March 24, 2012

Justice in the Shadowlands: Pretrial Detention, Punishment and the Sixth Amendment

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Abstract:

In a criminal system that tips heavily to the side of wealth and power, we routinely detain the accused in often horrifying conditions, confined in jails while still maintaining the presumption of innocence. Here, in the rotting jail cells of impoverished defendants, lies the Shadowlands of Justice, where the lack of criminal procedure has produced a darkness unrelieved by much scrutiny or concern on the part of the law.

This Article contends that our current system of pretrial detention lies in shambles, routinely incarcerating the accused in horrifying conditions often far worse than those convicted offenders existing in prisons. Due to these punitive conditions of incarceration, pretrial detainees appear to have a cognizable claim for the denial of their Sixth Amendment jury trial right, which, at its broadest, forbids punishment for any crime unless a cross-section of the offender’s community adjudicates his crime and finds him guilty. This Article argues that the spirit of the Sixth Amendment jury trial right might apply to many pretrial detainees, due to both the punishment-like conditions of their incarceration and the unfair procedures surrounding bail grants, denials and revocations. In so arguing, I expose some of the worst abuses of current procedures surrounding bail and jail in both federal and state systems. Additionally, I also propose some much needed reforms in the pretrial release world, including better oversight of the surety bond system, reducing prison overcrowding by increasing electronic bail surveillance and revising the bail hearing procedure to permit a community “bail jury” to help decide the defendant’s danger to the community.

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Introduction: Diplomats, Detention and Punishment

The decision to imprison a defendant before trial all too often hinges on wealth and power, crime notwithstanding. For example, a promiscuous foreign diplomat is halted at the airport, ready to flee the country, after allegedly sexually assaulting a hotel chambermaid, and initially denied bail, but then is permitted to reside in his posh Upper East Side penthouse while electronically monitored, serving an extremely upscale version of “house arrest.” A lifestyle maven charged with perpetrating insider trading pleads not guilty and is released without bail, along with her stockbroker. A well-known money manager, accused of running an 18 billion dollar Ponzi scheme, is permitted basic freedom of movement within several states while awaiting trial, even after confessing to the crime and failing to live up to his original 10 million dollar bail terms. A prominent governor is charged with serious corruption but is not only released on minimal bail, but is even allowed to take part in a Donald Trump reality show while charges were still pending. A wealthy couple charged with enslaving and brutally mistreating two young maids—including starving, beating and torturing—are permitted pretrial release with electronic monitoring, due in part to their ability to afford a specialized security firm which functions as private bail guards for the very wealthy. And a well-known alleged Mafia boss, charged with various racketeering charges (and suspected of inducing a variety of violent crimes as acting boss), is released on a ten-million-dollar bail, an oath to wear an electronic bracelet, and a guard at his Oyster Bay, Long Island mansion.

In contrast, an impoverished man, living out of his car, steals four blankets to keep him warm on a cold night. After his arrest, he is granted a bail of $3500, but due to his inability to raise even one-tenth of that sum, he is detained in a local jail for over six months while awaiting...

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3 See Martha Stewart Pleads Not Guilty, Resigns, ABC News (June 4, 2003), located at: http://abcnews.go.com/Business/story?id=86245&page=1
4 See Morley Safer, The Madoff Scam: Meet The Liquidator, 60 Minutes, CBS News.com (September 27, 2009).
6 See Blagojevich Free on $4500 Bail After Arrest, CNN.com (December 9, 2008), located at: http://articles.cnn.com/2008-12-09/politics/illinois.governor_1_76-page-affidavit-senate-seat-rod-blagoevich?_s=PM:POLITICS
7 See Emily Miller, Rod Blagojevich Will Star on ‘Celebrity Apprentice’ Despite Prosecutors’ Concerns, Politics Today (January 5, 2010), located at: http://www.politicstable.com/2010/01/05/rod-blagoevich-scheduled-for-celebrity-apprentice-despite-pro/
9 See Alan Feuer, Bail Sitters, New York Times (December 4, 2009), located at: http://www.nytimes.com/2009/12/27/nyregion/27bail.html?pagewanted=all . These kinds of “bail sitting” jobs often require bullet-proof vests, electronic ankle bracelet monitoring, and “the deployment of a chase car, a digital voice recorder, a broadband wireless router, several metal door bars and a high-resolution, vandal-resistant Nuvico day/night camera — the one with the plastic dome and manual zoom lens.” See id.
trial. His predicament is all too common. The average defendant in pretrial detention has either committed a minor crime and cannot afford to pay the set amount of bail, or has somehow triggered a preventative detention hold—this despite the fact that the science of predicting dangerousness is dubious at best. Incarcerated, this impoverished defendant has little ability to contact an attorney or plan a defense. And this impoverished defendant is captive to a justice system that regularly allows commercial bail bondsmen to lobby against pretrial release based on inexpensive electronic monitoring, simply to increase their profits.

Although most convicted prisoners are incarcerated at state or federal prisons, detainees are typically housed in local or municipal jails where “resources are scarcer, the staff is ‘less professionalized,’ classification of inmates is haphazard, and rapid turnover makes for generally chaotic conditions.” Once the average, non-privileged indicted defendant is detained, he is subject to all sorts of punitive conditions, as the state of many metropolitan and rural jails are truly reprehensible, even when measured against prisons. Frequently these detention centers are vastly overcrowded. Abuse of pretrial detainees, either by guards or other prisoners, is endemic. Various infections and serious illnesses all too often rage unabated in local and county jails, with minimal health services provided because of the transient nature of the population. Frequently not only are the jails themselves often older and decaying, but they also have various dangers associated with them, including mold, poor ventilation, lead pipes, and asbestos.

In a criminal system that tips heavily to the side of wealth and power, that routinely detains the accused in often horrifying conditions, justice is often nowhere to be found. Here, in the rotting jail cells of impoverished defendants, still innocent before being proven guilty, are the Shadowlands of Justice: the murky corners of the criminal justice system, where the lack of criminal procedure has produced a darkness unrelieved by much scrutiny or concern on the part of the law.

Our current framework of constitutional criminal procedure has primarily focused on the treatment of offenders once the trial or plea proceeding has begun, and to a lesser extent once these offenders have been convicted and sent to prison. But until very recently, little attention has been paid to the plight of those pretrial defendants languishing in the intermediate world of jails. In part this is due to the classification of a pretrial offender’s treatment as “detention,” as opposed to “punishment.” As I will argue, however, the conditions of most pretrial detention differ little from punitive incarceration, subjecting these offenders to the worst of conditions without even a guilty verdict.

As such, these pretrial detainees would appear to have a cognizable claim for the denial of their Sixth Amendment jury trial right, which, at its broadest, forbids punishment for any crime unless a cross-section of the offender’s community adjudicates his crime and finds him guilty. This Article explores how the animating principles of the Sixth Amendment community

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12 Gorlin, Evaluating Punishment, supra note __, at 418-19.
jury trial right would apply to defendants who held under pretrial detention. In doing so, I look specifically at the procedures surrounding indicted offenders denied bail and confined in jail.

After Blakely v. Washington, the Supreme Court has clarified that any imposition of punishment must be determined by a jury. The realities of bail and jail in today's criminal justice system, however, dictate that punishment is often imposed by non-jury, non-judicial, and occasionally, private actors, such as bail bondsmen, probation officers, and correction officials. In other words, conditions tantamount to punishment are imposed, far from the oversight imagined by the Framers of the Constitution, and violating the true spirit of the Sixth Amendment jury trial right.

Although bail and detention was a popular scholarly topic a generation ago, only a few contemporary legal academics have scrutinized the current machinations of pretrial release, with existing scholarship primarily focusing on Fourth, Fifth or Eighth Amendment violations. None, however, have analyzed the results of the changes in pretrial release standards and the increasing relevance of the Sixth Amendment. This Article aims to fill that gap by studying the problems of our current pretrial detention system through a Sixth Amendment lens. I contend that the spirit of the Sixth Amendment jury trial right might apply to many pretrial detainees, due to both the punishment-like conditions of their incarceration and the unfair procedures surrounding bail grants, denials and revocations. In doing so, I also expose some of the worst abuses of current procedures surrounding bail and jail in both federal and state systems.

This Article proceeds in four parts. Part II of this Article exposes the often intolerable and primitive conditions of state and local jails, which end up punishing all those incarcerated in them, whether convicted or not. In Part III, I trace the history of pretrial detention, focusing as well on the resurgence of the Sixth Amendment jury trial right. Part IV explores how pretrial confinement has become a kind of punishment imposed inconsistently, by fluctuating actors, and without proper predictive basis. This part focuses on both the failures of the 1984 Bail Reform Act as well as the complete lack of predictive basis that dangerousness formulas possess. Part IV also discusses how the current system of bail and jail entirely bypasses the community role in both imposing punishment and creating a safer living area. Finally, Part V introduces some much needed reforms in the pretrial release world, including reforming the surety bond system, reducing prison overcrowding by increasing electronic bail surveillance and revising the bail hearing procedure to permit a community “bail jury” to help decide the defendant’s danger to the community.

Only recently has the national and local media has shined a spotlight on both bail and jail procedures, their conditions and failures, finally exposing a dark corner of the criminal justice system, one where procedural fairness and due process are limited, sometimes non-existent. This Article hopes to add the scholarly dimension to these troubling exposes, illustrating how pretrial

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detention violates the spirit of the Sixth Amendment and creates a Shadowlands within the criminal justice system.

I. Pretrial Detention as Punishment

Pretrial detention in the 21st century has evolved from a brief containment to punishment for large numbers of the accused awaiting trial. The combination of inhumane and degrading conditions, a corrupt and unregulated system of bail surety, bail bondsmen and bounty hunters, and rising numbers of detainees, with the general absence of criminal due process in the pretrial realm, has resulted in a criminal justice system which punishes before it convicts. Even our minimal protection for defendants pretrial requires that punishment can only occur after a conviction.\textsuperscript{16} Punishing the accused before she is proven guilty violates every theory of punishment, but particularly retributive justice, which requires that punishment can only be imposed after a cross-section of the community has pronounced guilt—a far cry from the pretrial detention system we have now. Although the abuses of pretrial detention are beginning to garner some limited media attention, only a little scholarly attention has been paid.\textsuperscript{17} It is time to remedy this oversight.

A. Bail bondsmen, bounty hunters, and corrupt incentives

Our current bail system is by-and-large unregulated and plagued with corruption. First, numerous offenders languish in local jails for weeks for committing mere misdemeanors, simply for the lack of funds to post bail.\textsuperscript{18} In New York City, for example, most of these charges are for minor quality-of-life offenses, such as smoking marijuana in public, jumping a subway turnstile or shoplifting, and bail was set at $1,000 or less.\textsuperscript{19} The overwhelming majority of defendants, however, are unable to muster funds and are sent to jail, where they remain, on average, for more than two weeks.\textsuperscript{20} In a 2010 study, 87 percent of the low-income defendants who were not released on their own recognizance were not able to post bail and went to jail to await guilty pleas or trial.\textsuperscript{21} What is even more disturbing is that that many of the poorer defendants may have pleaded guilty at arraignment for sentences with no jail time, simply to avoid being behind bars while awaiting trial.\textsuperscript{22} Often impoverished defendants will accept a guilty plea, even if innocent, in order to gain release from pretrial detention, even if this injures their long-term prospects.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{16} Bell v. Wolfish held that due process requires that pretrial detainees be free from “punishment.” See Bell, 447 U.S. at 536-37.
\item \textsuperscript{17} See, e.g., Baradaran & McIntyre, Predictive Dangerousness, supra note __; Baradaran, Restoring the Presumption of Innocence, supra note __.
\item \textsuperscript{18} See Mosi Secret, N.Y C. Misdemeanor Defendants Lack Bail Money, THE NEW YORK TIMES, December 2, 2010.
\item \textsuperscript{19} See Secret, Defendants Lack Bail Money, supra note __, at 1.
\item \textsuperscript{20} See Secret, supra note __, at 1.
\item \textsuperscript{21} See The Price of Freedom: Bail and Pretrial Detention of NonFelony Low-Income Defendants in New York City, HUMAN RIGHTS WATCH REPORT (December 2010), at 2. Located at: http://www.hrw.org/sites/default/files/reports/us1210webwcovers_0.pdf
\item \textsuperscript{22} See The Price of Freedom, supra note __, at 2-3.
\item \textsuperscript{23} See Laura Sullivan, Bail Burden Keeps U.S. Jails Stuffed with Inmates, NPR.com (January 22, 2010), located at: http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates
\end{itemize}
Inability to muster the appropriate funds for bail is not just a problem with misdemeanor felony defendants. Judges often set money bail at an amount the defendant cannot afford. In New York, only ten percent of defendants in all criminal cases in which bail is set are able to post it at arraignment.\textsuperscript{24} This is despite the fact that many states have laws that establish a preference for nonfinancial conditions of release or unsecured bonds.\textsuperscript{25}

The existence of commercial surety bonds, or secured bonds, does not help low-income defendants. Commercial bondsmen rarely lend bail money involving $1,000 or less, and their services are usually too expensive for low income or indigent offenders.\textsuperscript{26} Likewise, secured bonds are often not accessible for poor defendants, who usually do not have the property available to secure such bonds, or friends with such assets.\textsuperscript{27} To simply obtain bail for even a minor felony or misdemeanor charge, an indicted defendant must pay cash out of pocket, sign a 20-page contract and initial 86 separate paragraphs.\textsuperscript{28}

If a defendant is fortunate enough to even qualify for secured bonds, then she must face the web of complex and innumerable fees charged for simple regulation. For example, in New York, a bondman often charges the defendant a fee of $250 if the defendant misses a weekly check-in, and as much as $375 an hour for obscure tasks like bail consulting and research.\textsuperscript{29} These specified fees can grow much greater when bail bondsmen are assigned to other tasks, like obtaining court documents or delivering release papers to jail.\textsuperscript{30}

Even if an indicted defendant can afford a commercial surety bond, these commercial bonds are almost entirely unregulated and often corrupt. At the frontiers of criminal justice, bail bondsmen hold an immense amount of power over the bailees, despite the bondsmen’s lack of legal, political or police authority. Far from having a jury or a judge decide on whether an indicted defendant should be incarcerated and punished, these bail bondsmen make such decisions in a completely unstructured universe, where they are both judge and jury. This kind of unauthorized decision-making surely violates the spirit of the Sixth Amendment, which at its very core requires legal conviction before punishment.

More troubling are the vast amounts that bail bondsmen may charge if they make the decision to revoke bail and return the defendant to jail, sometimes thousands of dollars.\textsuperscript{31} These decisions, made entirely on the bondman’s own accord, with no regulation from any judicial,
police or legal authority, end up not only returning the defendant to jail but also costing him, and his family, a good bulk of the deposited bond, which is forfeited when the defendant is surrendered on the sole decision of the bondsman.

There are few state laws overseeing the reasons why a defendant is surrendered by a bondsman, which leaves the bail system open to manipulation. Because this decision to surrender is based solely on the bondsman’s decision, without regulation or oversight, but it has recently been subject to abuse. New York bondsmen, among others, have been returning defendants to jail for questionable or unspecified reasons, and then withholding thousands of dollars to which the bondsmen may not be entitled.32

Since most state laws allow bondsmen to enter into private contracts with the people they bail out, it is hard for judges to regulate their behavior. And even in states that afford some regulatory supervision, judges rarely take advantage of it. For example, in New York, although state law allows judicial consideration of the bondsman’s background, character and reputation when deciding whether to accept a bond, a judge rarely denies bond because of improper behavior.33

Instead of helping defendants stay out of jail, some bail bondsmen take advantage of the situation and disadvantage them to an even further degree.34 In other words, as described by a New York attorney familiar with these sorts of abuses, an indicted offender “can be ordered imprisoned by a court based solely on the unsworn, untested word of a non-law-enforcement civilian, a civilian who stands to profit financially if the defendant is incarcerated.”35 This type of entirely unregulated, potentially improper bond revocation, requiring the defendant to return to jail on the whims of a private actor, is yet another example of how the world of pretrial detention operates in the Shadowlands.

If bailees fail to appear for their hearings entirely, the bondsman owes the entire bail amount to the court.36 This kind of financial liability has led to many bondsmen employing recovery agents, usually known as bounty hunters, to ensure that these indicted defendants appear for their court dates.37 The last time the Supreme Court addressed the role of bounty hunters and bondsmen—one hundred and fifty years ago38—it acknowledged the historical common law privileges of both bondsmen and bounty hunters, holding that the right to apprehend a fleeing defendant originates from the contract relationship between bondsmen and their clients.39” Despite changing standards, however, the Court has not addressed the topic since.

32 See Eligon, Bail System, supra note __, at id.
33 See John Eligon, New York is Owed More than 2 Million Dollars in Delinquent Forfeitures, THE NEW YORK TIMES (January 9, 2011).
34 See Eligon, Bail System, supra note __, at id.
35 See Eligon, Bail System, supra note __, at id.
37 See Freeland, The Invisible Badge, supra note __, at 209.
39 See Taylor v. Taintor, 83 U.S. at 370-71. The Taylor Court noted that bounty hunters could “seize [the delinquent defendant] at any time, detain them until trial, pursue them across state lines, and even break into their homes if necessary.” Id. at 371. Some scholars, however, have argued that this statement by the Taylor Court is only dicta,
Bounty hunters do have a few regulations on their behavior, mostly codified in state law, though they vary widely from state to state.\(^40\) Despite persistent effort, however, attempts to control bounty hunters through federal legislation have failed.\(^41\) As should not be surprising in such a “wild west,” behavior of some bounty hunters can be reprehensible. Beyond the showy brutality spotlighted in such reality shows as “Dog the Bounty Hunter,”\(^42\) the rules and prohibitions which constrain the police do not generally apply to bounty hunters.\(^43\) As a result, misconduct often occurs as bounty hunters take advantage of their legal privileges.\(^44\)

Bounty hunters look and act like police, but lack the screening and training that law enforcement provides its recruits.\(^45\) As a result, these recovery agents use dangerous and sometimes illegal tactics to retrieve defendants and/or property, including confrontations at gun point, forced entries into homes without a search warrant and the commandeering of vehicles on public roadways.\(^46\) Indeed, in states where they are allowed to practice, bail bondsmen can legally use stun guns, mace and firearms while apprehending bailees. As a result, in the process of “recovering” the bailee, bounty hunters often complicate and often endanger public safety.\(^47\) Moreover, although bounty hunters play a police-like role, there is little constitutional protection against poor behavior because they are usually not considered state actors.\(^48\)

In sum, the unregulated private actors, unsupervised and unaccountable bail bonding companies, complex and unfair fee structures, tremendous pressure to plead guilty, over-incarceration for minor offenses, and disproportionately high bail all combine to make our system of pretrial detention a nightmare to navigate and constitutionally questionable. That this system disproportionately affects the poor makes our current pretrial detention system all the more disturbing.

B. Increased numbers of poor indicted offenders denied bail

At any given moment, a vast proportion of jail dwellers consist of felony and non-felony pretrial detainees who are in jail because they have not posted bail. 62 percent of the nation’s

\(^{40}\) 47 states have some sort of statute regulating bounty hunting. See Freeland, The Invisible Badge, supra note __, at 210 n.66 For example, in 1997, Indiana, Nevada, and North Carolina started licensing bounty hunters, and Texas required warrants for bounty hunters as well as the assistance of licensed private investigators/security guards. Additionally, Florida, Illinois, Kentucky, and Oregon have banned commercial bail bonds system, and hence no bounty hunters. See id.

\(^{41}\) See Freeland, The Invisible Badge, supra note __, at 211-212.

\(^{42}\) See “Dog the Bounty Hunter” is a reality television show on A&E, which follows Duane Chapman as he hunts down defendants who have missed court appearances. located at: http://www.dogthebountyhunter.com/ The website for the show proclaims, “Considered the greatest bounty hunter in the world, Duane ”Dog” Chapman has made more than 6,000 captures in his 27-year career.” Id.


\(^{44}\) See Freeland, The Invisible Badge, supra note __, at 212.


\(^{46}\) See Stanton, Bondsmen pose danger to public, supra note __, at id.

\(^{47}\) See Stanton, Bondsmen pose danger to public, supra note __, at id.

\(^{48}\) See Freeland, The Invisible Badge, supra note __, at 228.
jail population consists of detainees awaiting trial. Nationally, taxpayers spend $9 billion annually to incarcerate defendants held on bail.

The rate of pretrial incarceration (and incarceration in jail in general) has continued to rise over the past ten years even though prison growth rates have been leveling off. Indicted offenders are less likely to be released pretrial. This includes not only those who have been indicted for violent offenses but also those who are awaiting trial for property, drug, and public order related charges. Additionally, fewer indicted offenders are being released from jail on their own recognizance, and those who have been granted bail are often unable to afford it. These types of high bail requirements make it very difficult for indicted defendants to obtain pretrial release, despite the fact that the vast majority of these offenders have been arrested for low-level, non-violent offenses.

Despite this increasing reliance on incarcerating indicted defendants before trial, communities are not necessarily any safer. The places with the highest incarceration rates have not necessarily seen violent crime rates fall. In fact, quite to the contrary, New York City decreased its jail population and experienced a drastic reduction in crime rates.

As Human Rights Watch has astutely noted, in discussing the problems with pretrial detentions in New York City:

Time in jail before one has had one’s day in court is particularly troubling for the one in five detained non-felony defendants who… will not be convicted. It is also disproportionate in light of sentences typically imposed when there is a non-felony conviction: data from the New York State Division of Criminal Justice Services, for example, indicates that eight out of ten convicted misdemeanor arrestees receive sentences that do not include jail time.

This is particularly troubling in regards to the large number of pretrial detainees who are indicted and held on misdemeanors, as detailed above. Incarcerating poor defendants for non-felony offenses (primarily misdemeanors, but also violations and infractions) is perhaps the most troubling aspect of this trend. This kind of jailing is “uniquely difficult to reconcile with

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49 See Bureau of Justice Statistics, US Department of Justice (2011)
50 See Pretrial Justice Institute report.
52 See Petteruti & Walsh, Jailing Communities, supra note __, at 3.
53 See Petteruti & Walsh, Jailing Communities, supra note __, at 3. Indeed, as the report notes, three quarters of those pretrial detainees charged with property, drug and public order related charges are “significantly less likely” to be released. Id.
54 See Petteruti & Walsh, Jailing Communities, supra note __, at 3. As the report explains: “Once, more than half of those jailed received bail amounts of $5,000 or less; today, just about half of the people in jail receive the highest bail amounts ($10,000 to the maximum).” Id.
55 Petteruti & Walsh, Jailing Communities, supra note __, at 3.
56 See Price of Freedom, supra note __, at 4.
57 See Price of Freedom, supra note __, at 4.
58 See The Price of Freedom, supra note __, at 2.
59 See The Price of Freedom, supra note __, at 2.
the fundamental notions of fairness and equality that should be the cornerstones of criminal justice.\textsuperscript{60} For these cases especially, pretrial detention is a disproportionate abbreviation of rights, particularly in light of the non-threatening, petty nature of most of the charged non-felony crimes.\textsuperscript{61}

The increasing rate of pretrial detention is disturbing, however, even for those defendants charged with more serious crimes. This is due to the conditions of the actual detention centers housing pretrial defendants. Although state and federal prisons are not generally known for their plush accommodations, the general state of the jails which hold pretrial detainees are so bad that simply to be incarcerated in them rises to a punitive experience.

C. The punishing conditions of pretrial detention.

The substandard conditions of today’s pretrial detention centers—our local and municipal jails—have transformed the detainee’s experience into a form of punishment. It is a little-known but unfortunate truth that pretrial detainees often undergo harsher conditions of confinement than those defendants who are convicted.\textsuperscript{62} While state and federal prisons house most convicted prisoners, jails and county lockups house the accused who have either been denied bail or cannot afford to pay it.

Moreover, pretrial detainees are often incarcerated alongside convicted criminals, ten percent of whom are housed in jails, not prisons.\textsuperscript{63} This indicates that the holding conditions for pretrial detainees is, at minimum, punishment-like, as it is precisely the same as that for some convicted offenders. The lines between prison and jail are becoming increasingly blurred.\textsuperscript{64}

Historically, determining whether certain conditions rise to the level of punishment requires objective indicia. Specifically, in \textit{Bell v. Wolfish}, the Supreme Court held that courts can decide “whether [the detainee’s condition] has historically been regarded as punishment.”\textsuperscript{65} In addition, \textit{Youngberg v. Romeo}\textsuperscript{66} held that that those forcibly committed to state institutions retain their substantive rights under the Due Process Clause.\textsuperscript{67} As others have noted, the Court’s holding in \textit{Youngberg} indicates that by the same token, the arguments of criminal pretrial detainees’ should be analyzed objectively, instead of subjectively.\textsuperscript{68}

There are numerous objective indicia of confinement that rise to the level of punishment for pretrial detainees. By far the most concerning—but not isolated—examples come from Rikers Island in New York, the municipal lockup for pretrial detainees, immigrants,

\begin{thebibliography}{99}
\bibitem{60} The Price of Freedom, supra note __, at 2.
\bibitem{61} See The Price of Freedom, supra note __, at 2.
\bibitem{63} See Petteruti & Walsh, Jailing Communities, supra note __, at 3.
\bibitem{64} See Petteruti & Walsh, Jailing Communities, supra note __, at 3.
\bibitem{65} Wolfish, 441 U.S. at 537.
\bibitem{67} Youngberg, 457 U.S. at 307.
\bibitem{68} Gorlin, Evaluating Punishment, supra note __, at 441.
\end{thebibliography}
juveniles, and any prisoner subject to rehearing or resentencing. The jail on Rikers Island has been sued in recent years by more than a half-dozen Rikers inmates, all claiming to have been the victims of beatings by prisoners while guards ignored it, or worse, ordered the attacks.

For example, in 2009, two Rikers guards were accused of recruiting inmates over a three month period last year to assist in maintaining order in a housing unit for teen boys, including training the inmates in how to restrain and assault their victims, as well as deciding where and when attacks would occur. The housing unit was run much like Mafia organization, where two correction officers were the bosses. Even more troubling, the recent pattern of cases involving Rikers guards indicates that the management of the jail is, if not complicit in the abuses, at least marginally aware of it.

The types of punitive violations occurring at Rikers do not just involve misconduct by guards. For years the jail had a policy of strip-searching all prisoners, even non-violent ones charged with minor crimes. Specifically, over an 8 year period, roughly 100,000 people were strip-searched after being charged with misdemeanors and taken to Rikers Island and other city correction facilities. A majority of the strip-searched detainees were charged with low-level misdemeanors or failing to pay child support, minor offenses on even a misdemeanor scale. Considering most federal circuits have laws banning strip-searches for detainees charged with minor offenses, this course of action violated the pretrial detainees’ Fourth Amendment rights and created an atmosphere of fear and punishment.

Jails in other major metropolitan areas are rife with similar abuses. The Los Angeles County Men’s Central Jail is notorious for overcrowding, forcing inmates to sleep on dirty floors, devoid of natural light, where inmates get only one 2-hour outdoor recreation session per week-on the jail’s roof. In Maricopa County’s Tent City Jail, in Phoenix, Arizona, inmates are housed outdoors in military tents without air conditioning (despite over 100 degree temperatures in the summers), fed 15-cent meals only twice a day to cut costs, are forced to wear humiliating

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71 See Weiser, Rikers Guards, supra note __, at id.

72 See John Eligon, Correction Officers Accused of Letting Inmates Run Rikers Island Jail, The New York Times (January 23, 2009). As the article explained, “guards reputedly sent inmates to intimidate, threaten and silence uncooperative prisoners with brute force. Inmates were ordered to turn over money, and their every move, including when they could use the bathroom, was controlled. If word of an assault got out, the guards would allegedly orchestrate a cover-up.” See id.

73 See Weiser, Rikers Guards, supra note __, at id.


75 See Schmidt, Strip Searches, supra note __, at id.

76 See, e.g., Evans v. Stephens, 407 F.3d 1272, 1280 (11th Cir. 2005); Nelson v. McMullen, 207 F.3d 1201 (10th Cir. 2000); Doe v. Burnham, 6 F.3d 476 (7th Cir. 1993).

77 See Petteruti & Walsh, Jailing Communities, supra note __, at 19.
prison gear, and have very few amenities.\textsuperscript{78} And in Washington, D.C.’s Central Detention Facility, there is overcrowding, serious health and sanitation issues (including broken showers, no running water in cells, and animal feces throughout the facility), and inadequate healthcare.\textsuperscript{79} All this is separate from the abuse that pretrial detainees can be subjected to in jails, ranging from violent treatment by other prisoners to more institutionalized practices.

On a somewhat less deadly scale, but still punitive in nature, are the fees now imposed by many jails onto poor detainees. In Florida, for example, fees are imposed for the use of the public defender for misdemeanors,\textsuperscript{80} which crimes, as discussed above, tends to include a large section of pretrial detainees, who often cannot afford the fees to make bail.\textsuperscript{81} Adding a $50 fee to even consult a public defender\textsuperscript{82} undoubtedly has a chilling effect on many of these indicted offenders, who may go without counsel for fear of not being able to afford the fee. Moreover, this failure to use the public defender can then lead into a cascade of effects, particularly for driving violations including court-ordered fees, followed by failure to pay, which can lead to more fees, more unlicensed driving, and sometimes incarceration.\textsuperscript{83} In Florida’s (and North Carolina’s) system, there are no exceptions or waivers for the indigent,\textsuperscript{84} and in Georgia’s system, the waiver is rarely utilized.\textsuperscript{85}

Likewise, in Louisiana, fees for using the public defender are imposed after the bail hearing.\textsuperscript{86} All of the criminal courts of Orleans Parish impose fines and fees regardless of an indicted defendant’s ability to pay them, and waiver is rarely granted.\textsuperscript{87} For very poor defendants who often cannot come up with bail money, the imposition of another fee on top of the bail fee, for simply consulting the public defender, results in a fee-based punishment. This is exacerbated by the fact that when defendants are unable to pay their fines, fees and costs, they may be incarcerated—even if they have been found not guilty of their original crime.\textsuperscript{88} Once incarcerated, the indigent defendant is even less likely to be able to pay the fees, which compound, leading to higher debt and longer incarceration.\textsuperscript{89} Since they can only afford to pay small amounts of their incomes to redeem their fees, many of these men and women can remain caught up in the criminal justice system for years, and they may find themselves back in jail when their legal debts become overwhelming.\textsuperscript{90}

\begin{thebibliography}{99}
\bibitem{78} See Petteruti & Walsh, Jailing Communities, supra note __, at 19
\bibitem{79} See id.
\bibitem{80} See Rebekah Diller, The Hidden Cost of Florida’s Criminal Justice Fees, BRENNAN CENTER FOR JUSTICE AT THE NEW YORK UNIVERSITY LAW SCHOOL (2010), at 4, 6.
\bibitem{81} See Diller, supra note __, at 4.
\bibitem{82} See Diller, supra note __, at 5-6. Specifically, there is a $50 “application fee.” See id.
\bibitem{83} See Diller, supra note __, at 4.
\bibitem{84} See Diller, supra note __, at 7.
\bibitem{85} See ACLU, In for a Penny, supra note __, at 62. Georgia requires a $50 fee from all poor criminal defendants, including pretrial detainees, who simply request the services of a public defender. See id. Most of such defendants never get a chance to demonstrate their indigence and simply waive their right to counsel. See id.
\bibitem{86} See ACLU, In for a Penny: The Rise of America’s New Debtor Prisons, supra note __, at 17. The public defender fee is usually $40. See id.
\bibitem{87} See ACLU, In for a Penny, supra note __, at 17.
\bibitem{88} See ACLU, In for a Penny, supra note __, at 17.
\bibitem{89} See ACLU, In for a Penny, supra note __, at 18. Late fees of $100 per payment are often imposed. See id. Defendants may also be sent to jail for 15 to 30 days for failure to pay. See id.
\bibitem{90} See ACLU, In for a Penny, supra note __, at 21.
\end{thebibliography}
In impoverished states like Michigan, some pretrial detainees are assessed a $12 jail entry fee, $60 per day for jail room and board, and with additional reimbursement to the correctional facility for medical and other services. One jail in Michigan requires the defendant to pay a $12 fee to be released from jail. So for an indigent pretrial detainee who cannot afford to meet bail, extra costs are imposed, even if the original charges ultimately are not proven or are dropped.

Similarly, states like Ohio frequently impose “pay-to-stay” programs on pretrial detainees. It took a federal lawsuit to stop an Ohio municipal jail to stop requiring detainees to pay a daily fee for their pre-conviction jail time. A comparable payment program for pretrial detainees also existed in Georgia until recently, where the sheriff of Clinch County routinely charged pre-trial detainees for the costs of room and board well before conviction. In certain cases, the sheriff even forced detainees to choose between either signing a promissory note (to be later enforced) or being returned to jail. This practice only stopped with the initiation of a federal lawsuit, which settled in 2006.

D. Pre-trial Incarcerative Harm

Those offenders who have been incarcerated pretrial suffer unquestionable harm from this detention. In general, incarceration in jail negatively impacts health, both mental and physical, employment, and the family and community interactions of those incarcerated. Pretrial incarceration is also particularly difficult for those indicted offenders who suffer from poor health, as jails rarely have adequate resources available to treat people with physical or mental health problems. Additionally, the poor have a much thinner safety net keeping them from homelessness and abject poverty, and being incarcerated for potential crimes, even for a short time, can have a devastating effect.

Moreover, jails can be dangerous and unhealthy environments, even more so than prisons. First, the jail buildings themselves are often older and decaying. These old buildings

91 See ACLU, In for a Penny, supra note __, at 30.
92 See ACLU, In for a Penny, supra note __, at 30. The aforementioned facility is the Saginaw County Jail, which is the “only lockup facility in the county to hold people on initial arrests or those sentenced to time for a year or less.” Saginaw County Michigan Jail: website, located at: www.saginawcounty.com/Sheriff/Jail.aspx [last visited 1/9/2012]
93 See ACLU, In for a Penny, supra note __, at 53. The Hamilton County Jail, in Ohio, routinely charged its pretrial detainees a “pay to stay” fee until 2002, when the District Court for the Southern District of Ohio found this violated the 14th Amendment’s guarantee of due process, because the detainees were not given a pre-deprivation opportunity to be heard. See Allen v. Leis, 213 F. Supp. 2d 819 (S.D. Ohio 2002).
94 See ACLU, In for a Penny, supra note __, at 57.
95 See ACLU, In for a Penny, supra note __, at 57.
97 See Gorlin, Evaluating Punishment, supra note __, at 419.
98 See Peteruti & Walsh, Jailing Communities, supra note __, at 3
99 See Peteruti & Walsh, Jailing Communities, supra note __, at 3.
101 See Peteruti & Walsh, Jailing Communities, supra note __, at 15.
can have various dangers associated with them, including mold, poor ventilation, lead pipes, asbestos, and other problems, all of which can be quite detrimental to the health of pretrial detainees. Second, the concentration of people, prisoners and visitors in a jail make it a vector of contagious diseases. This is in large part because serious infections and sexually transmitted diseases are highly concentrated and easily transmitted in jails, and the ever-changing detainee population means the residents are constantly in flux. For example, the MSRA drug-resistant superbug has been thriving in jails, with the potential to infect those detainees who are there even for only a short time, since it is so difficult to stop its spread even with proper precautions. Many jails are not properly equipped to treat serious health problems in their detainees, and what healthcare is available is hard to provide to jails’ often shorter-term visitors.

Drug and alcohol addiction and mental illness are an equally large problem in jails. There is minimal, if any, drug treatment, although as many as half or more of those arrested and detained have had issues with drug and/or alcohol addiction. And ever since the wave of deinstitutionalizing the mentally ill thirty years ago, a large number of the jails’ residents are mentally unstable.

This is troubling for a number of reasons. First, incarceration—even short term incarceration such as pretrial detention—tends to further traumatize people with mental illness, making them more at risk of harming themselves or others. This is particularly true in regards to suicide, which is the second-highest reason for death after illness in jails. These high suicide rates are closely linked with untreated depression, all too common in all correctional facilities. To further complicate the situation, many jails lack the institutional mental health resources required to serve the needs of their detainees.

Pretrial detention also exerts a hard price on an indicted offender’s family as well. Children of indicted offenders often end up in foster care or otherwise taken away from their families, and are far more likely to fall into poverty. Family members of the person in jail experience not only emotional and economic hardships, but also physical ailments and declining

102 See Petteruti & Walsh, Jailing Communities, supra note __, at 15.
103 See Petteruti & Walsh, Jailing Communities, supra note __, at 15.
104 For example, HIV, antibiotic-resistant TB, and bacterial infections all exist at much higher rates in jails than in the general population. See id.
105 See Petteruti & Walsh, Jailing Communities, supra note __, at 15.
107 See Petteruti & Walsh, Jailing Communities, supra note __, at 15.
109 See National Association of Counties info. This is particularly troubling because most pretrial detainees with mental illness—some 73% percent—are usually incarcerated for property, drug or public order offenses. See Bureau of Justice statistics.
110 See Petteruti & Walsh, Jailing Communities, supra note __, at 15.
111 See id.
112 See id.
113 See Dolovich, Incarceration American Style, supra note __, at 247.
health as well. In Michigan, courts have gone so far as to incarcerate parents for being unable to pay for their children’s incarceration costs, locking up the parents without even any crime charged.

Pretrial detention also augments the possibility of conviction. Incarcerated defendants before trial are more likely to be found or plead guilty and serve prison time than those released pretrial. Even simply the possibility of imprisonment often compels defendants to plead guilty and give up their right to trial. The prospect of being incarcerated, even for a short time, can look ruinous to poor defendants, as this often means the loss of their livelihood and/or severe disruptions to their family lives. Accordingly, when confronted with an unaffordable bail, a large number of pretrial detainees simply plead guilty. This rush to a guilty plea is often exacerbated by the application fee to use a public defender in some states, as detailed above.

All of these practices are transforming our imposition of pretrial detention from its original incarnation as brief confinement based on risk of flight to punitive incarceration decided by a fragmented and inconsistent variety of private and public actors. This creates two major problems: not only do our procedures for imposing jail and denying bail disproportionately punish the poor and disenfranchised, but, as I contend below, they also violate the spirit of the Sixth Amendment. Taken together, these practices have created a Shadowlands where the normal promises of substantive and procedural criminal justice do not apply.

E. Punishment before conviction violates the spirit of the 6th Amendment jury trial right

This prolonged pretrial incarceration feels troubling because it punishes accused offenders before conviction by members of the community, violating the very spirit of our criminal justice system. These offenders are considered innocent at this phase of the criminal process. Any discomfort we feel with such practices logically stems from the Sixth Amendment jury trial right, which holds that the accused “shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.” Our current pretrial detention practices violate the very tenets of the Sixth Amendment: the accused are incarcerated for lengthy periods, suffering punitive and dangerous conditions in jails and county lockups, based on decisions made by either unaccountable private actors, harried magistrates or line prosecutors. Punishment, in other words, is being imposed on those yet not convicted, without the imprimatur of the jury.
Our pretrial detention practices are even more questionable when contrasted against the Supreme Court’s recent spate of opinions highlighting the Sixth Amendment right to a jury trial. Specifically, in the Apprendi-Blakely line of cases, the Supreme Court reinvigorated the Sixth Amendment jury right, concentrating on the need for the community, as jury, to impose punishment on those found guilty. By focusing on this basic idea—that all aspects of a crime must be determined by a jury for a valid conviction—the Court “provided the basis for [its] . . . decisions interpreting modern criminal statutes and sentencing procedures.”121 The Court relied heavily on the historical role of the community as an arbiter of punishment to support its contention that only the jury could find facts that increased an convicted offender’s penalty. In holding that a court can sentence a defendant only on facts found by the jury beyond a reasonable doubt or admitted by the defendant himself,122 the Blakely Court gave strong support to the idea that the community must have the final word on criminal punishment. Thus, the basis of the Court’s new focus on the rights of the jury in criminal adjudication rested on the importance of the community’s determination of punishment.

Despite these recent decisions, bail and jail determinations still take place far from the community and the jury room, taking place in a Shadowlands of procedural justice. The Court’s focus on community participation in criminal adjudication was not limited to criminal trials, leaving an opening to integrate the community jury right into the pretrial detention sphere. If the Supreme Court has focused on the jury, as a representative of the community, as the only appropriate body to impose punishment on a convicted offender, then how much more important is it that the community have a say in determining whether punitive conditions fall upon an unconvicted offender? The Apprendi-Blakely line of decisions, forbidding imposition of punishment until the jury has decided guilt or innocence, needs to inform our practices governing pretrial detention.

When imposed upon pretrial offenders, our bail and jail procedures, separate or together, result in the imposition of unjustified punishment, taking place virtually unnoticed and unremedied. As such, the spirit of the Supreme Court’s recent Sixth Amendment jurisprudence could also apply to pretrial detention in a variety of circumstances. Whenever detention turns from regulatory to punitive, the community must have a say in the punishment imposed.

Looking back at both our constitutional and historical understanding of bail, it is difficult to understand how we got to this state, where we now routinely mete out punishment to an offender not yet convicted of a crime. Our historical bail practices differed greatly from the complicated and often bewildering array of rules that govern pretrial detention today. Thus a thorough understanding of the history of pretrial detention is critical to fully comprehending the problems we face today.

III. A Short History of Bailing and Jailing

Although the history of Anglo-American bail procedures has been well-covered, a brief review of how bail and jail evolved in this country both before and after the American

121 Booker, 543 U.S. at 230.
122 See id. at 313.
Revolution will prove helpful in showing how far we have departed from the our original understanding of both. Since the Supreme Court has shown a great fidelity to how bail and jail were originally practiced in deciding pretrial detention cases, we should strive to comprehend the actual working customs of during the nation’s earliest days.

A. Colonial Practices

The practice of bail came over from England with the first colonists. The system of bail developed to free untried prisoners. Like so many of our current criminal procedures, the bare bones of colonial bail were originally quite simple: the accused had a friend or neighbor take a pledge, backed by property, assume responsibility for him until trial. In determining bail, the judge usually considered such factors as likelihood of conviction, risk of flight, and severity of sentence. Many of these provisions were aimed at limiting judicial discretion in bail decisions, not at providing liberty for the defendant. This is unsurprising, considering how much criminal justice in the Anglo-American world was centered around community justice. Early British communities were loath to allow a visiting magistrate make any major decisions about one of their own offenders.

In 1628, the English Petition of Right, thought by many to be the indirect progenitor of colonial bail law, held that bail was to obtain “the liberty of the subjects” from pretrial imprisonment. It was this understanding of the right to bail that the colonists brought with them from the mother country. Excluding capital cases, defendants were guaranteed release on bail before trial.

On the American continent, right to bail provisions existed in several colonial charters, and were articulated as early as 1641 in the Massachusetts Body of Liberties. Other colonies such as Pennsylvania, Delaware and New York followed suit. Of course, as many major

123 See W. THOMAS, BAIL REFORM IN AMERICA 223 (1976).
124 See Note, Betsy K. Wagner, Limiting Preventive Detention through Conditional Release: The Unfulfilled Promise of the 1982 PreTrial Services Act, 97 YALE L.J. 320, 339 n.19 (1987). Wagner goes on to note that this system developed largely because magistrates in medieval England traveled among different counties, and permitting defendants to be released into the custody of friends or neighbors as a surety helped avoid their prolonged detention in jail. See id. Originally the surety had to deliver himself if the defendant absconded; later, the surety could forfeit money instead of his own person. See id.
125 See DANIエル FREED & PATRICIA WALD, BAIL IN THE UNITED STATES: 1964, at 1-3 (1964).
127 See Meyer, Constitutionality of Pretrial Detention, 60 GEO. L.J. 1140, 1162-63 (1972).
128 See id.
129 See Verrilli, The Eighth Amendment and the Right to Bail, supra note __, at 349.
131 See Article 18, MASSACHUSETTS BODY OF LIBERTIES (1641), published by The Winthrop Society, located at: http://www.winthropworld.com/liberties.php. Article 18 provided: “No man's person shall be restrained or imprisoned by any authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient security, bail, or mainprise, for his appearance and good behavior in the meantime, unless it be in capital crimes, and contempt in open Court, and in such cases where some express act of Court doth allow it.” See id.
crimes were still classified as capital felonies during the colonial era, any provisions granting bail in non-capital cases still excluded numerous defendants.

B. Bail following the Constitution

Despite these specific discussions of bail in colonial documents, however, the Framers did not explicitly include a right to bail in the Constitution, only mentioning it in the context of the Eighth Amendment. Depending on how colonial history is interpreted, the lack of an explicit right to bail in the Constitution can be seen either as an historical accident or a deliberate decision. There is minimal documentary evidence of the Framers’ intent to support either position. In contrast, the Judiciary Act of 1789 did specifically provide a right to bail for all non-capital cases, although there is no evidence of any debate on that provision either. The Northwest Ordinance, passed by Congress in 1787, also contained a right to bail.

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134 Delaware adopted the Pennsylvania Frame of Government, including its bail provision, when it became a colony in 1702. See Note, Donald B. Verrilli Jr., The Eighth Amendment and the Right to Bail: Historical Perspectives, 82 COLUM. L. REV. 328, 337 (1982).

135 See Art. 19, New York Charter of Liberties (1683), reprinted in CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK (Rochester NY, 1906), located at: http://www.montauk.com/history/seeds/charter.htm . Article 19 provided that “THAT In all Cases whatsoever Bayle by sufficient Sureties Shall be allowed and taken unless for treason or felony plainly and specially Expressed and menconed in the Warrant of Commitment provided Alwayes that nothing herein contained shall Extend to discharge out of prison upon bayle any person taken in Execucon for debts or otherwise legally sentenced by the judgment of any of the Courts of Record within the province.” See id. However, there is some evidence that New York’s right to bail provision was honored more in the breach than in the execution. Few acknowledged a right to bail in the eighteenth century. See J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 502-03 (1944).

136 See TODD R. CLEAR, GEORGE F. COLE, MICHAEL D. REISIG, AMERICAN CORRECTIONS 42-43 (2008). As the authors note, slightly more than twenty percent of felonies were capital ones in New York. See id.

137 The Eighth Amendment holds, among other things, that “[e]xcessive bail shall not be required.” U.S. CONST., Amend. VIII.

138 See, e.g., Caleb Foote, The Coming Constitutional Crisis in Bail, 113 U. PA. L. REV. 959 (1965) (arguing that failure to include a right to bail was a historical accident).

139 See, e.g., Duker, Right to Bail: A Historical Inquiry, 42 ALB. L. REV. 33 (1977) (arguing that nothing in the colonial history of bail or the history of the Bill of Rights evidences any intent to have a right to bail).

140 See Verrilli, The Eighth Amendment and the Right to Bail, supra note __, at 338 n.58. According to the 1788-90 Annals of Congress, the discussion of the bail clause in the Eighth Amendment was limited to one comment. See id.

141 The Judiciary Act held, in regards to bail:

{U}pon all arrests in criminal cases, bail shall be admitted, except where punishment may be by death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstance of the offense, and of the evidence, the usages of law.

SECT. 12, CHAP. XX, JUDICIARY ACT (September 24, 1789), later codified as 1 Stat. 91 (repealed by 18 U.S.C. §§3141-3151 (1982).

142 See Verrilli, The Eighth Amendment and the Right to Bail, supra note __, at 338 n.58.

On the whole, then, it is difficult to determine the particular intent of the Framers in regards to the right to bail.\footnote{See Verrilli, The Eighth Amendment and the Right to Bail, supra note __, at 350.}

Following the ratification of the Constitution, the federal judiciary made clear that bail was the norm following indictment,\footnote{See Verrilli, The Eighth Amendment and the Right to Bail, supra note __, at 351.} due to the presumption of innocence and due process.\footnote{Verrilli, The Eighth Amendment and the Right to Bail, supra note __, at 352.} The right to bail after 1789 also solidified through the vehicle of state constitutions. Specifically, although only two of the original colonies—North Carolina and Pennsylvania—retained a specific right to bail in their state constitutions, every state that joined the Union after 1789, excluding West Virginia and Hawai‘i, included a right to bail.\footnote{See Verrilli, The Eighth Amendment and the Right to Bail, supra note __, at 352.} This right managed to survive the “frequent redrafting of state constitutions that occurred during the nineteenth century.”\footnote{See Verrilli, The Eighth Amendment and the Right to Bail, supra note __, at 352.} Viewed another way, it was truly in the state constitutions that the American right to bail reached its full fruition.\footnote{See Verrilli, The Eighth Amendment and the Right to Bail, supra note __, at 352.}

This fully articulated state right to bail is important for a variety of reasons. First, most criminal law is state law, not federal law, despite the scholarly and popular focus on federal law enforcement.\footnote{This is particularly true with bail, as state and local detention practices “have come to mold and define the operations and limits of the criminal justice system.” Miller & Guggenheim, Pretrial Detention and Punishment, supra note __, at 344.} Second, bail rights expanded their reach as most state criminal justice codes eliminated many felonies from the list of capital crimes, generally leaving only murder and treason.\footnote{Verrilli, The Eighth Amendment and the Right to Bail, supra note __, at 352.} Third, the historical right to bail, as articulated by the states, has only denied bail for reasons involving risk of flight, rejecting the newer preventative detention theories.\footnote{Granted, many states have recently amended their constitutions to allow detention. See Miller & Guggenheim, Pretrial Detention and Punishment, supra note __, at 343.} Finally, this development shows that the right to bail, although not firmly rooted in a specific constitutional provision, has been part of the American criminal justice system since the founding of the country.

Moreover, how a specific right has been developed in state statutes has often been important to the Supreme Court when analyzing the scope of rights in the federal constitution. For example, the Supreme Court, in \textit{Jones v. United States},\footnote{\textit{Jones v. United States}, 526 U. S. 227 (1999) (holding that the court’s finding of serious bodily injury after trial and consequent sentence enhancement was error since serious bodily injury was an element of the crime).} looked how the states treated certain aspects of an aggravated crime as either an element or a sentencing factor in determining whether the reach of the Sixth Amendment jury trial right required defining serious bodily harm...
as an element of federal carjacking, as opposed to a sentencing factor.\textsuperscript{154} Similarly, in \textit{Duncan v. Louisiana}, the Supreme Court used the long history of jury trial rights in state constitutions to bolster its support for the jury trial right in the federal constitution.\textsuperscript{155}

Thus the historical right to bail, both as commonly practiced around the time of the Founding and afterwards in the various states, has much to teach us about how bail rights today should be understood and defined, particularly in light of the preventative detention proposals that are currently fashionable.

\textbf{C. Recent Bail Reforms}

The basic form of bail, relying on the personal surety as the custodian of the defendant,\textsuperscript{156} remained unchanged until the mid-nineteenth century. Because these custodians had to be both known and acceptable to the courts, however, the personal surety system eventually morphed into the commercial bondsman system.\textsuperscript{157} This switch “substantially reduced the courts’ ability to assess the risks of pretrial release,” and, combined with the decreasing number of non-bailable crimes, added to the general trend whereby judges set high bails exceeding a defendant’s ability to pay.\textsuperscript{158} The imposition of high bail remained the status quo in the state bail world.

Federal bail remained relatively unchanged from the Judiciary Act of 1789 until 1966, when the first bail reform act was passed by Congress.\textsuperscript{159} The 1966 Bail Reform Act\textsuperscript{160} marked a return to conditional release, and was designed in large part to reduce the high bails imposed by judges to prevent release of certain defendants.\textsuperscript{161} The 1966 Bail Reform Act relied heavily on custodial supervision to ensure proper behavior, requiring judges to consider a variety of release conditions and release defendants under the most minimal release strictures possible.\textsuperscript{162} A major goal of the 1966 Act was to reduce pretrial flight.\textsuperscript{163} Pretrial detention based on future dangerousness was not envisioned.\textsuperscript{164}

The difficulties of successfully implementing the 1966 Bail Reform Act, such as setting the terms of release and ensuring that conditions were met, along with worries about the crime committed by defendants out on conditional release, led to the passage of the 1984 Bail Reform

\textsuperscript{154} See Jones, id., at 236-37 (reviewing how “many States use causation of serious bodily injury or harm as an element defining a distinct offense of aggravated robbery.”)

\textsuperscript{155} See \textit{Duncan v. Louisiana}, 391 U.S. 145, 153 (1968) (discussing how every state joining the Union subsequent to formation had the right to a jury trial articulated in its constitution). \textit{See also} Verrilli, \textit{The Eighth Amendment and the Right to Bail}, supra note __, at 354.

\textsuperscript{156} See Wanger, \textit{Limiting Preventative Detention Through Conditional Release}, supra note __, at 324.

\textsuperscript{157} See Wanger, \textit{Limiting Preventative Detention Through Conditional Release}, supra note __, at 324.

\textsuperscript{158} See Wanger, \textit{Limiting Preventative Detention Through Conditional Release}, supra note __, at 324

\textsuperscript{159} See 18 U.S.C. §§3146-3153 (repealed 1983).

\textsuperscript{160} 18 U.S.C. §§3146-3153 (repealed 1983).

\textsuperscript{161} See Marc Miller and Martin Guggenheim, \textit{Pretrial Detention and Punishment}, 73 M\textsc{inn.} L. \textsc{Rev.} 335, 344 (1990). \textit{See generally} W. \textsc{thomas}, \textit{Bail Reform in America} 223 (1976).

\textsuperscript{162} See 18 U.S.C. § 3146 (1966). Release conditions included: personal recognizance; execution of an unsecured appearance bond; third party custody; travel, association or living restrictions; execution of an appearance bond; and/or execution of a bail bond. \textit{See id.}


This federal statute was paralleled on the state level by no fewer than 34 states articulating specific statutory provisions allowing detention based on a defendant’s dangerousness, as opposed to a risk of flight. The Bail Reform Act of 1984 was predicated on protection of the public and community safety, making this factor one of the most critical in the determination of whether to release or detain defendants before trial. Most states have followed the path of the BRA, with 45 states and the District of Columbia specifically permitting the determination of dangerousness as a predicate for denying pretrial release.

Technically, the 1984 Bail Reform Act reaffirmed the idea that pretrial release was to continue to be the norm. However, the 1984 Act was not entirely neutral on the procedure to determine future dangerousness. For example, the Act contains little to balance out the reliance on predicting dangerousness for the defense side. Evidence of other crimes may be presented as hearsay, which is not subject to cross-examination. There is little notice to defendants that prosecutors may seek pretrial detention based on prior crimes or behavior. Additionally, the 1984 Act does not require that there be any confrontation between the defendant and the prosecutor who proffers the evidence.

Moreover, purporting to be deeply concerned with “community safety,” the 1984 Bail Reform Act allows federal prosecutors to request pretrial detention for any felony committed after two or more federal or state crimes of violence. The Act contains a rebuttable presumption favoring detention whenever a defendant has a prior conviction of a violent crime less than five years prior and was arrested while on conditional release pending trial for another offense. The BRA granted authority to the courts to confine an indicted individual based on “the danger a person may pose to others if released.”

Additionally, under the 1984 BRA, there is no requirement of evidence of a substantial possibility of the defendant’s guilt. And there are no limits on the length of detention beyond the requirements of the Speedy Trial Act and the vague limits of the Sixth Amendment. In sum,
the requirements for pretrial detention under the 1984 Act only require a quick hearing with a few limited procedural protections, primarily focusing on whether the defendant’s prior acts or convictions make it “necessary” to deny bail for community safety purposes.\(^{177}\)

Despite the Act’s flaws, the Supreme Court upheld the 1984 Bail Reform Act against a substantive due process facial challenge in *United States v. Salerno*.\(^{178}\) Decided on narrow grounds, *Salerno* concluded that the Act was not unconstitutional in its determinations weighing the defendant’s interest in liberty against the government’s interest in community safety.\(^{179}\) Rejecting the Southern District of New York’s reasoning that our criminal justice system can only hold persons accountable for *past* actions, not *future* ones,\(^ {180}\) the *Salerno* Court found that merely detaining a person “does not inexorably lead to the conclusions that the government has imposed punishment.”\(^{181}\) The *Salerno* Court’s conclusion was based on its conclusion that the regulatory goal that Congress sought to achieve in the 1984 BRA was not punishment, but achievement of public safety.\(^{182}\)

The *Salerno* Court did carefully note that it was only looking at the 1984 Bail Reform Act as created by Congress, not as actually applied. As such, it reserved the right to decide the point “at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.”\(^{183}\) It is possible that by doing so, the Court was signaling that it would prefer to wait and strike down a particular detention order where the defendant could show his interest in liberty outweighed the state’s interest in community safety.\(^{184}\) Nonetheless, the *Salerno* Court’s upholding of the Bail Reform Act struck a blow to concepts of retributive criminal justice, the belief that a wrongdoer can only be punished for crimes he or she has actually committed.

The *Salerno* Court, however, used some sleight of hand between the actual language of the 1984 Bail Reform Act and the way it justified the Congressional Act. One of the ways *Salerno* defended the idea of pretrial detention exclusive of the risk of flight was by arguing that the government had a legitimate and compelling interest in preventing crime by arrestees.\(^{185}\) Preventing future crime, though, is a different endeavor than public safety for the community, the purported reasons behind the 1984 BRA. Although of course crime prevention does, in a very general sense, enhance public safety, few crimes are so dangerous that their very potential requires detention of a suspect. And the most dangerous of them, murder, is usually barred from bail release in any case. Nonetheless, the *Salerno* Court easily conflated future crime prevention and community safety into one amorphous concept. Moreover, as other scholars have noted, the

\(^{177}\) See Miller & Guggenheim, *Pretrial Detention and Punishment*, supra note __, at 349


\(^{179}\) See Salerno, 481 U.S. at 740.

\(^{180}\) See Salerno, 481 U.S. at 745.

\(^{181}\) See Salerno, 481 U.S. at 747.

\(^{182}\) See Salerno, 481 U.S. at 747.

\(^{183}\) Salerno, 481 U.S. at 748 n.4.

\(^{184}\) See Miller & Guggenheim, *Pretrial Detention and Punishment*, supra note __, at 351

\(^{185}\) See Salerno, 481 U.S. at 749.
Court evaded the BRA’s underlying problem of identifying the actual circumstances that transform detention into punishment.\textsuperscript{186}

*Salerno* also specifically addressed two constitutional claims involving the Fifth and Eighth Amendments, quickly dismissing them both.\textsuperscript{187} Regarding the Fifth Amendment substantive due process claim—that pretrial detention constituted impermissible punishment before trial\textsuperscript{188}—the Court held that since the legislative intent of Congress in the Bail Reform Act was not punitive, the pretrial detention was not punishment, but regulation.\textsuperscript{189}

As for the Eighth Amendment claim—that the 1984 Bail Reform Act violated the Excessive Bail Clause because this clause grants a defendant the right to bail based solely on the considerations of flight\textsuperscript{190}—the *Salerno* Court flatly rejected this argument, holding that nothing in the text of the Bail Clause limits bail decisions solely to questions of flight.\textsuperscript{191} However, the *Salerno* Court did not provide any historical evidence to support this conclusion about the Eighth Amendment, simply leaving the assertion to stand alone.\textsuperscript{192} As discussed briefly above, although the specific intent of the Framers regarding bail cannot be conclusively determined, all evidence points to the fact that pretrial detention, both under English common law and at the time the Constitution was written, was limited to flight risks. Thus the *Salerno* Court’s rejection of the Eighth Amendment challenge on this basis is undersupported at best.

Given the changes made to the historical right to bail, our newfound reliance on preventative incarceration, and the Supreme Court’s recent focus on the Sixth Amendment’s jury trial right, our current pretrial detention procedures may require some substantive changes. In Part IV, I explore the problem with our current system’s reliance on future dangerousness to routinely imprison indicted offenders, and contend that this violates our understanding of the role of punishment as dictated by the Sixth Amendment.

### IV. Preventative Detention, Future Dangerousness, and the Sixth Amendment

There is convincing evidence that modern day bail and jail practices result in punishment for the indicted defendant incarcerated before trial. Although usually the underlying reasoning for the imposition of pretrial detention is not based on a punishment rationale, the consequences of such decisions are often so severe that the end results are punitive.

This punishment before conviction creates numerous problems for our current bail and jail structure. First, many offenders are denied bail based on the relatively new field of preventative detention, which is one riddled with errors, both in theory and in practice. Second,

\textsuperscript{186} See Miller & Guggenheim, *Pretrial Detention and Punishment*, supra note __, at 353.
\textsuperscript{187} See *Salerno*, 481 U.S. at 746, 752.
\textsuperscript{188} See *Salerno*, 481 U.S. at 746.
\textsuperscript{189} See *Salerno*, 481 U.S. at 747.
\textsuperscript{190} See *Salerno*, 481 U.S. at 752.
\textsuperscript{191} See *Salerno*, 481 U.S. at 753. The *Salerno* Court did carve out a space to decide later whether “the Excessive Bail Clause speaks at all to Congress’ power to define the classes of criminal arrestees who shall be admitted to bail,” but maintained the validity of the Bail Reform Act even then. *Id.* at 754.
although Salerno has seemingly closed off both due process and 8th Amendment attacks against the 1984 Bail Act, there have not yet been any challenges based on the Sixth Amendment ban on punishment imposed before a conviction and without a jury’s imprimatur. Third, and relatedly, if we follow the dictates of the Sixth Amendment jury trial right, the community must take part if any punishment is to be imposed on an offender. Below I explore how these factors—the mistaken reliance on preventative detention, the holes left by Salerno, and the requirements of the Sixth Amendment—all converge to make our current pretrial detention hearings in need of reform.

A. The False Promise of Preventative Detention

In the federal system, preventative incarceration, or detaining the accused based on the potential of future crime, did not become popular until the 1984 Bail Reform Act, as described above. In the last twenty years or so, many states have followed suit, allowing their criminal justice systems to detain the indicted individuals based on their future dangerousness. Both judges and academics have challenged the bases for this type of determination, however, putting the entire theory to question.

1. Barefoot v. Estelle

One year before Congress passed the 1984 Bail Reform Act, the Supreme Court discussed a similar issue regarding the propriety of non-jury actors determining and punishing for future dangerousness. In Barefoot v. Estelle, the Supreme Court agreed with the lower trial court that the use of psychiatric experts to discuss the potential dangerousness of the defendant at trial was permissible because this type of determination was for the jury to decide:

Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters….”

Put another way, the majority of the Barefoot Court underlined the importance of the community’s role in deciding whether a fellow member of the public is so dangerous as to deserve incarceration on that basis. This decision, however, focused on the propriety of determining dangerousness during an actual trial, not during a pretrial detention hearing.

More important for our purposes, the dissent in Barefoot highlighted the role of the jury as the proper arbiter of decisions involving a defendant’s incarceration. Penned by Justice Marshall, the dissent noted that psychiatrists and other experts might actually be “less accurate predictors of future violence than laymen,” in part because the lay public lacks a personal bias leaning towards predicting violence, which can arise from being responsible for the erroneous

195 Barefoot, 463 U.S. at 903.
196 Barefoot, 463 U.S. at 922 n.4 (J. Marshall, dissenting).
release of a violent individual.\textsuperscript{197} If this is true for psychiatric experts, it is also likely to be true for magistrates and trial judges, especially those state court judges who must submit to the pressures of periodic re-election.

The dissent also focused on a key critique that applies generally to all determinations of potential future dangerousness: the general unreliability of these predictions.\textsuperscript{198} Citing to several studies, the dissent pointed out that long-term prediction of future violence by psychiatrists continues to be extremely inaccurate.\textsuperscript{199} This is due in part to the difficulty of identifying any sub-class of offenders who have a greater than 50-50 chance of re-engaging in assaultive conduct,\textsuperscript{200} the conduct with which future dangerousness is most concerned. Indeed, a ninety percent error rate is common.\textsuperscript{201}

All these concerns are focused, of course, on testimony given to the jury by expert psychiatric witnesses during an actual trial. How much more unreliable are those hasty predictions by an untrained magistrate or trial judge, determining future dangerous of a person who has not yet been convicted? At the minimum, the incarceration of an accused individual due to his potential to commit more crimes should be based on stronger science that gut feelings or past conduct, and should admit some aspect of community participation.

2. The binary nature of bail determinations

The unreliability of accurately determining future dangerousness, however, is not the only problem with current imposition of pretrial detention. As other scholars have argued, our present pretrial detention model is extremely binary, refusing to account for gray areas.\textsuperscript{202} Gray areas, however, repeatedly occur in determining eligibility for pretrial release: “a binary model requires a decision maker to round off the evidence and confine the case to total truth or no-truth to make a decision.”\textsuperscript{203} Accordingly, our current bail system fails to account for the varying degrees of detainability, dangerousness, and culpability that indicted offenders present.\textsuperscript{204}

Due to the limitations of the binary model, many of the judicial determinations that lead to pretrial detention are overly harsh or punitive.\textsuperscript{205} This is especially true when it comes to predicting future dangerousness. Neither experts nor courts have had much success in accurately

\begin{footnotesize}
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\item<1-> Barefoot, 463 U.S. at 922 n.4 (J. Marshall, dissenting).
\item<2-> Barefoot, 463 U.S. at 919 (J. Marshall, dissenting)(discussing how “the unreliability of …. predictions of long-term future dangerousness is by now an established fact within the profession,” and noting that two out of three predictions of long-term future violence made by psychiatrists are wrong.)
\item<3-> Barefoot, 463 U.S. at 920 (J. Marshall, dissenting).
\item<4-> Barefoot, 463 U.S. at 922 n.4 (J. Marshall, dissenting)(citing Wenk, Robinson & Smith, Can Violence Be Predicted?, 18 CRIME & DELINQUENCY 393, 394 (1972)).
\item<5-> Barefoot, 463 U.S. at 921 n.2 (J. Marshall, dissenting).
\item<6-> See Jack F. Williams,Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention, 79 Minn. L. Rev. 325, 327 (1994).
\item<7-> Williams, Process and Prediction, supra note __, at 327 (1994).
\item<8-> See Williams, Process and Prediction, supra note __, at 327-28.
\item<9-> See Williams, Process and Prediction, supra note __, at 327.
\end{itemize}
\end{footnotesize}
determining if and when an offender might commit more crimes.\textsuperscript{206} Unsurprisingly, then, many harmless defendants are unfairly detained as dangerous.\textsuperscript{207}

The term “dangerous” itself, can be quite vague when it comes to detaining pre-trial defendants. The 1984 Bail Reform Act failed to define the term at all.\textsuperscript{208} Thus the idea of determining dangerousness to the community is an incredibly broad one which could encompass almost anything, from physical danger to conspiracy. The problem with this imprecision of terminology is that accurately determining dangerousness requires a narrow focus, which the determination of bail so notably lacks.

All of this imprecision means that judging future dangerousness within our current pretrial detention scheme can be quite arbitrary. Forcing a black or white decision onto a mass of grey evidence (particularly since it is evidence that has not yet been proven beyond a reasonable doubt), makes many bail hearings unreliable and inconsistent.

3. Judging dangerousness

The problems with determining future dangerousness, however, do not end there. Even if future dangerousness can be accurately predicted, should that necessarily mean that dangerousness should always equal detention and punishment?

Although the question of dangerousness has been widely discussed in terms of sentencing, the scholarly exploration of the topic, both procedurally and jurisprudentially, has been rather limited in terms of pretrial detention. It is this gap that I aim to fill.

Norval Morris famously addressed using predictions of future behavior to determine whether a criminal should be imprisoned after conviction.\textsuperscript{209} As he noted, “as a matter of justice we should never take power over the convicted criminal on the basis of unreliable predictions of his dangerousness.”\textsuperscript{210} Morris was concerned that dangerousness was so expansive a concept that “the punitively minded” would use it to classify all offenders, deserving or not.\textsuperscript{211} Moreover, as other scholars have observed, dangerousness is “peculiarly seductive” because it can be ascribed as a personal characteristic of the offender, not a judicial imposition.\textsuperscript{212} And when dangerousness is seen as a personal trait, it leads to confusion between the determination of dangerousness and


\textsuperscript{207} See, e.g., Michael R. Gottfredson & Don M. Gottfredson, Decisionmaking in Criminal Justice: Towards the Rational Exercise of Discretion 122-27 (1980) (articulating reasons that predictions of dangerousness for indicted offenders are often unreliable).

\textsuperscript{208} See 18 U.S.C. § 3142(e) – (g).


\textsuperscript{210} Morris, Future of Imprisonment, supra note __, at 72-73.

\textsuperscript{211} See Morris, Future of Imprisonment, supra note __, at 72.

the determination of desert, when both are usually animate the reasons underlying punishment.\textsuperscript{213} Likewise, Andrew von Hirsch has argued that the moral argument against predictive detention “is that it is not deserved. This objection stands even were the prediction of future criminality accurate.”\textsuperscript{214}

If all these objections exist for the convicted defendant, how much more do they resonate for the offender who is only indicted? In 1968, before the passage of the 1986 Bail Reform Act, the American Bar Association rejected pretrial preventative detention, even for “dangerous” offenders, because too little was known about the actual need for this type of detention and of the predictive techniques used.\textsuperscript{215} Although this ship has clearly sailed, the theoretical issues still remain.

Whether one’s take on desert is animated by limits, proportionality or by the parity principle, the theory of desert is simply inapplicable to pretrial detention. Predictive dangerousness has no place in any rational system of retributive justice, and yet it is a commonplace determination in American bail hearings, where it seems least appropriate.

Although the Supreme Court, in \textit{Salerno}, rejected both the procedural\textsuperscript{216} and substantive\textsuperscript{217} due process claims, it failed to discuss the more theoretical problems with judging future dangerousness. The \textit{Salerno} Court took for granted that dangerousness is a fixed term with a fixed meaning, as opposed to its actual amorphous nature, difficult to chart or pin down. As such, it is truly inappropriate for use at the pretrial detention hearing, where judges have neither the time nor the inclination to engage theorizing about how desert might be applied to offenders who have not yet been convicted.

This uncertainly and ambiguity of standards in pretrial detention matters because determining dangerousness is a central preoccupation of the criminal justice system.\textsuperscript{218} In part because of this, the reliability of preventative detention is a hotly debated topic. As Christopher Slobogin has noted, there is a two-part challenge to the reliability of predictive dangerousness: 1) persons should not be denied liberty on dangerousness grounds unless there is a high degree of certainty that the person will offend in the near future; and 2) this sort of proof of dangerousness is nearly impossible to obtain.\textsuperscript{219} Responses to these concerns have included the charge that even proof beyond a reasonable doubt is has its own unreliabilities as an indicator of culpability and predictor of future dangerousness.\textsuperscript{220}

\textsuperscript{213} See Zimring & Hawkins, \textit{Dangerousness and Criminal Justice}, supra note __, at 492.
\textsuperscript{214} ANDREW VON HIRSCH, \textit{DOING JUSTICE: THE CHOICE OF PUNISHMENT} 125 (1976). Granted, von Hirsch admits a small fraction of offenders should be confined by preventative detention, including those who have violent records and who were convicted of serious assault crimes. \textit{Id}.
\textsuperscript{215} See ABA Standards Relating to Pretrial Release § 5.5 commentary at 69 (1968) (originally cited in Zimring & Hawkins, \textit{Dangerousness and Criminal Justice}, supra note __, at 496 n.28).
\textsuperscript{216} See Salerno, 481 U.S. at 755.
\textsuperscript{217} See Salerno, 481 U.S. at 750-51.
\textsuperscript{220} See Slobogin, \textit{supra} note __, at 7-8. As Slobogin explains in greater detail:

First, imposition of the reasonable doubt standard [for predictive detention] is overly stringent when the state’s goal is to prevent rather than to punish. Second, the belief that
For example, the *Barefoot* Supreme Court held that the inconsistencies inherent in predicting future dangerousness, even in regards to the death penalty, are largely eradicated by the adversarial process, which usually exposes erroneous views.\(^{221}\) So if we can rely on the shaky credibility of predictive dangerousness to justify an execution, how could it not justify regular pretrial detention, where no life is lost?

The answer, of course, is specific to pretrial detention. First, there is no adversarial contest in the typical pretrial detention hearing, as there is no right to appointed counsel during bail determination. As the vast majority of those detained without bail are those who cannot afford counsel on their own, it is rare to see defense counsel appear at these hearings. Accordingly, the prosecutor usually presents her reasons why the indicted offender should not be granted bail, and the judge decides.

Second, there is a large difference between assessing future dangerousness for a convicted offender, who is subject to punishment of some kind, and assessing the same for someone who has not even been subject to conviction. Eliminating liberty from a person convicted beyond a reasonable doubt (or who has admitted his or her guilt) is a far more acceptable matter than imprisoning someone whose very guilt is still in doubt.

4. **Empirical Evidence and National Trends**

Determining dangerousness is a chancy business, filled with pitfalls and indeterminacy. To predict the dangerousness of the defendant, courts tend to analyze the nature of the charged crime and combine this information with their knowledge of his or her past conduct.\(^{222}\) The court then adds to this assessment its own determination of the accused’s circumstances and character.\(^{223}\) In many states more subjective judicial assessment permits courts to consider the totality of the defendant’s circumstances and character.\(^{224}\) This aspect of determining dangerousness, then, is highly influenced by the court’s personal feelings and quirks. Despite the claim for scientific accuracy, the determination of dangerousness is far more based on subjectivity than objective factors.

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the criminal law permits conviction only when there is no reasonable doubt about blameworthiness is based on a misconception about the reliability of assessments made in criminal cases; in fact, the culpability determinations that provide the primary basis for criminal punishment are subject to serious inaccuracy. Third, requiring a high degree of danger is inconsistent with the fact that many of the crimes that penalize dangerous activity require very little in the way of predictive validity.

*Id.* at 7.

\(^{221}\) *See* *Barefoot v. Estelle*, 463 U.S. 880, 991 (1983).

\(^{222}\) *See* Baradaran & McIntyre, *Predicting Dangerousness*, supra note __, at 7. As Baradaran and McIntyre show, there are ten states that allow for an even deeper look into a defendants background by allowing judges to factor the defendant’s past conduct into their determination. *See id.* at 9.

\(^{223}\) *See* Baradaran & McIntyre, *Predicting Dangerousness*, supra note __, at 7.

\(^{224}\) *See* Baradaran & McIntyre, *Predicting Dangerousness*, supra note __, at 8. As the authors note, some state statutes “refer to these factors by saying the court “may consider,” while others say “shall consider” or “must consider.””

*Id.*
As a whole, then, predicting pretrial crime is a dubious science. In fact, our assumptions about who might be mostly likely to reoffend before trial are often not borne out. For example, those charged with violent crimes are not necessarily more likely to be rearrested pretrial, as we learn from one of the few large, empirical studies done on defendants released before their trials. Nationally, 16% of released defendants on bail are arrested overall (for any reason), and 11% are rearrested for a felony. Particularly important for our purposes, only 1.9% of all defendants released on bail before trial are rearrested for a violent felony. Thus one prong of the furor over “dangerous” indicted defendants is blunted; if only a tiny percent of all defendants released on bail go on to reoffend with violent crimes, then perhaps our fear over the danger posed by the pretrial defendant to the community is overblown.

Moreover, this same study shows that those charged with violent crimes are not necessarily more likely to be rearrested pretrial. Critically, the research done by Baradaran and McIntyre illustrates although those defendants charged with violent crimes have the highest likelihood of being re-arrested on bail, there is still huge variation in how dangerous these violent crime defendants can be, depending on the specific crime charged. Ultimately, despite the large variety of assessments of pretrial “dangerousness,” the defendants granted bail before trial are often far less threatening to public safety than most people would anticipate.

Interestingly, the greatest predictor for future pretrial crime, dangerous or not, is the existence of past convictions. It is important to note that analysis of prior convictions shows that even defendants with multiple prior convictions are still unlikely to be rearrested for a new violent crime while on release.

This information can help us find a better way of predicting “dangerousness” than our current fumbling in the dark. Simply the charged crime, by itself, is a poor predictor of a threat to the community, except for the most violent ones (such as murder, which usually is statutorily prevented from bail release in any case). The existence of multiple past convictions for similar crime seems to have the most predictive effect, although even those pretrial recidivism rates are low. Thus relying on our current system of judicial and prosecutorial decision-making regarding pretrial release—which relies primarily on the charged crime—is not only unfair, but largely

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225 See Baradaran & McIntyre, Predicting Dangerousness, supra note __, at 17.
226 See Baradaran & McIntyre, Predicting Dangerousness, supra note __, at 21. As the authors point out: “The highest rearrest rates pretrial are for defendants charged with drug sales and robbery (21%), followed by motor vehicle theft (20%), and burglary (19%). Those released who are charged with the more —dangerous crimes such as murder, rape, and felony assault have much overall lower rates of pretrial rearrest at 12%, 9% and 12%.” Id.
227 See Baradaran & McIntyre, Predicting Dangerousness, supra note __, at 20.
228 See Baradaran & McIntyre, Predicting Dangerousness, supra note __, at 20.
229 See Baradaran & McIntyre, Predicting Dangerousness, supra note __, at 20. Granted, those charged with violent crimes are more likely to be rearrested for violent crimes on release. See id.
230 See Baradaran & McIntyre, Predicting Dangerousness, supra note __, at 21. For example, those defendants charged with murder have a 6.4% violent crime rearrest rate, one of the highest. Similarly, those defendants charged with robbery have a 5.8% chance of rearrest for violent crime, those defendants charged with rape at 3.2% chance of rearrest for violent crime, and those defendants charged with assault reoffend at a rate of 2.9%. See id.
231 See Baradaran & McIntyre, Predicting Dangerousness, supra note __, at 21.
232 See Baradaran & McIntyre, Predicting Dangerousness, supra note __, at 22.
233 See Baradaran & McIntyre, Predicting Dangerousness, supra note __, at 22.
ineffective. And considering that roughly 62 percent of the overall jail population consists of pretrial detainees, these decisions make a huge difference.

Finally, on the broadest level, post-9/11 case law has also raised important questions about the permissible scope of all pretrial confinement. Do the 9/11 detainee cases affect the law governing other detainees, whether held in state or in federal custody, either before or after conviction? At least one prominent scholar has answered the question affirmatively, arguing that the law created in addressing the extraordinary detention of prisoners in Guantanamo Bay is “continuous with judicial responses to the central challenges, faced daily, by governments trying to maintain peace and security and, hence, incapacitating some individuals feared likely to inflict grave harm to the social order.” This is because the criminal justice system has always had to address uncertainty about how much harm a detainee might do, whether in the context of 9/11 or of more familiar kinds of criminality and border regulation.

Put another way, criminal charges range in a wide continuum from minor crimes to terrorism. In all these cases, however, “the government must still distinguish among and classify detainees to justify why a particular subset is to be confined in more restrictive conditions than others, and for longer periods of time.” The crimes may differ, but the determinations are still the same.

The six post-9/11 cases decided by the Supreme Court have held that the Constitution requires some procedural justice for all detainees, even those held at Guantanomo Bay. Applied to pretrial detention, this conclusion signals that it is time to import some fairness and procedural justice into the bail hearing, since it is part of the same continuum of pretrial detention.

Integrating emerging 9/11 law with state and local laws governing confinement is an important task. Doing so highlights, among other things, the state’s job in addressing serious challenges in securing safety, whether locally, nationally, and world-wide. As Judith Resnik has pointed out, “Sorting the dangerous from the benign is a daunting task.” This is particularly true because neither courts nor legislatures have been able to come to any sort of consensus over the years regarding who should be detained and who may be freed.

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234 See Baradaran & McIntyre, Predicting Dangerousness, supra note __, at 37.
236 See Resnik, Detention, supra note __, at 583. Resnik points out that “As [Henry] Monaghan noted, these questions are at the core of the shifting conception of federal courts jurisprudence, once preoccupied with the ‘relationship between state and federal law’ and the sometimes ‘irritating difficulty’ of sorting between the two kinds.” Id. These issues arise with state courts as well.
237 See Resnik, Detention, supra note __, at 584.
238 See Resnik, Detention, supra note __, at 585. As Resnik notes, “Governments regularly desire to obtain information through intense interrogations aimed at preventing injuries and at apprehending wrongdoers, and governments regularly detain various persons. Courts in turn have, over the last several decades, ruled many times on the legality of detention and of confinement conditions.”
239 See Resnik, Detention, supra note __, at 584.
240 See Resnik, Detention, supra note __, at 584.
241 See Resnik, Detention, supra note __, at 587.
242 See Resnik, Detention, supra note __, at 587.
243 See Resnik, Detention, supra note __, at 588.
For example, in *Ashcroft v. Iqbal*, the defendant, a Pakistani national, was detained for almost a year in the Metropolitan Detention Center in New York, part of that time in solitary confinement, because of a claim that his identity papers were false. Iqbal was deported to Pakistan after his period of governmental detention. Iqbal sued the government for his treatment period of confinement, during which he alleged that he was subjected to cruel and inhumane conditions and denied medical assistance. The *Iqbal* Court held, among other things, that courts could limit individual accountability and civil liability for the harms imposed during detention, thereby protecting those officials who were involved in such detention programs. Although *Iqbal* is obviously a case that can be classified as a post-9/11 terrorism case, its disturbing lesson resonates for all pretrial detainees, and illustrates how the Shadowlands can extend to defendants both high and low.

Ultimately, similar problems plague both the practice of general pretrial detention and the small body of 9/11 law, including the existence of only a tiny batch of procedural remedies instead of a more robust body of constitutional constraints in response to wide-ranging complaints of abuse. The lax oversight, minimal supervision, and extreme deference to governmental decisions and jailors continue to be issues for 9/11 detainees, detained immigrants held for deportation, and those indicted defendants confined in pretrial detainment. All three are held without much procedural justice due to nebulous fears of dangerousness. All three types of experiences linger in the Shadowlands.

**B. Salerno, the 1984 Act, and the Sixth Amendment**

The problems with *Salerno* are larger than just its failure to grapple with the concept of future dangerousness. Viewed in the aftermath of the Court’s subsequent decisions in the *Apprendi-Blakely* line of cases, *Salerno*’s decision that a court may incarcerate a defendant on the basis of potential danger to the community seems to contradict the spirit of the Sixth Amendment. If, as I contend, the imposition of pretrial detention in today’s jails is a form of punishment, then the community must have some say in the matter. Although there have been numerous challenges to the 1984 Bail Reform Act, none have been based on the Sixth Amendment jury trial right. Below, I detail how and why such a challenge might be successful.

1. *Salerno* did not close the door

Most practitioners and scholars have concluded that the Supreme Court’s decision in *Salerno* pronounced the death knell for challenges to preventative detention. This is not entirely true, however. The *Salerno* Court specifically noted that it was foreclosing a *facial* challenge to the 1984 Bail Reform Act, not foreclosing all challenges for the future: “[w]e hold that, as against

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244 *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).
245 *See Iqbal*, 129 S.Ct. at 1943.
246 *See Iqbal*, 129 S.Ct. at 1942-4.
247 *See Iqbal*, 129 S.Ct. at 1942-4.
248 *See Resnik, Detention, supra note __, at 633.
249 *See Resnik, Detention, supra note __, at 635.
250 As the *Salerno* Court held, “We are unwilling to say that this congressional determination . . . on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.” *Salerno*, 481 U.S. at 754.
the facial attack mounted by these respondents, the Act fully comports with constitutional requirements.”

As such, an as-applied challenge to the 1984 Act is still entirely feasible.

The Salerno Court seemed to leave several doors open indicating its willingness to revisit its decision upholding the constitutionality of the 1984 Act. First, it began the analysis of the Act with a warning that a facial challenge to a legislative act was one of the most difficult at which to succeed, since the challenged “must establish that no set of circumstances exists under which the Act would be valid.” In other words, for the defendants to have succeeded in challenging the 1984 Act on facial grounds, they would have had to prove that the Bail Reform Act could never operate constitutionally. The Salerno Court even hinted that it might be willing to find some aspect of the 1984 Bail Reform Act unconstitutional under certain circumstances, but simply cannot do it here: “The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.” Moreover, the Salerno Court carefully carved out space for future, as-applied challenges to the Act, noting in a footnote that they “intimate[d] no view on the validity of any aspects of the Act that are not relevant to respondents’ case.” Although not precisely an invitation to bring an as-applied challenge, the Supreme Court certainly allowed for the future possibility.

2. Pretrial Detention as Punishment under the 1984 BRA

Even in its rejection of the defendants’ facial challenge, the Salerno Court carved out an exception to its holding: when pretrial detention becomes punishment. Of course, simply because a defendant is detained does not mean that he is being punished. Traditionally, we look to legislative intent to determine whether a restriction on liberty, like pretrial detention, is more like punishment than like regulation. Unless Congress intended on imposing punishment, whether a restriction on liberty is classified as punitive or regulatory depends on whether there is an alternative purpose related to the restriction, and whether this restriction seems excessive in relation to the original goal. In Salerno, the Supreme Court decided that the 1984 Act, addressed facially, had both a legitimate regulatory goal (preventing danger to the community) and that the incidents of pretrial detention was not excessive in relation to that regulatory goal.

Whether the Act’s legislative intent was regulatory or not, however, the constitutionality of the scheme is far different when the effect of pretrial detention results in punishment. The Salerno Court itself reserved the right to decide on the constitutionality of a situation where “detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.” This was particularly important in this case because as a facial challenge, Salerno only addressed theoretical pretrial detention, not actual pretrial detention as experienced by indicted defendants.

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251 Salerno, 481 U.S. at 741.
252 Salerno, 481 U.S. at 745 (emphasis added).
253 Salerno, 481 U.S. at 745.
254 Salerno, 481 U.S. at 745 n.3.
258 See Salerno, 481 U.S. at 747.
As detailed above, much of pretrial detention, whether based on fears for community safety or flight risk, has an effect virtually indistinguishable from punishment. Thus despite Salerno’s decision upholding the 1984 Act, there is nothing precluding a court finding pretrial detention unconstitutional under certain circumstances.

3. Applying the 6th Amendment to the BRA

Salerno rejected the facial challenge to the 1984 Act under both the Fifth and Eighth Amendments, but did not evaluate any Sixth Amendment claims. As such, there is nothing prohibiting an attack on Salerno’s defense of predictive dangerousness based on the argument that only a jury may impose punishment on an offender.

In Salerno, the Court first tackled the Fifth Amendment claim, where the defendants argued that the Act violated the substantive due process clause because the pretrial detention it authorized constituted impermissible punishment.259 The Supreme Court rejected this argument, focusing on the regulatory nature of the Act.260 Next the Court addressed the Eighth Amendment argument, where the defendants argued that the Act violated the Excessive Bail Clause.261 Here, the defendants argued that the Excessive Bail Clause granted them a right to bail calculated solely upon considerations of flight.262 The Salerno Court also rejected this argument, holding that "nothing in the text of the Bail Clause limits permissible Government consideration solely to questions of flight."263

Salerno, however, did not address the Sixth Amendment implications for the 1984 Act, as the defendants did not raise the issue on appeal. Additionally, a Sixth Amendment claim at the time of the Salerno decision, in 1986, would have been fruitless. Now, however, after the Apprendi-Blakely line of cases, an application of the current understanding of the Sixth Amendment jury trial right, requiring that the community be the only arbiter of punishment for an offender, makes more sense.

Although not addressing the issue, Salerno did leave room for the application of our more recent understanding of the Sixth Amendment. First, in its discussion of the due process clause challenge, the Salerno Court did note that even the government had not argued that pretrial detention could be upheld if it were punishment.264 Second, as noted above, the Court carved out an exception for cases where detention might become excessively prolonged, thereby converting to punishment.265

In its discussion of the Eighth Amendment excessive punishment challenge, the Salerno Court was careful to note that its decision did not implicate the question of whether the

259 See Salerno, 481 U.S. at 747.
260 See Salerno, 481 U.S. at 747.
261 See Salerno, 481 U.S. at 753.
262 See Salerno, 481 U.S. at 753.
263 Salerno, 481 U.S. at 755.
264 See Salerno, 481 U.S. at 748.
265 See Salerno, 481 U.S. at 749 n.4.
Excessive Bail Clause affects the legislative power to delineate who might be eligible for bail.266 In this way, the Court left room to determine whether and how pretrial detention flight can be punishment, and how. It is this space that I will explore through the dimensions of the Sixth Amendment community jury trial right.

C. Punishment, Community Rights and Pre-Trial Detention

In Blakely, the Supreme Court held that the jury is the only body that can find facts that increase the maximum punishment for an offender. Put another way, Blakely contended that a criminal offender must have a jury, or the local community, determine all aspects of punishment.267 This newfound understanding of the Sixth Amendment jury trial right applies to all aspects of our criminal justice system, including bail and jail. In fact, all of our constitutional guarantees should apply with more force to the pretrial stage, since at this point the offender still maintains the presumption of innocence. Yet the spirit of the Sixth Amendment jury trial right has not been applied to the pretrial detention determination stage, until now.

1. Future dangerousness in adversary context

When we apply the spirit of the Sixth Amendment jury trial right to the pretrial detention hearing, many problems with the bail procedure are illuminated. One such problem is the lack of adversary context when determining the future dangerousness of an indicted offender. Since the adversarial process is crucial for the proper community understanding and imposition of punishment, the lack of it raises equity and possibly even constitutional concerns.

Although the 1984 Bail Reform Act does permit a federal indicted defendant the right to legal assistance, the right to cross-examine prosecution witnesses, and the right to testify and present witnesses in her own defense,268 the accused does not have a right to compulsory process.269 Indeed, evidence submitted by the prosecutor may be submitted by proffer.270 In the states, however, the amount of disclosure that is required varies widely; some districts comport with Brady requirements, and some do not. Moreover, the lack of the right to appointed counsel at the pretrial detention stage means that the vast majority of defendants do not have any legal representation.

The failure to require full disclosure of evidence by the prosecutor at the pretrial detention stage means that indicted defendants often cannot challenge the evidence presented by the government to establish the accused’s future dangerousness. Although the Supreme Court has held that the pretrial detention hearing does not generally require “the full panoply of adversarial safeguards,” the establishment of potential dangerousness by the government is such a questionable area that perhaps this is one aspect of the hearing that the adversary process should apply. Especially since the standard of evidence required from the prosecutor at this stage is

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266 See Salerno, 481 U.S. at 755.
269 See Kitai-Sangero, Due Process at the Pretrial Detention Stage, supra note __, at 1.
270 See Kitai-Sangero, Due Process at the Pretrial Detention Stage, supra note __, at 1.
relatively low—only probable cause—it seems only fair that the accused get a greater disclosure of evidence when she is subject to potential detention based on dangerousness.

More and better disclosure of prosecutorial evidence is important for the offender to help challenge the request for pretrial detention. If the proceeding is one-sided due to the defense’s lack of knowledge of what the evidence is against him, the defendant cannot properly challenge the detention request, meaningfully participate in the hearing, or refute any secret evidence.

This lack of adversary context and one-sided nature of the detention hearing implicates the spirit of the Sixth Amendment jury trial right as well. If, as the Apprendi-Blakely line of cases instructs us, the community is supposed to decide all potential punishments for an offender after observing the adjudicatory process, then there should be some sort of adversarial process during the detention hearing. Although a full adversarial procedure would not be feasible, a detention hearing should provide a few more procedural safeguards. This at the very least should include the requirement of a minimum proffer of prosecutorial evidence at the hearing, proved by probable cause, in any case where the indicted defendant might potentially be detained due to community safety concerns.

2. The community as only arbiter of punishment

Of even more concern to the application of the Sixth Amendment jury trial right is the belief that the community should be the primary arbiter of punishment for all offenders. The guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury” promises a criminal offender that “all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.” This interpretation of the Sixth Amendment jury trial right ultimately became law in Blakely.

This animating principle behind Blakely—that the community should determine all punishment to be meted out to the defendant—has import for not just the jury trial, but for other areas of criminal procedure too. Blakely applied first and foremost to sentencing, but there is no reason why it should not be applied to the pretrial detention hearing as well.

Recent conditions in pretrial detention centers have rendered any sort of time in them a form of punishment, not to mention all the negative externalities that flow from a pre-trial loss of liberty. Not only is this punishment imposed before a determination of guilt, but it is also imposed by a judge, not a jury—a violation of the Sixth Amendment jury trial right to determine all punishment for a criminal offender. The question becomes, then, under what circumstances does the judicial determination of pretrial detention turn into an imposition of punishment? When denial of bail results in an imposition of punishment, this might mean that the community should play a role, particularly in determinations of its own safety.

271 See Kitai-Sangero, Due Process at the Pretrial Detention Stage, supra note __, at 7.
272 See Kitai-Sangero, Due Process at the Pretrial Detention Stage, supra note __, at 7.
273 See Kitai-Sangero, Due Process at the Pretrial Detention Stage, supra note __, at 8.
274 Apprendi, 530 U.S. at 499 (Scalia, J., concurring) (quoting Breyer, J.).
3. Community should decide danger to itself

Considering that a very popular aspect of pretrial detention confines offenders before trial due to their supposed threat to community safety, it is ironic that this determination currently has no community imprimatur whatsoever. Surely members of the community would be more familiar with who may pose danger to their own surroundings than would a line prosecutor, who often has other concerns on his or her mind when determining whether an indicted offender may post bail before trial, or a judge, who is not always part of the community she governs, and may be more interested in uniformity than individual justice.

It is true that the prosecutor is both technically and legally the public’s representative.\textsuperscript{276} The prosecutor’s function as the people’s representative, however, can subsumed by a gradual inclination to align with the government and a desire to achieve a positive win-loss record. Too often, prosecutors have “their own agendas, both personal and administrative.”\textsuperscript{277} For prosecutors, the concepts of “public interest” or “justice” can be too diffuse and elastic to constrain them. A prosecutor’s simultaneous representation of both the state and the people can get submersed in the everyday details of doing her job, particularly when the indicted offender is a high-profile defendant and there is considerable media scrutiny and pressure on the case.

Allowing some slice of the community to help determine whether the accused is truly a threat to community safety, however, makes both logical and ethical sense. First, the community often knows the offender far better than either the prosecutor or the judge, especially in a state or local forum. Despite the persistent fear of crimes perpetuated by strangers, most crime is committed by locals within their community. As such, who better than a representative of a community to help determine whether the accused might pose a danger if granted bail?

Additionally, granting the community power to determine whether pretrial detention should be imposed would also foster a feeling of participation and investment in the criminal justice system, something that many members of the public lack. Being given the opportunity to make real decisions on community safety would hopefully make these citizens, and by association, their families and friends, feel far more connected to how the criminal justice system works. Put another way, instead of envisioning the criminal justice system as a faceless, remote entity, the local public, through their participation in the pretrial detention hearing, would realize that they are part of the justice system as well. This would generally promote the legitimacy and public confidence in the justice system, something that has been lacking of late.

Finally, having the community become involved with pretrial detention determinations will result in the public’s increased understanding of the criminal justice system. Particularly with high-profile cases, the current non-transparent procedures determining pretrial detention can create both disappointment and a sense of helplessness in the local community. For example, when disgraced financier Bernie Madoff was granted bail after his confession to the police, the

\textsuperscript{276} As the Supreme Court has noted, the prosecution’s interest “is not that it shall win a case, but that justice shall be done.” Berger v. United States, 295 U.S. 78, 88 (1935).

local and international public was angered and dismayed.\textsuperscript{278} The public’s integration into the pretrial detention hearing through participation in the procedure can eliminate some of the concerns inherent in imposing pretrial detention or granting bail by exposing the public to the actual discussion and debate over individual bail determinations.

4. Members of community better predictors of danger

Having an informed segment of the community take part in pretrial detention determinations will also help the accuracy of the “future dangerousness” predictions. Currently, judges tend to use their own intuition as to how dangerous an indicted offender might be, or rely on a prosecutor’s statement of disrupted community safety. This can result in an over-prediction of future dangerousness. On the prosecutor’s part, naturally he or she would have an interest in the defendant remaining in custody as long as possible, both to ensure cooperation and to make sure no further crimes happen which might reflect negatively on the prosecutor’s office itself.

Judges also have a tendency to be biased in favor of predicting violence, in part because they will be responsible if they erroneously release a violent individual.\textsuperscript{279} Additionally, judges, like all experts who routinely make these types of dangerousness determinations, may also have a tendency to generalize from experiences with past offenders on bases that have few, if any, relationships to future violence.\textsuperscript{280}

Members of the community, on the other hand, lack these pressures and biases. First, even if they participate in some sort of pretrial detention hearing, they would not bear any ultimate responsibility if the indicted offender were to commit another crime before trial. Equally important, the small cross-section of the public that would be involved in determining whether the accused obtained bail would not have the aforementioned tendency to generalize from prior experiences, allowing them to make the determination of pretrial detention from a fresh perspective.

5. Attacking the problems of race & gender in pretrial detention

Like the rest of the criminal justice system, the pretrial detention procedure is rife with racial and gender-based disparities. First, people of color are disproportionately confined in jail,

\textsuperscript{278} See Madoff debate: Should he be free on bail?, January 7, 2009, MSNBC.COM (discussing how investors, editorial writers, and the general public expressed outrage regarding the granting of Madoff’s bail, while prosecutors argued Madoff should be thrown behind bars because he could flee or hide his assets), located at: http://www.msnbc.msn.com/id/28540171/ns/business-us_business/t/madoff-debate-should-he-be-free-bail/. See also Larry Neumeister, Bernie Madoff Escapes Jail, Judge Declines To Revoke Bail, January 12, 2009, THE HUFFINGTON POST (discussing how “There is a thirst for blood that transcends just those who have been victimized”), located at: http://www.huffingtonpost.com/2009/01/12/bernie-madoff-jail-hearin_n_157049.html


whether for pretrial detention or other reasons. 281 Recent analysis has shown that both the race and gender of an offender can have a significant effect on the likelihood of pretrial detention. 282

For example, in federal cases, an offender’s sex affected pretrial custody for both black and white offenders; pretrial detention was less likely for both black and white females than for black males. 283 Likewise, the likelihood of pretrial custody was substantially higher for black male offenders than for other offenders—twice those for white males, and over three times more likely than for black or white females. 284 The author of the study has suggested that some of this may be due to judicial stereotyping of black or male defendants as more dangerous than their white or female counterparts, particularly when dealing with drug crimes. 285 Finally, Latinos are most likely of all races to suffer the negative consequences of pretrial detention: they are most likely to have to pay bail (as opposed to being released on their own recognizance); courts tend to set them the highest bail amounts; they are least likely to be able to pay; and are by far the least likely to be released prior to trial. 286

Although there is no guarantee that the local community or general public would hold less prejudicial attitudes toward defendants based on race or gender, in some communities, the presence of community members could make a difference in terms of expanding diversity and representation. Although strides certainly have been made to diversify the bar and the bench, the fact remains that magistrates and trial judges are primarily white 287 and defendants are often minorities. 288 In certain districts, such as the Bronx or East Los Angeles, the presence of a few community members would make some diversity that much more likely.

Additionally, as discussed above, the presence of representatives from historically minority communities would help make the ultimate decision to either grant bail or impose pretrial detention more understandable to the local public as well as explain how the pretrial detention decision might impact the community. Since many minority communities tend to feel alienated or distanced from the criminal justice system, the incorporation of some public representatives into the bail determination hearing would help reduce some of this distance.

281 See Petteruti & Walsh, Jailing Communities, supra note __, at 4.
282 See Caasia Spohn, Race, Sex and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage, 57 U. KAN. L. REV. 879, 888 (2009). The data analyzed in this article showed that race and gender affected pretrial detention determinations even after excluding the offender’s dangerousness, community ties, financial resources, criminal history, and crime seriousness. Id.
283 See Spohn, Race, Sex and Pretrial Detention in the Federal Court, supra note __, at 891.
284 See Spohn, Race, Sex and Pretrial Detention in the Federal Court, supra note __, at 895-96.
286 See Petteruti & Walsh, Jailing Communities, supra note __, at 4.
287 See Am. Judicature Soc’y, Judicial Selection in the States—Diversity of the Bench, located at:
V. Proposal: Reform and Revision

A. Reform Bail Bondsmen/surety bond system

One problem that plagues several states is the problem of the commercial bondsmen. Some states have no commercial bondsmen at all, which results in serious problems for the poor, who often cannot afford even the small amount comprising their bail. Other states have bail bondsmen who do not provide loans for small bail amounts. There are a couple of ways to solve this problem.

First, states and counties could expand and better fund their pretrial release programs. Pretrial release programs often allow non-violent or low-level offenders out on bail with supervision, using GPS, ankle bracelets, and monitoring.\(^{289}\) Allowing indicted offenders out on bail with the help of electronic monitoring permits them to save their jobs, pay their bills, keep their homes and see their families.\(^{290}\) This would not only prevent non-violent indicted offenders from suffering the dangers and indignities of pretrial detention, but also save counties and states thousands of dollars in incarceration costs.

However, pretrial release programs across the country are all too often fighting a futile battle with bail bond companies trying to either limit these types of programs or completely shut them down.\(^{291}\) As one pretrial release program official notes, commercial bail bondsmen lobby to keep these programs as miniscule as possible, so that they don’t siphon off any paying customers, even if that means thousands of inmates wait in jail at taxpayer expense.\(^{292}\)

Thus one way to improve the current pretrial detention system is to increase local and county pretrial supervision programs. Although these services do cost money, in the long term they end up saving far more taxpayer dollars, as it is far more expensive to imprison those indicted offenders waiting for trial than to supervise them electronically at home.\(^{293}\)

B. Revise Bail Hearing Procedure

Some of ills of our criminal justice systems can be traced to the dissociation between our local communities and their ability to effect change on the system. This problem of insufficient local control is a serious one, pervading all aspects of criminal justice. As Bill Stuntz persuasively argued,

To the suburban voters, state legislators, and state and federal appellate judges whose decisions shape policing and punishment on city streets, criminal justice policies are mostly political symbols or legal abstractions, not questions the answers to which


\(^{291}\) See Sullivan, *Bail Burden, supra note __*, at id.

\(^{292}\) See Sullivan, *Bail Burden, supra note __*, at id.

\(^{293}\) See Sullivan, *Bondsman Lobby Targets Pretrial Release Programs, supra note __*, at id.
define neighborhood life. Decisionmakers who neither reap the benefit of good decisions nor bear the cost of bad ones tend to make bad ones. Those sad propositions explain much of the inequality in American criminal justice.394

This is particularly true in pretrial detention hearings, where the question of whether an indicted defendant is released or not before his trial often rests on decisions made by remote legislators or senior district attorneys. The local community has little or no say in the matter.

But this result is neither preordained nor necessary. One way to get the community more involved the criminal justice process—thus making them feeling more invested in the system—is to invite their participation in the pretrial detention hearing, allowing them to give their opinion on whether the suspect is a true threat to community safety.

Having the community actually involved in determining what would best serve community safety, and possibly being more lenient regarding the pretrial release of indicted, low-level offenders is not such a novel idea. Various scholars have noted in the past 10 years the social consequences of mass incarceration: by incarcerating too many non-violent criminals, either before or after conviction, not only are poor and minority communities increasingly harmed by the massive scale of incarceration, but many of these nonviolent offenders do become dangerous after being exposed to violent criminals in jail or prison.395 Thus the short-term decision to incarcerate pretrial offenders for purposes of “community safety” ends up backfiring on a number of levels in the long run.

However, incorporating the community into the bail hearing would have many positive results. These positive aspects include the public’s increased understanding of the criminal justice system, a restoration of criminal adjudication’s educative function, and a sense of investment and trust for the local community.

First, and most basically, the current bail hearing process—like so much else in the criminal justice system—functions out of sight from the average citizen. The local public has a meaningful interest in uncovering the procedures involved in denying or granting bail, especially since so many taxpayer dollars are being used to incarcerate those who have not yet been determined guilty.

Moreover, enhancing local, popular participation within an existing criminal justice institution396 such as the bail hearing combines the positives of community involvement without requiring new courts or immense change in the existing system. Additionally, through citizen involvement, the “cynicism and contempt” for the criminal justice system that is invariably created by more secret proceedings will be minimized.397 This is especially important for

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396 See Adriaan Lanni, The Future of Community Justice, supra note __, at 363.
communities that have felt distanced and isolated by the criminal justice system; by allowing these communities to determine whether one of their own is “safe” enough to release pretrial, the local public may feel some investment or purchase into the workings of the system.

As Judith Resnik has powerfully argued, “[t]hird-party scrutiny illuminates the treatment of suspects, detainees, prisoners, and immigrants, all reliant on government for their well-being.”298 Allowing the community to observe and participate in the routine preventative detention hearing of a domestic defendant, then, would vindicate a number of rights, including, of course, the Sixth Amendment’s jury trial right. Resnik has made a similar suggestion concerning the imposition of detention on various detainees or prisoners, proposing a more audience role for the public.299 Her comment, however, applies equally to both her proposal and mine: “law ought to oblige open decisionmaking when confinement is at stake.”300

This kind of open decisionmaking—and open participation by the local public—is most likely to take place in the state court system, which processes a vast percentage of pretrial detainees in the country. As Resnik notes, “The last few decades have brought attention to state courts as a font of constitutional jurisprudence that can be more rights-protective than federal precepts.”301 Because of this, it would be easy enough to draw from the county jury rolls to create a body of local fact-finders for bail hearings, who would be selected in a manner similar to those citizens selected for the grand jury. These “bail juries” could sit for a week or two at a time, focusing their decisions on the community safety issue: in other words, whether the indicted defendants brought before the court would be eligible for bail. If the “bail jury” deemed the defendant safe for release out into the community, then barring any true evidence of danger to the public, he or she would be released either on their own recognizance or electronically monitored until trial or guilty plea date.

C. Critiques and Problems

The major possible critiques of a bail jury are two-fold. First is one of history: the question of bail has always been left to the court, and not the community. Second is the cluster of concerns centering around the implementation of a bail jury, its potential costs, complexity, and delay. I address both these concerns below.

298 Resnik, Detention, supra note __, at 670. Although Resnik is primarily envisioning courts as this public oversight, she admits to a possible role for other third parties. As she notes, speaking of the general public’s right of audience during these impositions of detention, “[e]mpowered, participatory audiences can therefore see and then debate what legal parameters ought to govern.” See id.
299 Resnik, Detention, supra note __, at 671. As she argues, “law could require that some members of the public (subject to appropriate security screening) be permitted to observe decisions resulting in the long-term detention of persons, whether alleged to be terrorists, illicit migrants, or misbehaving prisoners.”
300 Resnik, Detention, supra note __, at 671. This is particularly true when, as now, the Court has “repeatedly insulated the federal judiciary from addressing the merits to decide when an individual is wrongfully convicted or detained in intolerable conditions.” Id. at 681.
301 Resnik, Detention, supra note __, at 682.
1. Lack of Historical Precedent

Since the practice of granting bail began, the traditional arbiter of detention or release has been the court. However, as discussed infra Part II, the decision of whether to detain a defendant pending trial was always left to the community—literally, as a friend or neighbor had to stand surety for the defendant and house him or her in their own residence.\textsuperscript{302} The various rules that developed regarding bail were, as noted above, aimed more at limiting judicial discretion than anything else—always a concern in both 17\textsuperscript{th}-century England and colonial America. Thus even in the earliest of bail systems, the community’s voice was heard.

Additionally, pretrial detention as originally configured was based only on risk of flight. There was no incarceration, at a neighbor’s house or in a local jail, ever predicated on future dangerousness, or community safety. Thus there is no historical precedent limiting the bail decision solely to the judge. On the contrary, returning some power to the community would be a return to the original bail granting practice, upon which our Constitution is based.

Moreover, the use of a bail jury meshes neatly with the recent interest in local control over local environments.\textsuperscript{303} Various advocates of localism argue that “local governments are more responsive to the specific needs of unique communities and that local institutions can provide better and increased services.”\textsuperscript{304} These arguments parallel the one that can be made for the bail jury—that the local input is critical in implementing our criminal justice system, particularly for issues of community safety.

2. Impracticality/Cost/Delays

A second, potentially more serious critique of the bail jury is its impracticality, both in terms of cost and delay. In these fiscally stringent times, any procedure that would add to the cost structure of the criminal justice process is viewed dubiously at best. And incorporating a bail jury into the pretrial detention hearing would potentially increase costs; although the bail jury could be drawn from the same rolls as the grand jury, the more citizens drawn, the more money needed to fund per diems, reimburse transportation costs, and pay court staff to organize such juries.

As noted above, however, the potential amount of savings that a properly working bail jury would provide could be vast. Even a thirty percent reduction in those incarcerated before trial could save the state thousands of dollars. And while there are no guarantees that a bail jury would be more lenient on matters of pretrial release than the traditional judicial arbiter, it is likely that a more informed body of decisionmakers—i.e., a cross-section of the community—might not believe that every indicted offender is a threat to public safety.

\textsuperscript{302} See infra Part II, Section 1.

\textsuperscript{303} See Richard C. Schragger, The Limits of Localism, 100 Mich. L. Rev. 371, 380 (2001). Schragger points out that this new localism has arisen as a response to urban disorder and the problems of urban governance. See id.

\textsuperscript{304} See Schragger, The Limits of Localism, supra note __, at 381.
As for delays, it is possible that the incorporation of the bail jury would slow down the pretrial detention somewhat. But that is not necessarily a bad thing. Part of the problem with our current bail hearings is the speed at which these critical determinations happen. Since there is no right to appointed counsel at a bail hearing, often they are very fast, as the prosecutor presents evidence regarding defendant’s incarceration and the court makes a decision. Reducing the haste of the process might also ensure that both the court and the prosecutor take the process more seriously; since the bail jury will not be criminal justice insiders, they will likely focus on each individual case more intensely, and requiring the prosecutor to more fully explain her reasoning for denying bail. The court, too, may spend more time on the decision, since it will need to incorporate the bail jury’s decision into its own. Thus the delay in imposing pretrial detention or granting bail might be a positive one, opening up the procedure to some much needed sunshine and scrutiny.

Although the bail jury does not tidily solve all of the problems of our framework of bail and jail, it provides partial solution to some of the glaring inequities of pretrial detention.

V. Conclusion

Reform is desperately needed in the realm of pretrial detention to remove it from the Shadowlands of justice. As Resnik has persuasively argued, in protecting and preserving rights, “Article III judges—the exemplars of independent jurists—can never be enough.” This is equally true for state court judges and magistrates, many of whom are at the mercy of re-election cycles, overwhelming caseloads, and restrictive statutes.

Although there is no one perfect solution, the use of a bail jury, combined with increasing monitored pretrial release would begin to solve both constitutional and procedural problems. First, the bail jury would help ameliorate the Sixth Amendment issue, allowing the community a change to help decide any pretrial punishment imposed on indicted offenders. Additionally, giving local citizens a say in who is released back into their community has a practical aspect to it; instead of having the prosecutor and the judge, both representatives of the government, be the only ones to determine community safety, it makes sense to have some input from the very community that the government is trying to protect. Second, the addition of increased electronic monitoring of those offenders released before trial would be a relatively easy, cost-effective way to permit those accused who either cannot afford to make bail or about whom the community or judge still have some reservations.

As both a practical measure and a fundamental matter of constitutional fidelity, the people should be involved in the machinations of criminal punishment. This includes the procedures that happen before trial. Our current system of pretrial detention lies in shambles, incarcerating those not yet convicted in punitive conditions often far worse than those existing in prisons. Allowing the community a say in the matter and broadening the ambit of those who can be released pretrial is one way to shine light into the Shadowlands.

305 Resnik, Detention, supra note __, at 685. As Resnik argues, “[As] the constitutional law of detention makes painfully clear, if American law is to cherish human dignity, it will be because more than life-tenured judges make it do so.” See id. at 685.