying text, is perhaps a function of the much longer average pretrial period in felony cases; defendants have much more time to post bail and lack the alternative of pleading guilty for a “time-served” sentence after a few days or weeks.

46. Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 733 (2017). This percentage excludes defendants held on a probation or other detainer, who were excluded from the sample.

47. Mayson & Stevenson, *supra* note 43, (manuscript at 34 fig.10).

48. MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES 13 (2007) (reporting that 25 percent of nonfelony defendants in New York City are held on bail); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1525 n.81 (2013) (“In New York . . . 25 percent of nonfelony defendants are held on bail. In Baltimore, that number is closer to 50 percent.”).

of a person who goes on to commit a terrible crime. Conversely, she has very few incentives to err on the side of maximizing pretrial liberty.⁴⁹ Overlaid on this incentive structure is the ease of setting money bail and the difficulty of adjusting it to defendants' means. When money bail results in detention, furthermore, the magistrate who sets the bail does not necessarily find out. Finally, ever since the rise of commercial bail bonding, the bail-bond industry has been a powerful advocate for the use of secured bonds over alternative methods of release.⁵⁰ Given these structural conditions, it stands to reason that absent some check on their discretion, officials charged with pretrial custody decisions will set unaffordable bail quite regularly. And there has been no such check. Until the wave of constitutional challenges to money-bail systems in the last five years, relatively few challenges to unaffordable bail orders arrived in the appellate courts. When they did, appellate courts generally deferred to the judgment of the bail-setting official.

The contradiction is stark. Bail-setting courts have very limited authority to explicitly deny bail, and they rarely do so. But they have been given unbounded authority to functionally deny bail by setting it out of reach. They do it all the time.

II. UNAFFORDABLE BAIL AS DENIAL OF BAIL

There is no contradiction, of course, unless one accepts the premise that an unaffordable bail condition is the practical and legal equivalent of a detention order. This Part makes the case for that premise.

49. See, e.g., Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 428–32 (2016) (explaining bail-setting judges' incentive to err on the side of detention over release).

50. E.g., COLOR OF CHANGE & ACLU CAMPAIGN FOR SMART JUSTICE, *SELLING OFF OUR FREEDOM* 40 (2017), https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf [<https://perma.cc/D735-K4LQ>] (“For-profit bail has used ALEC to promote and pass at least 12 different model bills to insulate and expand for-profit bail’s role, including four bills requiring full cash or fully secured bail”); Michael Hiltzik, *Column: Facing Eradication, the Bail Industry Gears Up to Mislead the Public About Its Value*, L.A. TIMES (Oct. 4, 2019, 6:00 AM), <https://www.latimes.com/business/story/2019-10-04/hiltzik-bail-industry-eradication> [<https://perma.cc/698N-NRK3>] (reporting that the bail-bond industry’s trade group, the American Bail Coalition, claims that a secured bond is “[t]he most effective form of release”); see also ABCAdmin, *Former U.S. Solicitor General Paul Clement To Argue on Behalf of the American Bail Coalition*, *Tuesday, May 15, 2018*, AM. BAIL COALITION (May 12, 2018), <https://ambailcoalition.org/former-u-s-solicitor-general-paul-clement-argue-behalf-american-bail-coalition-tuesday-may-15-2018> [<https://perma.cc/E3VA-KVZH>] (“The American Bail Coalition is the only national bail association that has been involved in all of these critical cases, devoting significant resources to engage General Clement”).

A. *The Logical Case*

The logical case entails two propositions. The first is that imposing an unaffordable bail condition is the functional equivalent of denying bail. Both result in pretrial detention. The second proposition is that because both orders result in pretrial detention, they should be subject to equivalent procedures and standards.

The first proposition is straightforward. When a court conditions a person's liberty on a money-bail requirement the person cannot meet, the court has functionally ordered the person detained. Setting unaffordable bail has the same effect as denying bail. The accused person remains in jail. She remains in precisely the same facility, under precisely the same conditions, as a person who has been denied bail outright. An unaffordable bail order is a de facto order of detention.

The second proposition—that de jure and de facto detention orders should be subject to equivalent standards—arguably requires more support. It is not self-evident that all actions with equivalent effects should be subject to the same standards.⁵¹ In this context, though, the effect of both orders—pretrial detention—warrants uniform standards and procedures. That is because detention is a severe deprivation of liberty. In a liberal republic, the deprivation of a person's liberty requires robust justification and process.⁵² Sometimes detention is justified as punishment pursuant to a lawful conviction. This is obviously not true in the pretrial arena.⁵³ Pretrial detention can only be justified on the consequentialist ground that it is necessary to prevent flight or some other harm.⁵⁴ This justification structure applies

51. Thanks to the editors of the *Duke Law Journal* and Sam Wiseman for pressing this point.

52. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.” (citation omitted)); cf. Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258, 262–66 (2008) (examining what it means for something to stand in need of justification).

53. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”); cf. *United States v. Salerno*, 481 U.S. 739, 746–48 (1987) (considering whether pretrial detention authorized by Bail Reform Act of 1984 “constitutes impermissible punishment before trial” and holding that it “is regulatory in nature, and [thus] does not constitute punishment before trial in violation of the Due Process Clause”). See generally Shima Baradaran, *Restoring the Presumption of Innocence*, 72 *OHIO ST. L.J.* 723 (2011) (exploring the history of due process protections against punishment before trial).

54. *Salerno*, 481 U.S. at 750–51 (explaining that the individual's fundamental liberty interest “may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society,” and holding that the “careful delineation of the

equally to all instances of pretrial detention. Detention is just as severe a deprivation of liberty when a court sets bail out of reach as when it denies bail outright. Because pretrial detention always requires a consequentialist justification, every order that imposes pretrial detention should logically be required to meet the criterion of necessity, with sufficient process to minimize the risk of error.

To summarize, the logical argument is that: (1) setting bail out of reach is the functional equivalent of denying bail because it results in an identical deprivation of liberty; (2) every instance of pretrial detention stands in equal need of justification; and (3) because of this, any order that imposes pretrial detention—whether it does so directly or indirectly via unaffordable bail—should be subject to equally robust protection against error. The deprivation of pretrial liberty is the fact that requires a denial of bail to be subject to careful process and limits. Because unaffordable bail deprives a person of liberty in exactly the same way, it should be subject to equivalent protections.

B. The Legal Case

Courts have long acknowledged the first proposition of the logical case: that an unaffordable bail condition is a *de facto* detention order.⁵⁵ The most prominent eighteenth-century treatise on bail, written by Anthony Highmore, noted as much. Highmore defined bail as a “means of giving liberty to a prisoner and at the same time securing” a

circumstances under which detention will be permitted [in the federal Bail Reform Act of 1984] satisfies this standard”).

55. For recent recognition of this fact, see, for example, *ODonnell v. Harris Cty.*, 892 F.3d 147, 158 (5th Cir. 2018) (“[W]hen the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order.”); *State v. Hill*, No. 2018-0637, 2019 WL 6794418, at *5 (N.H. Dec. 13, 2019) (“[D]e facto detention . . . occurs when a trial court sets unaffordable bail that results in detention.”); *Hill v. Hall*, No. 3:19-CV-00452, 2019 WL 4928915, at *19 (M.D. Tenn. Oct. 7, 2019) (“[T]he setting of bail at \$150,000, with full knowledge that the defendant would be unable to post bail in that amount, clearly amounted to a *de facto* detention order”); *Schultz v. State*, 330 F. Supp. 3d 1344, 1358 (N.D. Ala. 2018) (noting that unattainable bail assessments “serve as *de facto* detention orders for the indigent”); *Weatherspoon v. Oldham*, No. 17-CV-2535-SHM-cgc, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018) (“[R]equiring money bail as a condition of release at an amount impossible for the defendant to pay is equivalent to a detention order.”); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 517 (Cal. Ct. App. 2018) (“[R]equiring money bail as a condition of pretrial release at an amount it is impossible for the defendant to pay is the functional equivalent of a pretrial detention order.”); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) (“Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether.”); *Commonwealth v. Hamborsky*, 75 Pa. D. & C. 4th 505, 521 (Pa. Commonw. Ct. 2005) (“Setting bond at \$200,000 would be a charade that would only thinly disguise the denial of the defendant’s constitutional right to reasonable bail”).

defendant's appearance.⁵⁶ He further explained that "justices must take care that, under pretence of demanding sufficient surety, they do not make so excessive a demand as in effect amounts to a denial of bail; for this is looked upon as a great grievance."⁵⁷ The drafters of the federal Bail Reform Act of 1966 acknowledged the point, too.⁵⁸ The D.C. Circuit Court noted that "[t]he authors of the Act were fully aware that the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."⁵⁹

Congress has also acknowledged the second half of the logical argument: the proposition that de facto and de jure detention orders should be subject to equivalent procedures and constraints. The Bail Reform Act of 1984 stipulates, as an initial matter, that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person."⁶⁰ But the drafters acknowledged that a court might sometimes conclude that no lesser amount, and no less restrictive alternative, could adequately manage a serious risk of flight.⁶¹ In those circumstances, the Senate Report on the Act explains:

[I]t would appear that there is no available condition of release that will assure the defendant's appearance. This is the very finding which, under section 3142(e), is the basis for an order of detention, and therefore the judge may *proceed with a detention hearing* pursuant to section 3142(f) and order the defendant detained, if appropriate.⁶²

56. A. HIGHMORE, DIGEST OF THE DOCTRINE OF BAIL; IN CIVIL AND CRIMINAL CASES vi (1783); *see also id.* at 193, 196.

57. *Id.* at vi.

58. As the Senate Report put it:

There is no doubt . . . that each year thousands of citizens accused of crimes are confined before their innocence or guilt has been determined by a court of law, not because there is any substantial doubt that they will appear for trial if released, but merely because they cannot afford money bail. There is little disagreement that this system is indefensible.

S. REP. NO. 89-750, at 6 (1965). *See also* Allen v. United States, 386 F.2d 634, 637 n.5 (D.C. Cir. 1967) (Bazelon, J., dissenting) (quoting and citing the above language).

59. United States v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969).

60. 18 U.S.C. § 3142(c)(2) (2018).

61. Flight is not the only risk at issue in the pretrial phase; the state also has a compelling interest in protecting the public and preventing witness tampering or obstruction of justice. *See, e.g., id.* § 3142(c)(1)(B) (authorizing pretrial release conditions and/or detention if necessary to "reasonably assure the appearance of the person as required" or protect "the safety of any other person or the community"). But the federal schema only authorizes the use of monetary bail to "assure appearance of the person as required," not to manage other pretrial risks. *Id.* § 3142(c)(1)(B)(xi)–(xii).

62. S. REP. NO. 98-225, at 16 (1984) (emphasis added).

Three federal courts of appeal have affirmed that the Bail Reform Act requires full detention process when a court wishes to impose unaffordable bail. In *United States v. McConnell*, the Fifth Circuit declined to hold that the Bail Reform Act prohibits unaffordable bail entirely.⁶³ But the court went out of its way to remind the defendant that an unaffordable bail order triggers full detention process and that “the detention hearing is a critical component” of that process.⁶⁴ The petitioner in *McConnell* had not complained about the lack of a detention hearing in his case, but the opinion implies that he should have.⁶⁵ The First and Eighth Circuits have likewise noted that unaffordable bail triggers full detention process.⁶⁶ There are ample grounds to conclude that federal statutory law requires courts to treat unaffordable bail as the de facto detention order that it is.⁶⁷

In jurisdictions with less explicit statutory detention regimes, courts have begun to recognize that unaffordable bail orders are subject to the same *constitutional* requirements as transparent orders of pretrial detention. As the Massachusetts Supreme Court has explained, because unaffordable bail “is the functional equivalent of an order for pretrial detention,” it “must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty.”⁶⁸ The California Court of Appeals recently held that “the [trial] court’s order, by setting bail in an amount it was impossible for

63. *United States v. McConnell*, 842 F.2d 105, 108–10 (5th Cir. 1988).

64. *Id.* at 109 n.5.

65. *Id.*

66. *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (“[O]nce a court finds itself in this situation—insisting on terms in a ‘release’ order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order.”); *United States v. Maull*, 773 F.2d 1479, 1482–83 (8th Cir. 1985) (en banc) (noting that “[t]he legislative history of the Bail Reform Act particularly addresses the situation” in which a court concludes that no lesser release condition than unaffordable bail can ensure appearance, and that in such circumstances the court should hold “a prompt hearing on the issue of detention” (quoting *United States v. Delker*, 757 F.2d 1390, 1394 (3d Cir. 1985))).

67. *Accord* *United States v. Clark*, No. 1:12-CR-156, 2012 WL 5874483, at *3 (W.D. Mich. Nov. 20, 2012) (“In short, a finding that a defendant is unable to meet the financial conditions of a release order serves as a trigger to proceed to make the findings necessary to detain a defendant pursuant to a detention hearing.”); *United States v. Lemos*, 876 F. Supp. 58, 61 (D.N.J. 1995) (“Because the inability to meet a financial condition imposed under subsection (c) [of 18 U.S.C. § 3142] has the same effect on the defendant as a detention order under subsection (e), courts have readily extended the analogy to require the same procedural protection subsection (e) provides.”).

68. *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017); *see also* *State v. Hill*, No. 2018-0637, 2019 WL 6794418, at *7 (N.H. Dec. 13, 2019) (citing *Brangan* as “setting forth due process standards that apply when unaffordable bail results in detention”).

petitioner to pay” without a determination of necessity and robust procedural safeguards, “effectively constituted a *sub rosa* detention order lacking the due process protections constitutionally required to attend such an order.”⁶⁹

Caselaw addressing “*sub rosa*” detention is one thread of this larger jurisprudence. The term “*sub rosa* detention” typically refers to the practice of setting unaffordable bail with the specific intention of detaining a defendant whom the court lacks authority to detain outright, or without having to comply with full detention process.⁷⁰ This practice has long been pervasive.⁷¹ Since the 1960s, appellate courts have consistently held it to violate state and federal constitutional law.⁷² As Justice Douglas once wrote, “It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom.”⁷³

Regardless of the intention with which it is set, though, unaffordable bail constitutes a de facto detention order that is subject to the constitutional criteria for detention. A growing number of

69. *In re Humphrey*, 228 Cal. Rptr. 3d 513, 517 (Cal. Ct. App. 2018). The decision is pending review before the California Supreme Court.

70. *E.g.*, S. REP. NO. 98-225, at 16, *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3199 (“The purpose of this provision [18 U.S.C. § 3142(c)(2)] is to preclude the *sub rosa* use of money bond to detain dangerous defendants.”); Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1489 (1966) (noting that although the law strictly limits pretrial detention, “courts currently accomplish such detention *sub rosa* by setting prohibitively high bail for defendants they consider dangerous”).

71. *See State ex rel. Torrez v. Whitaker*, 410 P.3d 201, 219 (N.M. 2018) (“It is common knowledge among judges and others who have worked in our courts that in the vast majority of cases imposition of high-dollar bonds for any but the most wealthy defendants is an effort to deny defendants the opportunity to exercise their constitutional right to pretrial release.”); AM. BAR ASS’N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PRETRIAL RELEASE STANDARDS 6 (1974) (“[I]t is no secret that many judges, when faced with a defendant whom they fear will commit ‘additional crimes’ if released, feel compelled to set bail beyond his reach.”).

72. *See, e.g.*, U.S. DEP’T OF JUSTICE, NATIONAL CONFERENCE ON BAIL & CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT xxix (1965) (“A substantial body of opinion supports the view that setting high bail to detain dangerous offenders is unconstitutional.”); *cf. Hairston v. United States*, 343 F.2d 313, 316 (D.C. Cir. 1965) (Bazelon, C.J., dissenting) (“Setting high bail to deny release discriminate[s] between the dangerous rich and the dangerous poor and masks the difficult problems of predicting future behavior . . .” (quotations and citation omitted)).

73. *Bandy v. United States*, 81 S. Ct. 197, 198 (1960); *see also, e.g., Stack v. Boyle*, 342 U.S. 1, 5 (1951) (“Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [of ensuring the defendant’s appearance] is ‘excessive’ under the Eighth Amendment.” (citing *United States v. Motlow*, 10 F.2d 657 (7th Cir. 1926))); *State ex rel. Torrez v. Whitaker*, 410 P.3d 201, 219 (N.M. 2018) (“Setting a money bond that a defendant cannot afford to post is a denial of the constitutional right to be released on bail for those who are not detainable . . .”); *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014).

federal and state courts have acknowledged this.⁷⁴ Detention is no less oppressive when bail is set out of reach than when bail is denied. And limits on pretrial detention are pointless if a court can circumvent them merely by announcing an unattainable bail amount.⁷⁵

C. *Obstacles and Counterarguments*

However straightforward the point that unaffordable bail is tantamount to no bail, few jurisdictions respect this principle in practice. The courts that have endorsed it remain a small minority. Perhaps more surprisingly, a few appellate courts have rejected it. This

74. *Hill v. Hall*, No. 3:19-CV-00452, 2019 WL 4928915, at *19 (M.D. Tenn. Oct. 7, 2019) (acknowledging that “the setting of bail at \$150,000, with full knowledge that the defendant would be unable to post bail in that amount, clearly amounted to a *de facto* detention order” subject to due-process criteria for detention but concluding that bail-setting court had complied with those criteria); *Buffin v. City & County of San Francisco*, No. 15-CV-04959-YGR, 2019 WL 1017537, at *16 (N.D. Cal. Mar. 4, 2019) (applying strict scrutiny to equal-protection and due-process challenge to money-bail schedule “because the fundamental right to liberty is implicated by plaintiffs’ claims”; granting summary judgment for plaintiffs); *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) (finding that due process requires a panoply of protections before an accused person can be detained on bail, including representation, meaningful opportunity to be heard, and finding of necessity by clear and convincing evidence); *Schultz v. State*, 330 F. Supp. 3d 1344, 1358, 1366 (N.D. Ala. 2018) (recognizing that “judges set unattainable bond amounts that serve as *de facto* detention orders for the indigent,” and that “[t]he substantive right to pretrial liberty may not be infringed without ‘constitutionally adequate procedures’” (quotations and citations omitted)); *Weatherspoon v. Oldham*, No. 17-CV-2535-SHM-cgc, 2018 WL 1053548, at *6 (W.D. Tenn. Feb. 26, 2018) (“When an indigent arrestee faces the possibility of pretrial detention or its functional equivalent, courts have held that the minimum process a state must provide is an opportunity to determine whether no condition or combination of conditions of release could satisfy the purposes of bail”); *Coleman v. Hennessy*, No. 17-CV-06503-EMC, 2018 WL 541091, at *1 (N.D. Cal. Jan. 5, 2018) (holding that bail-setting court violated due process by “failing to consider whether its bond order amounted to a *de facto* order of pretrial detention which would be constitutionally permissible only if narrowly tailored to serve a compelling government interest”); *Rodriguez-Ziese v. Hennessy*, No. 17-CV-06473-BLF, 2017 WL 6039705, at *3 (N.D. Cal. Dec. 6, 2017) (holding that hearing at which trial court imposed unaffordable bail condition “does not withstand the heightened scrutiny required by *Salerno* in order to deprive Petitioner of his liberty”); *State ex rel. Torrez*, 410 P.3d at 219 (clarifying that pretrial detention must comply with the “new due process procedures under the New Mexico Constitution”); *In re Humphrey*, 228 Cal. Rptr. 3d at 525–26 (applying strict scrutiny to equal-protection and due-process challenge to money-bail schedules); *Commonwealth v. Hamborsky*, 75 Pa. D. & C. 4th 505, 521 (Pa. C.P. Fayette 2005) (reasoning that “setting bond at \$200,000 would be equivalent to denying bail altogether,” which court was not authorized to do for the offense at issue).

75. *Accord United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (“Conditions which are impossible to meet are not to be permitted to serve as devices to thwart the plain purposes of the [Bail Reform] Act [of 1966], nor are they to serve as a thinly veiled cloak for preventive detention.”); *Brown*, 338 P.3d at 1292 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant’s pretrial release.”).

Section considers the jurisprudential and practical obstacles to treating unaffordable bail as a de facto detention order.

1. *Conflicting Case Law.* One state appellate court has flatly rejected the proposition that unaffordable bail must be subject to the same constraints as a detention order. In *State v. Anderson*, the Connecticut Supreme Court held that an unaffordable bond requirement is *not* equivalent to a denial of bail for purposes of legal analysis.⁷⁶ *Anderson* concerned an insanity acquittee who was alleged to have committed a series of assaults in the psychiatric facility where he was confined, resulting in a felony charge.⁷⁷ At the state's request, the trial court imposed a secured bond requirement of \$100,000, which Anderson could not pay and which resulted in his transfer to a maximum-security prison.⁷⁸ The court's apparent purpose in imposing the bond was to effectuate this transfer, since Anderson posed an ostensibly unmanageable threat in the psychiatric facility.⁷⁹ Anderson argued that this maneuver violated Connecticut's constitutional right to bail, but the Connecticut Supreme Court disagreed.⁸⁰ It held that "the defendant was not actually denied bail but, rather, was unable to post the bail that the trial court, in its discretion, properly set."⁸¹ Thus, Anderson "was afforded the opportunity for release that constitutionally was required."⁸² The court dismissed the case law that Anderson had invoked: "Because the trial court set a bond, much of the authority on which the defendant relies [involving denials of bail] . . . , is readily distinguishable or otherwise does not support his claim."⁸³

Let us be clear about what happened in this case: Anderson had a right to bail. The trial court lacked authority to detain him. So the court

76. *State v. Anderson*, 127 A.3d 100, 113 (Conn. 2015).

77. *Id.* at 107, 105–06.

78. *Id.* at 106–07.

79. *Id.* at 125 n.4 (Palmer, J., dissenting) ("[I]t is undisputed that the trial court intentionally set a bond that far exceeded an amount that the defendant could pay solely to ensure that he would be incarcerated in advance of trial due to his perceived dangerousness.").

80. Anderson also argued that it violated procedural due process. The Court held that he had been afforded adequate process to protect against an erroneous deprivation of liberty. *See id.* at 121 ("Prior to the decision that ultimately resulted in his transfer, the defendant had multiple hearings, was represented by one or more competent counsel at all times and was permitted to present whatever argument and evidence he believed was pertinent.").

81. *Id.* at 113.

82. *Id.*

83. *Id.* at 113 n.31.

imposed an unaffordable bond in order to detain him. And the Connecticut Supreme Court held that he had not been detained.

In the federal system, only three circuit courts have acknowledged that an unaffordable bail order triggers full detention process under the Bail Reform Act.⁸⁴ Others have simply elided the question. The Eleventh Circuit, for instance, has written that the question of what process is due when a court insists on an unaffordable condition of release “raises a number of difficult questions that we decline to reach in this case.”⁸⁵ Perhaps the lack of clarity is due to the fact that until very recently, defendants who challenged unaffordable bonds typically claimed a right to release rather than to adequate detention process.⁸⁶

Very recently, moreover, the Fifth Circuit misconstrued *McConnell* by subtly altering a quote from that case in its seminal opinion addressing Houston’s misdemeanor bail system, *O’Donnell v. Harris County*.⁸⁷ The *O’Donnell* court cited *McConnell* with respect to the question of what process is due when a court sets unaffordable bail.⁸⁸ But it cited *McConnell* as “concluding that, under the Bail Reform Act of 1984, the “court must [merely] explain its reasons for concluding that the particular financial requirement is a necessary part of the conditions for release” when setting a bond that a detainee cannot pay.”⁸⁹

The word “merely,” inserted by *O’Donnell*, renders this quote inaccurate. In fact, *McConnell* expressly noted that the court must do much more than explain its reasons! Having cited the Senate Report’s clarification that an unaffordable bond requirement triggers full detention process, the *McConnell* court dropped a footnote: “Although *McConnell* does not complain about the absence of a formal hearing, we remind that the detention hearing is a critical component of the Bail Reform Act.”⁹⁰ The *McConnell* court proceeded to quote the full statutory criteria for a detention hearing and a

84. See *supra* notes 63–66 and accompanying text.

85. *United States v. Wong-Alvarez*, 779 F.2d 583, 585 (11th Cir. 1985).

86. *Cf.* *United States v. Jessup*, 757 F.2d 378, 388–89 (1st Cir. 1985) (rejecting the defendant’s claim that unaffordable bail violated Bail Reform Act but not addressing whether the magistrate complied with full detention process); *United States v. Maull*, 773 F.2d 1479, 1482 (8th Cir. 1985) (en banc) (same); see also *United States v. Lemos*, 876 F. Supp. 58, 61 (D.N.J. 1995) (observing that circuit court opinions addressing appeals of unaffordable bond orders “are unclear as to whether the defendant had yet been afforded an [sic] full evidentiary hearing”).

87. *O’Donnell v. Harris County*, 892 F.3d 147, 160 (5th Cir. 2018).

88. *Id.*

89. *Id.* (quoting *United States v. McConnell*, 842 F.2d 105, 110 (5th Cir. 1988)).

90. *Id.* at 110 n.5.

detention order, ostensibly to ensure that the defendant was aware of all the procedure to which he was entitled.⁹¹

It is important to note, finally, that although many courts have paid lip service to the principle that an unaffordable bail condition is the functional equivalent of no bail, relatively few have actually held that orders imposing unaffordable bail conditions must be subject to precisely the same limits and procedures as orders denying bail outright. Some have, and the list is growing,⁹² but it is still quite short.

2. *Practical Counterarguments.* What is going on here? *Anderson* invoked semantics to deny reality. *O'Donnell* misrepresented *McConnell* by omitting an important qualifer to its holding. Courts wax eloquent about the right to pretrial freedom and blithely defer to bail conditions that keep people locked up. Why have the courts failed to treat unaffordable bail conditions as detention orders?

One possibility is that courts' reluctance to equate unaffordable bail with no bail reflects an appreciation of judicial-resource constraints. It would be a lot of trouble to treat unaffordable bail orders as detention orders. It would require bail-setting courts to dedicate considerably more attention to the process than they have been accustomed to, both in order to determine when a bail condition might be unaffordable and, if a court still felt inclined to impose it, to comply with full detention process. The fact that the procedures and criteria for detention remain opaque in many jurisdictions adds to the difficulty. This concern with resource constraints is understandable, but it is not a sound counterargument against the proposition that functional detention and outright detention warrant equal care.

A second source of resistance to recognizing unaffordable bail as tantamount to no bail is that it would preclude *sub rosa* detention. Approximately twenty state constitutions currently prohibit the denial of bail outside of extremely serious cases.⁹³ It is an open secret that in these right-to-bail states, courts use unaffordable bail conditions to detain people deemed too dangerous or flight prone to release.⁹⁴ This

91. See *id.* (setting out the requirements under § 3142(e)–(f) of the Bail Reform Act).

92. See *supra* notes 68–69, 74 and accompanying text.

93. See *supra* LAFAVE ET AL., note 5.

94. See, e.g., State *ex rel.* Torrez v. Whitaker, 410 P.3d 201, 219 (N.M. 2018) (“It is common knowledge among judges and others who have worked in our courts that in the vast majority of cases imposition of high-dollar bonds for any but the most wealthy defendants is an effort to deny defendants the opportunity to exercise their constitutional right to pretrial release.”); see also Hill v. Hall, No. 3:19-cv-00452, 2019 WL 4928915, at *19 (M.D. Tenn. Oct. 7, 2019) (“[B]ecause the

is what happened in *Anderson*. Anderson posed a threat of violence that required detention in a maximum-security facility.⁹⁵ But in Connecticut, a right-to-bail state, the trial court lacked authority to order Anderson detained directly. So the court used the only mechanism available to ensure Anderson's detention: a bond requirement patently beyond his ability to meet. Rather than confront the apparent conflict between the state constitutional right to bail and the ostensible necessity of detention, the Connecticut Supreme Court simply held that Anderson *had* been granted bail. By virtue of having announced a condition of release—albeit an impossible one—the trial court had “afforded the opportunity for release that constitutionally was required.”⁹⁶

The problems with the *Anderson* approach are clear. The idea that an admittedly impossible condition offers an “opportunity” for release is farcical. For a court to embrace this transparent fiction compromises the legitimacy of the law.⁹⁷ The notion that the right to bail is merely a right to have a court announce some theoretical condition for release, whether it lies in the realm of possibility or not, also renders the right to bail entirely empty. After *Anderson*, the right to bail enshrined in the Connecticut Constitution is satisfied so long as a court names a monetary sum before an accused person is carted off to jail. Finally, as courts have long recognized, *sub rosa* detention is an inappropriate method for making the determination to deprive a person of liberty.⁹⁸

There are other ways for right-to-bail states to address the occasional necessity of detention. As the dissenting judges in *Anderson* wrote, “Our law . . . provides other mechanisms—mechanisms that do not run afoul of the constitution—that courts may use to protect the safety of the public when confronted with a potentially violent defendant.”⁹⁹ Courts “have the authority to impose nonfinancial conditions of release and to revoke bail if a defendant fails to comply

Tennessee constitution guarantees a right to bail, the Tennessee courts appear to use unattainable bail amounts as a proxy for denying bail altogether.”)

95. *State v. Anderson*, 127 A.3d 100, 107 (Conn. 2015). Why the psychiatric facility was unable to manage him is a mystery not addressed in the opinion.

96. *Id.* at 101.

97. The *Anderson* court, for example, simultaneously blessed the use of an unattainable bond requirement to detain Anderson and purported to interpret the state constitution as prohibiting preventive detention. *Id.* at 113 n.32 (“While preventive detention is permitted in certain instances in the federal system, I agree that it is not permitted under our state constitution except in capital cases.”).

98. *See supra* notes 70–73 and accompanying text.

99. *Anderson*, 127 A.3d at 146 (Palmer, J., dissenting).

with those conditions.”¹⁰⁰ In cases involving mental illness, they can initiate involuntary civil-commitment procedures specifically designed to address prospective threats of violence.¹⁰¹ Right-to-bail jurisdictions can consider amending their state constitutions, as New Jersey and New Mexico recently have, to authorize preventive detention under limited circumstances.¹⁰² Even without such amendment, there is a case for interpreting right-to-bail provisions to entail only a conditional right to release—the condition being the ability of the accused to provide a sufficient guarantee of her appearance and good behavior. On this interpretation, a court may deny bail when the state has adequately demonstrated that no surety is “sufficient.”¹⁰³

The need to manage acute threats thus does not require—and does not justify—willful blindness to the reality that unaffordable bail is a functional denial of bail. The fact that equating unaffordable bail with a denial of bail precludes *sub rosa* detention is a reason to recognize the equivalence, not an argument against it.

3. *The Conceptual Counterargument.* The more principled argument against treating unaffordable bail as tantamount to no bail is that they are *not* the same because unaffordable bail does not make release impossible. It only makes it difficult. A bail condition may be unaffordable in the sense of inflicting economic hardship and yet not

100. *Id.*; see also *State v. Ayala*, 610 A.2d 1162, 1171 (Conn. 1992) (holding that “the power to enforce reasonable conditions of release [by revocation of release] is a necessary component of a trial court’s jurisdiction over a criminal case” and surveying broad authority in other jurisdictions supporting that proposition). The *Anderson* dissent further noted: “Indeed, it appears that the trial court in the present case, following the appropriate procedures, could have revoked the defendant’s bail for his commission of a crime in violation of the conditions of his release.” *Anderson*, 127 A.3d at 146 (Palmer, J., dissenting).

101. See, e.g., 56 C.J.S. MENTAL HEALTH § 46 (“Individuals are subject to involuntary civil commitment for mental illness or mental disorder if they pose a danger to others, the public, or society.” (footnotes omitted)).

102. N.J. CONST. art. I, ¶ 11 (amended 2017); N.M. CONST. art. II, § 13 (amended 2016).

103. The Connecticut right-to-bail provision, like most others, guarantees the right “to be released on bail upon sufficient security” in noncapital cases. CONN. CONST. art. I § 8. The argument would be that the right to release on bail is contingent on the existence of a sufficient security. There is support in the history of the Connecticut right to bail to support this interpretation. See, e.g., *Ayala*, 610 A.2d at 1172 (reporting that the right “is traceable to a 1672 legislative enactment declaring that ‘no mans person shall be Restrained or Imprisoned by any Authority whatsoever, before the Law hath sentenced him thereunto *if he can put in sufficient security, bayl or mainprize for his appearance and good behaviour in the mean time . . .* .’” (emphasis added)). On the other hand, other historical evidence suggests that the right to bail was indeed understood as a right to release. See, e.g., HIGHMORE, *supra* note 56 and accompanying text.

factually impossible for the accused person to meet. In other words, it might be unaffordable but still technically attainable.

Consider the frequent scenario in which an accused person has no income or assets herself but does have relatives who might be willing to contribute toward her bail. If the bail-setting court imposes a secured bond of \$500 as a condition of release, the condition is unaffordable for her, but it may not be unattainable. If her relatives come up with the money, it will not keep her in jail.

This scenario highlights the complexity of “unaffordability.” When is a bail condition unaffordable? The question requires two kinds of judgment. It requires, first, a factual assessment of the resources available to a person. Does she have income? Assets? Liabilities or debts? Indirect access to resources through other people? These questions have objective answers, although they may not be easy to establish.¹⁰⁴ Secondly, though, a determination of affordability requires a *moral* assessment about what a person should be willing to do, or forego, in order to pay the sum in question. Should she be expected to draw on the resources of friends and family? To substitute current assets—for instance, by pawning a watch, selling a car, or mortgaging a home? To forego paying rent or a child’s tuition? To sell her blood or organs?¹⁰⁵ There is a long continuum from a sum a person can procure instantly and painlessly to one that she could not possibly procure under any circumstances. The point along that spectrum where a financial condition becomes unaffordable is a moral judgment, not an empirical fact.

One should therefore concede that there are real differences between an unaffordable bail condition and an outright denial of bail. When a court has denied bail, there is no action the accused could take to procure her lawful release on bail. When a court has imposed an unaffordable condition, by contrast, there may be some action the accused—or a third party—could theoretically take to procure her lawful release on bail. The denial of bail is categorically final in a way

104. It is difficult to obtain an accurate accounting of an accused person’s financial situation. Time is limited and arrestees may not be reliable reporters.

105. Cf. Campbell Robertson, *For Offenders Who Can’t Pay, It’s a Pint of Blood or Jail Time*, N.Y. TIMES (Oct. 19, 2015), <https://www.nytimes.com/2015/10/20/us/for-offenders-who-cant-pay-its-a-pint-of-blood-or-jail-time.html> [<https://perma.cc/KR3M-YTHW>] (citing examples of courts ordering those defendants subject to fines for minor offenses who were unable to pay to give blood or face jail time in lieu of payment).

that unaffordable bail is not.¹⁰⁶ And whereas it is easy to determine objectively when a court has denied bail, it is impossible to determine objectively when bail becomes unaffordable.

Yet these differences do not negate the proposition that unaffordable bail is the functional equivalent of a detention order. First of all, we *can* determine when bail is unaffordable. Courts and agencies conduct ability-to-pay assessments all the time, in contexts that include appointment of counsel, imposition of fines and fees,¹⁰⁷ the evaluation of *in forma pauperis* filings,¹⁰⁸ and applications for all forms of public benefits. The most straightforward procedure is for the court to ask a defendant: “Can you post a two-hundred-dollar deposit by tomorrow?”¹⁰⁹ The slightly more involved model is a short questionnaire that asks a person to list her income, assets, dependents, routine financial outlays, and debts.¹¹⁰ Some jurisdictions use questioning under oath to assess a person’s resources. A number of jurisdictions and organizations have developed model ability-to-pay

106. In addition to the possibility that the accused or her family might scrape together the funds to post bail, in some jurisdictions and circumstances there might be a possibility that a bail fund or other group of concerned citizens might ultimately post the bail. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 599–600 (2017).

107. See Beth A. Colgan, *Graduating Economic Sanctions According to Ability To Pay*, 103 IOWA L. REV. 53, 59 (2017) (arguing that “the development of a meaningful system for graduating economic sanctions according to ability to pay is both feasible and desirable,” drawing on day-fine models used in past). See generally NAT’L TASK FORCE ON FINES, FEES & BAIL PRACTICES, CONFERENCE OF CHIEF JUSTICES AND THE CONFERENCE OF STATE COURT ADMINISTRATORS, *LAWFUL COLLECTION OF LEGAL FINANCIAL OBLIGATIONS: A BENCH CARD FOR JUDGES* (2017), https://www.ncsc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx [perma.cc/E2BB-LJWW] (offering guidance around ability-to-pay determinations).

108. See, e.g., Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019) (empirical study of *in forma pauperis* pleadings in federal court); *AO 239: Application to Proceed in District Court Without Prepaying Fees or Costs (Long Form)*, U.S. COURTS (revised Jan. 2015), https://www.uscourts.gov/sites/default/files/ao239_1.pdf [perma.cc/WG7P-VHRZ]; *AO 240: Application to Proceed in District Court Without Prepaying Fees or Costs (Short Form)*, U.S. COURTS (2010), https://www.uscourts.gov/sites/default/files/ao240_0.pdf [perma.cc/8Z4Y-YQS4].

109. This approach has the virtue of avoiding the “invasive inquiry” and risk of implicit bias that more involved ability-to-pay determinations entail. See Theresa Zhen, *(Color)blind Reform: How Ability-to-Pay Determinations Are Inadequate To Transform A Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 201 (2019).

110. One Georgia county, for instance, uses a one-page form that asks, in simple language, if a person is married, supports children, and has sources of income. *Bond Hearing Financial Worksheet* (on file with author). For another example, see *Affidavit of Financial Hardship for Bail Determination in Misdemeanor Arrest Cases* developed and implemented as part of a consent decree in Glynn County, Georgia. *Affidavit of Financial Hardship for Bail Determination in Misdemeanor Arrest Cases*, <https://www.aclu.org/legal-document/mock-et-al-v-glynn-county-et-al-financial-status-affidavit-bond-determination-order> [https://perma.cc/MC2V-2GRE].

forms or processes for the sentencing context that might be adapted for bail inquiries.¹¹¹

Every ability-to-pay regime entails a moral determination about what people should be expected to pay, given their resources, although that determination is usually implicit. For appointment-of-counsel purposes, for instance, it is the rule in many jurisdictions that a person who receives any public benefits qualifies as “indigent” and is entitled to public counsel.¹¹² The rationale for that rule is not that it is factually impossible for every person—or even most people—who receive public benefits to hire private counsel. The rationale is that it is impossible for some and would impose undue hardship for most of the rest, which is to say that it would impose a financial strain that we should not ask people to take on.

Every pretrial system likewise needs a mechanism for assessing ability-to-pay that includes both a factual inquiry into a person’s resources and a moral determination about what, given a particular level of wealth, a person should be expected to pay toward bail. This moral determination is difficult, but it is also unavoidable. A society that values human agency and dignity cannot condition liberty on a person’s willingness to sell his organs or forego paying rent. Detention that is “chosen” over posting a bond that would put a family on the streets is not chosen in any meaningful sense. There is a threshold beyond which a payment is functionally impossible to make, if not factually impossible.¹¹³ A bail condition is unaffordable, in other words,

111. Increasingly, the process is digital. *See generally* Meghan O’Neil & J.J. Prescott, *Targeting Poverty in the Courts: Improving the Measurement of Ability To Pay*, 82 LAW & CONTEMP. PROBS. 199 (2019). For paper models, see, for example, SHARON BRETT & MITALI NAGRECHA, HARVARD LAW SCH. CRIMINAL JUSTICE POLICY PROGRAM, PROPORTIONATE FINANCIAL SANCTIONS: POLICY PRESCRIPTIONS FOR JUDICIAL REFORM vi (2019), http://cjpp.law.harvard.edu/assets/Proportionate-Financial-Sanctions_layout_FINAL.pdf [perma.cc/UJ3P-2SJT] (providing table of contents summary of recommendations), HARVARD LAW SCH. CRIMINAL JUSTICE POLICY PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 26–32 (2016), <http://cjpp.law.harvard.edu/assets/Confronting-Criminal-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf> [perma.cc/H8DJ-6NTZ], and MECKLENBURG COUNTY DISTRICT COURT, BENCH CARD: IMPOSITION OF FINES, COSTS, FEES, AND RESTITUTION 1–2 (2017), <https://finesandfeesjusticecenter.org/content/uploads/2018/11/Mecklenburg-Final-Imposition-Bench-Card-10.16.17.pdf> [https://perma.cc/3GZF-2EK8].

112. Zhen, *supra* note 109, at 203 (reporting, on the basis of a fifty-state survey of indigency standards, that “the majority of statutes contained a presumption of indigency if the defendant receives public assistance”).

113. *Cf.* Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After Timbs*, 129 YALE L.J. F. 430, 449 (2020) (proposing a test for assessing the severity of forfeitures that is “sensitive” to their “real-world effects”).

if the accused person either cannot pay it or should not be expected to. We can determine where this threshold lies because we decide where it lies, just as we have done in other contexts.¹¹⁴

Beyond that threshold, a bail condition is the functional equivalent of a detention order. Either there is no action the accused person can lawfully take to obtain release because the bail amount is patently out of reach, or there is no *reasonable* action the accused can take to obtain release. In either case, detention is the expected—indeed, the appropriate—result of the court order imposing the condition. When detention is the expected and appropriate result of a court order, that order is a *de facto* detention order.¹¹⁵

Lastly, if there is any ambiguity about whether a bail condition is affordable or not, the system provides a good heuristic: if a financial condition is the only thing keeping a person in jail, it is probably unaffordable. When a person is still in jail forty-eight hours after the first opportunity to post bond, it is a good indication that the person cannot post it. Jail is a very bad place to be.¹¹⁶ People do not choose to stay there lightly.¹¹⁷ Even if courts cannot always identify the threshold

114. I do not mean to understate how fraught this decision is. The difficulty of determining what bail is “affordable,” and the risk that ability-to-pay frameworks will exacerbate structural inequality, is a powerful argument for ending reliance on money bail altogether. *See generally* Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529 (2020) (“[G]raduation [of economic sanctions] as reform is incomplete and perhaps even dangerous if divorced from broader efforts at structural transformation.”); Zhen, *supra* note 109, at 184–87 (explaining how ability-to-pay frameworks can exacerbate structural inequality).

115. This principle also answers the argument that unaffordable bail lacks the finality of a bail denial because a third party, including a bail fund, might post a bail amount that is unaffordable to the accused. Unaffordable bail *does* lack the finality of a denial of bail. And finality is relevant to the protections required for a deprivation of liberty, here as in other contexts. *Cf. Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (recognizing that the death penalty “is unique in its severity and irrevocability” and thus requires special protections). But finality, like unaffordability, is a spectrum. At some point along that spectrum, the possibility of release becomes more theoretical than real. *Cf. Graham v. Florida*, 560 U.S. 48, 69–70 (2010), *modified* (July 6, 2010) (observing that a life-without-parole sentence “deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.”).

116. *See* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1297 (2012) (describing the “often horrifying” conditions in jails).

117. *See* Sandra Mayson & Megan Stevenson, *The Blackstone Ratio for Preventive Detention* (May 29, 2019) (unpublished manuscript) (on file with author) (reporting that the average Mechanical Turk survey participant “would rather be robbed than spend five days in jail, rather be burglarized than go to jail for more than a week, rather be seriously assaulted than be jailed for any more than a month”). The one possible exception are homeless individuals. In jurisdictions with cold weather and without adequate shelter capacity for the homeless population, desperate people may prefer jail—“two hots and a cot”—to the streets.

of unaffordability at the outset, they should be able to identify bail conditions that do in fact detain.

III. TREATING UNAFFORDABLE BAIL AS A DETENTION ORDER

Treating unaffordable bail as a detention order simply means that a bail-setting court contemplating a financial condition of release must ensure that the defendant can meet it without undue hardship. If not, and the court nonetheless believes that the condition is necessary, it must proceed with whatever process and fact finding is required to authorize pretrial detention. If a court imposes a financial condition that results in detention without having complied with full detention process, the accused should be entitled to a prompt detention hearing. Appellate courts should zealously ensure that judicial officers charged with regulating pretrial release fully comply with detention criteria.

This is essentially the federal schema, at least on paper. Federal statutory law directs the judicial officer charged with bail determinations to release an accused person on recognizance or an unsecured bond “unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community,” in which case the officer must release the person subject to the least restrictive condition or combination of conditions that will reasonably assure appearance and protect public safety.¹¹⁸ If such conditions are not adequate, the court must hold a detention hearing at which the accused has the right to counsel and the right to present and interrogate evidence.¹¹⁹ The court may order detention only if it finds by clear and convincing evidence that no lesser intervention will suffice.¹²⁰ The law stipulates that “[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person.”¹²¹ As the Senate Report explains, if the judicial officer feels that such a condition is necessary, then “it would appear that there is no available condition of release that will assure the defendant’s appearance,” and the judicial officer should “proceed with a detention hearing pursuant to section 3142(f) and order the defendant detained, if appropriate.”¹²²

118. 18 U.S.C. § 1342(b) (2018); *id.* § 1342(a), (c)(1).

119. *Id.* § 3142(f).

120. *Id.* § 3142(e).

121. *Id.* § 3142(c)(2).

122. S. REP. NO. 98-225, at 16 (1983).

It is not clear, however, that federal practice adheres to this procedure. As noted above, appellate opinions addressing challenges to unaffordable bail conditions imposed by federal courts suggest that such conditions may be imposed fairly regularly.¹²³ As also noted, neither the federal statute nor current case law clearly establishes that detaining a person on an unaffordable condition requires full detention process. The federal scheme thus falls short in failing to explicitly address the scenario in which a court violates the prohibition on unaffordable bail and imposes a condition that results in detention.¹²⁴

Two new model bail statutes aspire to more directly require that unaffordable bail conditions be treated as de facto detention orders. The first is a “Model Bill for Pretrial Procedures” drafted by the Criminal Justice Policy Program at Harvard Law School (“CJPP”).¹²⁵ The second is the Pretrial Release and Detention Act under development by the Uniform Law Commission (“ULC”).¹²⁶ These are not the only pretrial models in circulation, but the others either prohibit money bail entirely or prohibit unaffordable bail without addressing situations where it is nonetheless imposed.¹²⁷

123. *See supra* notes 81–82 and accompanying text.

124. This is not what advocates for federal pretrial reform identify as the most serious problem in the federal pretrial system, however. The most serious problem is that “the federal system detains people at an astronomical rate,” mostly through the explicit detention procedures. *Hearing on “The Administration of Bail by State and Federal Courts: A Call for Reform” Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. of the Judiciary*, 116th Cong. 1 (2019) (testimony of Alison Siegler, Clinical Professor of Law and Director of the Federal Criminal Justice Clinic).

125. HARVARD LAW SCH. CRIMINAL JUSTICE POLICY PROGRAM, BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS 28–32 (2019), http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf [perma.cc/3W5B-8LL5].

126. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, DRAFT FOR DISCUSSION ONLY: ALTERNATIVES TO BAIL ACT [PROPOSED NEW NAME: PRETRIAL RELEASE AND DETENTION ACT] (2020) [hereinafter ULC Draft], <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=55561562-444e-6270-4a9f-3c67344d64d8&forceDialog=0> [https://perma.cc/S4PG-LZD9]. As noted above, the author is the Associate Reporter for the ULC Alternatives to Bail Committee.

127. *See* AM. BAR ASS’N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 71, at 58–61 (including provisions in § 5.3 “Release on money bail” explaining that money should be used only to assure appearance and should not result in detention, but not addressing situations where it does); AM. CIVIL LIBERTIES UNION, A NEW VISION FOR PRETRIAL JUSTICE IN THE UNITED STATES 5 (2019), <https://www.aclu.org/report/new-vision-pretrial-justice-united-states> [perma.cc/ME4M-WKLV] (prohibiting unaffordable bail but not addressing situation where a court nonetheless imposes it); CIVIL RIGHTS CORPS, PRETRIAL RELEASE AND DETENTION ACT § 2, <https://cdn.buttercms.com/1ted5IrSx2ynPT8kitB5> [perma.cc/47PA-MADD] (prohibiting secured financial conditions altogether); SCHNACKE, MODEL BAIL LAWS, *supra* note 18, at 199 (advising jurisdictions to eliminate “all financial conditions at bail, including amounts on warrants”).

The CJPP Bill bifurcates pretrial process between those arrestees who can be immediately released on recognizance and those for whom some form of intervention with pretrial liberty may be warranted. For an arrestee in the latter group, the court must hold a “detention and conditional release hearing” at which the accused has the right to representation and to present and interrogate evidence.¹²⁸ The court may impose a restriction on liberty only if “the court finds clear and convincing evidence that no less restrictive conditions would reasonably assure” the defendant’s future appearance, public safety, and the integrity of the criminal proceeding.¹²⁹ The model act prohibits unaffordable bail but anticipates that some court might nonetheless impose it. To address this scenario, it provides that “[i]f, 24 hours after the imposition of money bail, a defendant continues to be detained, that defendant is entitled to a detention and conditional release hearing.”¹³⁰

The ULC Act bifurcates pretrial process differently, requiring a full adversarial hearing only for detention, but it likewise includes provisions to ensure that unaffordable bail is treated as a denial of bail. Like the CJPP Bill, the ULC Act prohibits unaffordable bail. Anticipating that it might nonetheless be imposed, it provides that if a person ordered conditionally released remains in jail, the court must hold a full adversarial detention hearing “not later than [72] hours after” the proceeding at which the condition was imposed, with a possible good-cause continuance for another [72] hours.¹³¹ The Act subjects such presumptively unaffordable conditions to the same standard as a denial of bail: “The court may not order pretrial detention *or continue a condition of release that results in detention* unless [the individual is charged with a detention-eligible offense and] the court determines by clear and convincing evidence,” after the adversary hearing, that the criteria for detention are met.¹³²

No existing pretrial regime includes a mechanism to ensure that an unaffordable bail condition is subject to exactly the same process

128. HARVARD LAW SCH. CRIMINAL JUSTICE POLICY PROGRAM, *supra* note 125, at 28.

129. *Id.* at 30.

130. *Id.* at 31.

131. ULC Draft, *supra* note 126, § 401. Section 402 of the draft notes that at the detention hearing, the defendant has the right to testify, to present and cross-examine witnesses, to review evidence to be introduced by the government, to present evidence, to provide information and to be represented by counsel. *Id.* § 402.

132. *Id.* § 403(b) (emphasis added).

and standards as a denial of bail.¹³³ Two jurisdictions often cited as pretrial models, New Jersey and the District of Columbia, fall notably short. The regime that comes the closest is the new framework of statutory and court rules in New Mexico, but even this does not enforce the equivalence completely.

New Jersey undertook wholesale pretrial reform in 2014, including by amending its state constitution, and the results have been promising. Detention rates have plummeted, courts have almost entirely foregone financial conditions, and pretrial rearrest and appearance rates have remained steady.¹³⁴ New Jersey's new bail statute, though, does not address the scenario in which a court imposes unaffordable bail, except to subject such cases to the speedy-trial limits for people ordered detained.¹³⁵ This omission does not pose a problem so long as New Jersey judges continue to eschew financial conditions, but should the culture shift, it could present a significant problem in future.

The D.C. bail statute does make some effort to address the scenario where a court imposes unaffordable bail but does not treat it as the equivalent of a detention order. As an initial matter, the D.C. statute, like the federal one, prohibits financial conditions that “result in the preventive detention of the person,” except if the court complies with full detention process.¹³⁶ The statute then provides that a person who remains detained on a condition of release 24 hours after the release hearing “shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them.”¹³⁷ Unless that review results in release, “the judicial officer shall set forth in writing the reasons for requiring the conditions imposed.”¹³⁸ The statute thus offers some recognition that de facto detention by unaffordable bail requires additional justification. But it does not require the court to comply with the adversarial hearing and finding of

133. At least, my research has disclosed none.

134. CHLOE ANDERSON, CINDY REDCROSS, ERIN VALENTINE & LUKE MIRATRIX, MDRC CTR. FOR CRIMINAL JUSTICE RESEARCH, EVALUATION OF PRETRIAL JUSTICE SYSTEM REFORMS THAT USE THE PUBLIC SAFETY ASSESSMENT: EFFECTS OF NEW JERSEY'S CRIMINAL JUSTICE REFORM 32–33 (2019); N.J. JUDICIARY, 2017 REPORT TO THE GOVERNOR AND THE LEGISLATURE 19 (2018).

135. N.J. STAT. ANN. § 2A:162-17(c)(2), (d)(2) (2019).

136. D.C. CODE § 23-1321(c)(3) (2019).

137. *Id.* § 23-1321(c)(4).

138. *Id.*

necessity by clear and convincing evidence that it requires for detention.

New Mexico's new bail regime comes the closest to subjecting unaffordable bail orders to the same process and standards as a denial of bail. New Mexico undertook comprehensive bail reform in 2016 and 2017, including a constitutional amendment and new statutory rules governing pretrial release and detention decisions. The new constitutional provision authorizes pretrial detention "for a defendant charged with a felony if the prosecuting authority requests a hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community."¹³⁹ New statutory rules guarantee the accused the right to representation and to present and interrogate evidence at this detention hearing.¹⁴⁰ They also provide a right to immediate appeal of any detention order and speedy-trial limits for cases in which the accused is detained.¹⁴¹

The New Mexico Supreme Court has been very clear that courts may not circumvent these detention procedures by setting unaffordable bail conditions, and both the state constitution and the new statutory framework strive to codify that principle. The New Mexico Constitution stipulates that an accused person "shall not be detained solely because of financial inability to post a money or property bond."¹⁴² The statute provides that if a defendant remains in custody twenty-four hours after an order imposing conditions of release "as a result of the defendant's inability" to meet them, "the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release."¹⁴³ The

139. N.M. CONST. art. II, § 13 (amended 2016). The amendment further provides that "[a]n appeal from an order denying bail shall be given preference over all other matters." *Id.*

140. N.M. R. CIV. P. DIST. CT. 5-409(F)(3).

141. *Id.*

142. N.M. CONST. art. II, § 13 (amended 2016). This is actually a simplification. The full relevant portion of the constitutional provision reads:

A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.

Id. The meaning of the qualifiers "who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond" and "who is neither a danger nor a flight risk" is not entirely clear. *Id.*

143. N.M. R. CRIM. P. DIST. CT. 5-401(H)(1).

court must hold the review hearing within five days.¹⁴⁴ The accused has the right to representation.¹⁴⁵ The court must amend the condition to ensure release unless it determines by clear and convincing evidence that the condition “is reasonably necessary” to ensure the defendant’s appearance, and explains its reasoning on the record.¹⁴⁶

Much of the credit for this schema goes to the New Mexico Supreme Court. Between 2014 and 2018, former Chief Justice Charles Daniels authored a series of opinions that set the stage for bail reform in New Mexico and then sought to clarify and enforce the new rules in place.¹⁴⁷ In the final such opinion he authored before his death in 2019, Chief Justice Daniels wrote:

In both the *Salas* and *Harper* detention orders the district court denied pretrial detention and then conditioned release on posting \$100,000 bonds. Money bonds are not light substitutes for principled pretrial detention. . . . Setting a money bond that a defendant cannot afford to post is a denial of the constitutional right to be released on bail for those who are not detainable for dangerousness in the new due process procedures under the New Mexico Constitution.¹⁴⁸

The New Mexico Supreme Court has done a great deal to curtail *sub rosa* detention on unaffordable bail, whether the detention is intentional or inadvertent, as has the new constitutional and statutory regime.

Yet even the regimes that come closest to treating unaffordable bail conditions as detention orders—the New Mexico regime and the CJPP and ULC models—do not do as much as they could to accomplish the goal. The New Mexico regime places the burden of initiating review of an unaffordable condition on the defendant, and potentially the burden of proof at the review hearing to show that the condition is unaffordable.¹⁴⁹ The review hearing does not appear to include the full set of procedures and protections as a detention

144. N.M. R. CRIM. P. DIST. CT. 5-401(H)(2).

145. *Id.*

146. *Id.* The court must also “file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.” *Id.*

147. See generally *State v. Groves*, 410 P.3d 193 (N.M. 2018); *State v. Ameer*, No. S-1-SC-36395, 2018 WL 1904680 (N.M. 2018); *State ex rel. Torrez v. Whitaker*, 410 P.3d 201 (N.M. 2018); *State v. Brown*, 338 P.3d 1276 (N.M. 2014).

148. *Whitaker*, 410 P.3d at 219.

149. The court rule does not specify who bears the burden of proof. N.M. R. CRIM. P. DIST. CT. 5-401(H)(2).

hearing.¹⁵⁰ All three of these regimes, moreover, lack a real enforcement mechanism. An accused person who remains jailed on a secured-bond condition may be entitled to a review or detention hearing, but what happens if a court does not hold it? One option, for those designing new bail regimes, might be to provide for automatic release if the detention hearing is not held within a certain timespan. Setting that default might provide an adequate incentive for courts to comply with detention process.

IV. WHAT STANDARDS FOR DETENTION?

The proposition that unaffordable bail conditions must be subject to the same process and standards as a detention order foregrounds a question that lies at the core of all bail reform debates: What *are* the substantive and procedural criteria for pretrial detention? This Article cannot begin to answer that question, but it can offer a brief overview of the state of the law.

In jurisdictions that already have an explicit pretrial detention regime, the standards for detention are relatively clear. “At least twenty-two states, the District of Columbia, and the federal system already authorize the use of pretrial preventive detention in some circumstances.”¹⁵¹ Several of these jurisdictions have a statutory framework governing detention process in some detail.¹⁵² Statutory requirements for detention vary among them, but there is a core of uniformity. Most authorize pretrial detention only upon a judicial

150. At a review hearing, an accused person is entitled to representation and to written findings of fact if the court determines by clear and convincing evidence that an unaffordable bond is necessary to assure the defendant’s appearance, which is the only basis on which the court is permitted to continue an unaffordable bond. But it does not appear that an accused person has the full panoply of discovery rights and rights to present, compel, and interrogate evidence as in a detention hearing. *Compare* N.M. R. CRIM. P. DIST. CT. 5-401(H)(2), *with* N.M. R. CRIM. P. DIST. CT. 5-409.

151. HARVARD LAW SCH. CRIMINAL JUSTICE POLICY PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 25 (2016); *see also* *Pretrial Release Eligibility*, NAT’L CONFERENCE OF STATE LEGISLATURES (Mar. 13, 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx> [<https://perma.cc/Q3M2-KYC7>] (cataloging state constitutions and statutes stipulating “when pretrial release may be denied” as of 2013); *Pretrial Detention*, NAT’L CONFERENCE OF STATE LEGISLATURES (July 7, 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx> [<https://perma.cc/JEU5-XJW6>] (cataloguing “limits on pretrial detention” in state constitutions and statutes as of 2013).

152. *See, e.g.*, 18 U.S.C. § 3142 (2018); D.C. CODE § 23-1322 (2019); FLA. STAT. § 907.041 (2019); FLA. R. CRIM. P. 3.132 (2019); MASS. GEN. LAWS ANN. ch. 276, § 58A (Lexis 2019); N.J. STAT. ANN. § 2A:162-18 (West 2019); WIS. STAT. § 969.035 (2019); N.M. R. CRIM. P. DIST. CT. 5-409.

finding by clear and convincing evidence that no less restrictive alternative is adequate to meet a compelling state interest.¹⁵³ Nearly all require a full adversarial hearing before detention can be imposed.¹⁵⁴

Because many jurisdictions do not have such a regime in place, though, and because there is no guarantee that existing statutes comply with constitutional standards, the foundational question is what constraints the federal Constitution and state constitutions place on pretrial detention. This question is the subject of ongoing debate. Courts are wrestling with it across the country as this Article goes to print.

Courts and litigants have recently advanced two competing views of federal constitutional criteria for pretrial detention. We can call the first the “robust-constraints view.” On this view, because physical liberty is a fundamental right—no less so when a person stands accused of crime—substantive due process requires that any detention be narrowly tailored to a compelling state interest, and procedural due process requires the state to bear the burden of proving necessity by clear and convincing evidence in an adversarial hearing.¹⁵⁵ We can call the opposing view the “minimal-constraints view.” On this view, probable cause is sufficient to authorize detention through adjudication, and the state grants pretrial release wholly at its discretion. Due process jurisprudence is inapposite because more

153. *E.g.*, 18 U.S.C. § 3142(e)(1), (f); D.C. CODE § 23-1322 (b)(1), (d); MASS. GEN. LAWS ANN. ch. 276, § 58A(3); N.J. STAT. ANN. § 2A:162-18(a)(1); N.J. STAT. ANN. § 2A:162-19 (e)(2), (3); N.M. R. CRIM. P. DIST. CT. 5-409(a), (f)(4); WIS. STAT. § 969.035(5), (6)(b); *see also* FLA. STAT. § 907.041 (providing that “[t]he court may order pretrial detention if it finds a substantial probability” that any of certain enumerated circumstances exist, including circumstances indicating “that no condition of release will reasonably prevent the obstruction of the judicial process,” “assure the defendant’s appearance,” or “protect the community from risk of physical harm to persons”); FLA. R. CRIM. P. 3.132 (“The state attorney has the burden of showing beyond a reasonable doubt the need for pretrial detention pursuant to the criteria in section 907.041, Florida Statutes.”).

154. *E.g.*, 18 U.S.C. § 3142(e)(1), (f); D.C. CODE § 23-1322 (b)(1), (d); FLA. STAT. § 907.041(h); MASS. GEN. LAWS ANN. ch. 276, § 58A(4); N.J. STAT. ANN. § 2A:162-19 (e)(1); WIS. STAT. § 969.035(6)(c); N.M. R. CRIM. P. DIST. CT. 5-409(f)(2), (3).

155. *See, e.g.*, *Buffin v. City & County of San Francisco*, No. 15-CV-04959-YGR, 2019 WL 1017537, at *16 (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); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 517 (Cal. Ct. App. 2018); Brief for the Nat’l Law Professors of Criminal Law, Criminal Procedure, and Constitutional Law as Amicus Curiae Supporting Respondent at 15–16, *Humphrey*, 228 Cal. Rptr. 3d 513; *cf. Whitaker*, 410 P.3d at 219 (clarifying that pretrial detention must comply with the “new due process procedures under the New Mexico Constitution,” which include proof of necessity by clear and convincing evidence).

specific constitutional provisions—the Fourth Amendment and Excessive Bail Clause—alone govern pretrial custody.¹⁵⁶

The federal court system has yet to resolve the conflict between these opposing views. There is no Supreme Court jurisprudence that explicitly precludes or rejects the minimal-constraints view. Adherents of the robust-constraints view reply that *United States v. Salerno*,¹⁵⁷ in which the Supreme Court rejected a constitutional challenge to the federal pretrial detention regime, clearly presumed that probable cause is not sufficient to authorize detention until adjudication. If it were, *Salerno* would have been an easy case! There would have been no need for the due process and Excessive Bail Clause analyses that the Court undertook. At a structural level, interpreting the Constitution to permit pretrial detention solely on the basis of probable cause would eviscerate other protections for the liberty of the accused, including the presumption of innocence.¹⁵⁸ History also supports the fundamental right to pretrial liberty.¹⁵⁹ Due process doctrine is apposite because liberty is at issue, but even if the Fourth Amendment and Excessive Bail Clause exclusively govern pretrial custody, they should be understood to entail the same requirements as due process would.

As bail litigation percolates in the federal courts, a consensus may be emerging. Given that physical liberty “lies at the heart of the liberty that [the Due Process] Clause protects,”¹⁶⁰ courts have generally agreed that pretrial detention requires a finding of necessity and robust process. They have diverged, however, with respect to what that

156. See, e.g., Fourteen Judges’ Combined Motion for Summary Judgment and Opposition to Plaintiffs’ Motion for Partial Summary Judgment, *ODonnell v. Harris County*, No. 4:16-cv-01414, 24–52 (S.D.Tex. July 6, 2018); Brief for Amici Curiae American Bail Coalition and Georgia Ass’n of Professional Bondsmen in Support of Defendants-Appellants and Reversal of the Preliminary Injunction, *Hester v. Gentry*, No. 18-13894, 2018 WL 6735059 (11th Cir. 2019); Brief of Appellants Fourteen Judges of Harris County Criminal Courts at Law, *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018); Brief for American Bail Coalition et al. as Amici Curiae Supporting Defendant-Appellant and Reversal of the Preliminary Injunction, *Walker v. City of Calhoun*, No. 16-10521, 901 F.3d 1245 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1446 (2019).

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

158. *Accord Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”).

159. See *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1068–85 (S.D. Tex. 2017) (chronicling the historical development of bail), *aff’d as modified*, 892 F.3d 147 (5th Cir. 2018); see also SCHNACKE, *FUNDAMENTALS OF BAIL*, *supra* note 21, at 19–40 (chronicling a history of the practice); Hegreiness, *supra* note 22, at 912.

160. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

process must include. Some have held it to require a full adversarial hearing, a finding of necessity by clear and convincing evidence, and written reasoning.¹⁶¹ Others have held that a finding of necessity by a preponderance of the evidence will suffice, and a court need not commit its findings to writing.¹⁶² Still others have declined to take a position on the appropriate burden of proof.¹⁶³

State constitutional law adds another layer of complexity. As discussed above, a majority of state constitutions enshrine a right to bail with limited exceptions, for either capital cases only or capital cases and certain other serious felonies. If understood to entail a right to release, these provisions also prohibit unaffordable bail outside of the detention “eligibility net.” The hard question is whether the right to be “bailable by sufficient sureties” does entail a right to release. Does it presume that some available surety is sufficient? Or is the right to be “bailable by sufficient sureties” a right to release conditional on the availability of a sufficient surety, such that the state may order detention if no surety can adequately ensure appearance and protect safety?¹⁶⁴

Answering these questions is the central challenge now facing the bail-reform movement. Recognizing that unaffordable bail is a *de facto* detention order does not itself shed any light on when it is appropriate and lawful to keep a person in a cell. But it does put that question front and center, which is where it belongs.

CONCLUSION

This Article has sought to lay out the argument that an order imposing unaffordable bail is an order of pretrial detention and must be treated as such. This argument has become increasingly prominent

161. See, e.g., *Buffin v. City & County of San Francisco*, No. 15-cv-04959-YGR, 2019 WL 1017537, at *16 (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); *In re Humphrey*, 228 Cal. Rptr. 3d 513, 517 (Cal. Ct. App. 2018).

162. See, e.g., *Hill v. Hall*, No. 3:19-cv-00452, 2019 WL 4928915, at *17 (M.D. Tenn. Oct. 7, 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).

163. See, e.g., *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).

164. See *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (“The right to release before trial is conditioned upon the accused’s giving adequate assurance that he will stand trial and submit to sentence if found guilty.”).

in bail-reform litigation. It should become even more so. There are practical reasons that courts may resist treating unaffordable bail as a de facto denial of bail, but they are not legitimate grounds for resistance. There is also a more conceptual argument that an unaffordable bail condition is not precisely the equivalent of a denial of bail, especially at the margin of affordability. Yet we must draw the line of “unaffordability” somewhere. Beyond the threshold of what we can reasonably expect a person to pay, a monetary bail condition becomes the functional equivalent of an order imposing detention. Recognizing unaffordable bail as a de facto detention order foregrounds the challenge ahead for the bail reform movement: clarifying the substantive and procedural criteria for locking up a presumptively innocent person while his case unfolds.