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“Liberty and Justice for All”: Equalizing Pretrial Detention for Wealthy and Indigent Defendants

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Note

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CAIT BARRETT

Pretrial detention is affected by many factors. One of those is wealth. While the ability to post bail is a major issue in state systems, the federal system poses a different problem: the ability to pay for mitigating conditions. This has the potential to create a disparate impact between wealthy defendants—who can afford conditions that mitigate findings of flight or danger—and indigent defendants who cannot. There are two solutions: detaining wealthy defendants to avoid disparate release or releasing indigent defendants to avoid disparate detention. This Note argues for the latter. It does so by focusing on the requirement for courts under the Bail Reform Act to release defendants with the “least restrictive” conditions. A framework for release is created by reading “least restrictive” through various lenses. First, reading “least restrictive” through a purposeful lens allows it to become quite expansive, such that almost any set of conditions, as long as they mitigate the necessary findings, allow for release. Second, a practical approach allows “least restrictive” to be read in the context of the Bail Reform Act’s language and mandate to argue for a broad range of conditions. Third, “least restrictive,” read in light of societal considerations, including who bears the burden of detention, opens up more pathways for release and demonstrates the importance of leveling up release instead of leveling down detention. The overall goal of this Note is to provide various analyses to help inform bail decisionmakers’ considerations and to use this new facet of bail reform to advocate for indigent defendants.

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“Liberty and Justice for All”: Equalizing Pretrial Detention for Wealthy and Indigent Defendants

CAIT BARRETT*

INTRODUCTION

Pretrial detention is becoming an increasing focus in scholarship across the United States. As prison reform and mass incarceration dialogues carry on, pretrial detention and bail reform play an important role, in part because “[p]retrial detainees make up more than 70 percent of the U.S. jail population – approximately 536,000 people,”¹ and 75% of federal defendants in prison are pretrial detainees, costing the federal government \$1.5 billion per year.² Pretrial bail reform exemplifies the need for fairness and equity in the criminal justice system as individuals are detained without a conviction. In that vein, a large part of the current scholarship focuses on the racial and wealth disparities present at the state-level through the practice of money bail.³ Modern pretrial scholarship also focuses on the fairness and

* J.D., University of Connecticut School of Law; B.A., Johns Hopkins University. I would like to thank Professor Jamelia Morgan for advising me throughout this process; this Note would not have gone far without her calmness and wisdom. I would also like to thank Professor Steven Wilf for his substantive guidance on my argument and for graciously plying me with books. A special thank you to the Honorable Robert A. Richardson and John Fries for giving me the job and experience that inspired this Note, both of whom have been so supportive throughout my law school career. I would also like to thank my friends for supporting me during this writing process, including reading drafts. A final thank you to my parents and brother for giving me the opportunity and encouragement to pursue all of my passions.

¹ Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (Dec. 10, 2019), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

² Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 FED. PROB. 13, 13 (2018).

³ See LINDSEY DEVERS, BAIL DECISIONMAKING: RESEARCH SUMMARY, BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST. 2–3 (2011), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BailDecisionmakingResearchSummary.pdf> (citations omitted) (“[T]he true source of bias in bail decisions might be financial rather than demographic. Although income and social disadvantage have correlated with pretrial release, many of the characteristics overlap with those stereotypes associated with race and ethnicity. Minority populations share many of the same social problems, such as poverty, unemployment, greater numbers of single heads of household, lower levels of education, and increased opportunity to commit crime. . . . It has also been found that bail decisionmakers are less likely to give black suspects the same ‘benefit of the doubt’ they give white suspects. Black defendants are less likely to be released from pretrial detention than are white defendants. . . . Hispanics are more likely to be detained than are both white and black suspects.”). See also Application for Leave to File Brief *Amici Curiae* and Proposed Brief of *Amici Curiae* National Law Professors of Criminal, Procedural, and Constitutional Law in Support of Respondent at 15, *In re Humphrey*, No. S247278, 2018 WL 5465210 (Cal. Oct. 18, 2018) (asking the court to affirm the lower court’s holding that “[w]hen the government proposes to incarcerate a person before trial, it must provide thorough justification, whether the mechanism of detention is a transparent detention order or its functional equivalent, the imposition of unaffordable money bail” (emphasis omitted)).

equity of risk assessment of defendants at both the state and federal level.⁴ And because pretrial detention is a liminal area, the constitutionality and legality of certain practices are oft questioned.⁵ It is against this backdrop that a new⁶ problem in pretrial detention emerges.

In August 2019, the United States Court of Appeals for the Second Circuit released a written opinion in *United States v. Boustani*,⁷ where the court explained its affirmance of an order of detention for a wealthy defendant issued in May 2019. At the center of the court's analysis was its desire to prevent a "two-tiered bail system,"⁸ where wealthy defendants are released because they can afford conditions that mitigate findings of flight risk and danger to the community, while indigent defendants who cannot afford the same conditions are detained.

The idea of allowing wealthy defendants to escape to a gilded cage while indigent defendants, releasable but for their wealth, are sent to detention centers, potentially in another state from where they reside and are being charged, seems fundamentally unfair. But the Bail Reform Act mandates release when conditions mitigate any findings of flight risk or danger to the community. To read it any other way would be to ignore the statute's clear directive. So, how can the Bail Reform Act, in light of this requirement, be read to equalize release between wealthy and indigent defendants?

This Note seeks to answer that question. This Note will discuss the gravity of pretrial detention and the effects on individuals, particularly in

⁴ See Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 502–03 (2012) (proposing a model for release focusing on the release "of older defendants, defendants with clean records, and defendants charged with fraud and public-order offenses" based on an empirical study of factors considered by judges in determining the risk of violent re-offense during release); Kristin Bechtel, Alexander M. Holsinger, Christopher T. Lowenkamp & Madeline J. Warren, *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 AM. J. CRIM. JUST. 443, 446 (2017) ("Due to financial and resource constraints, the majority of jurisdictions still do not have an objective and standardized pretrial risk assessment instrument available to inform the release decision. Nonetheless, the objective use of actuarial risk assessments at any stage of justice decision making constitutes a 'best practice,' and there may be consequences for not developing or adopting a pretrial risk tool."); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 518–20 (2018) (challenging the assumption that defendants are inherently more dangerous than non-defendant individuals and how that affects the imposition of conditions and detention); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218, 2226 (2019) (demonstrating that "disparities in classification will translate in disparities in outcomes" when utilizing algorithmic risk assessment tools); see generally Ngozi Okidegbe, *The Democratizing Potential of Algorithms?*, 53 CONN. L. REV. (forthcoming 2021) (discussing how pretrial risk assessment algorithms are racially exclusive).

⁵ For just one of many examples of this liminality, see Angelina N. McDonald, *In Search of a Standard of Review: Decisions to Forcibly Medicate Pre-Trial Detainees in Light of Riggins v. Nevada*, 72 U. CIN. L. REV. 285, 286, 295–96 (2003) (noting that *Riggins*, a case where a defendant was ordered to continue Mellaril—an antipsychotic drug—during trial involuntarily, "does not provide a standard by which to review the forced medication of pre-trial detainees, particularly those that have not been proven a danger to themselves or others, and that the decision to forcibly medicate both dangerous and non-dangerous pre-trial detainees should be reviewed under strict scrutiny").

⁶ New in the sense that the same problems discussed above are framed in a different light, raising novel concerns and arguments about old issues.

⁷ 932 F.3d 79 (*Boustani II*) (2d Cir. 2019).

⁸ *Id.* at 82.

light of the presumption of innocence. Using this backdrop, this Note will argue that detaining wealthy individuals who can afford certain conditions to avoid disparate treatment is actually a detriment to indigent defendants. By leveling down, more defendants are detained in contravention of the original purpose of the Bail Reform Act. Instead, this Note will explore the language of the Bail Reform Act to argue for a level up to allow more individuals to be released, regardless of wealth. One way in which this Note will engage with the idea of release and detention is by using Jeffrey Epstein's detention as a case study.⁹ His case exemplifies the tension within the *Boustani II* opinion¹⁰ and serves as a starting point for what this change in bail reform could look like.¹¹

In order to do so, this Note will utilize language within the Bail Reform Act to argue for an expansion of release. This Note will explore several interpretations of the term "least restrictive" in § 3142(c)(1)(B) of the Bail Reform Act. These different approaches all lead to the same result: utilizing the flexibility of the term in order to strike back at the inequity within the pretrial justice system. First, this Note will read "least restrictive" together with the purpose of the Bail Reform Act to argue for release of both wealthy and indigent defendants.¹² Next, this Note will argue for a practical reading of the term "least restrictive," especially in the age of "e-carceration."¹³ Finally, this Note will look at "least restrictive" in a larger societal context and with emphasis on the important role that federal bail reform plays in the criminal justice system.

These arguments create a return to the presumption of release embedded within the Bail Reform Act. There are nearly 500,000 pretrial individuals in

⁹ There are, of course, defendants similar to Epstein who have been released. A recent notable case is Fotis Dulos, a real estate developer in Connecticut arrested and charged with capital murder, murder, and kidnapping. He was released on a \$6 million bond. He then committed suicide, stating in his suicide note that he refused to spend another minute in jail despite being innocent. Dulos's case is an important foil to Epstein's. Juxtaposing these cases highlights that a defendant's release or detention does not always ensure a trial, or justice. This serves as an important reminder that pretrial detention is not a component of getting justice; it reminds us that pretrial detention is administrative and does not always do what it is designed to do: ensure appearance at trial and minimize harm to the community. For more information on the Fotis Dulos case, see Emily Shapiro & Aaron Katersky, *Fotis Dulos Arrested for Murder of Estranged Wife Jennifer Dulos*, ABC NEWS (Jan. 7, 2020, 4:36 PM), <https://abcnews.go.com/US/fotis-dulos-arrested-murder-case-missing-connecticut-mom/story?id=68116764>; Emily Shapiro, *Fotis Dulos Released on Bond in Jennifer Dulos Murder Case*, ABC NEWS (Jan. 9, 2020, 12:56 PM), <https://abcnews.go.com/US/fotis-dulos-released-bond-jennifer-dulos-murder-case/story?id=68168186>; Mola Lenghi, *Fotis Dulos Denies Killing Estranged Wife in Suicide Note*, CBS NEWS, (Feb. 1, 2020, 7:36 PM) <https://www.cbsnews.com/news/fotis-dulos-news-ct-man-denies-killing-estranged-wife-jennifer-dulos-in-suicide-note-defends-michelle-troconis/>.

¹⁰ It is arguably the entire reason for the *Boustani II* opinion. See *infra* pp. 482–85.

¹¹ This Note is not advocating that Epstein should have been released; rather that the bail conditions that he proposed, and their potential mitigating factors, can serve as examples for the future.

¹² 18 U.S.C. § 3142(c)(1)(B) (2018).

¹³ See *infra* Part IV.

United States jails each day,¹⁴ but drafting notes reflect that the Bail Reform Act was supposed to *decrease* the amount of pretrial detainees favoring release.¹⁵ There is a rebuttable presumption for detention only for “a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons.”¹⁶ But even this presumption for detention for certain offenses “can easily be rebutted.”¹⁷ And importantly, at this stage of the criminal trial, criminal defendants are still presumed innocent.¹⁸ For the presumption of innocence to mean anything, there *must* be a presumption of release, with detention only under specific circumstances.¹⁹ Without it, there is a risk that pretrial detention can morph into a determination of punishment without trial.²⁰ This Note reestablishes this presumption for release through a reexamination of the Bail Reform Act.

This Note will not discuss money bail.²¹ Money bail is mainly utilized within the state systems, which are not governed by the Bail Reform Act. In the federal system, the Bail Reform Act allows courts to release individuals either on personal recognizance, unsecured bonds, or forfeiture bonds,

¹⁴ *Why We Need Pretrial Reform*, PRETRIAL JUST. INST., <https://www.pretrial.org/get-involved/learn-more/why-we-need-pretrial-reform/> (last visited Nov. 8, 2019); *see also* Onyekwere, *supra* note 1.

¹⁵ *See* 18 U.S.C. § 3142(b) (authorizing release on personal recognizance “*unless* the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community”) (emphasis added). *But see* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 752 (2011) (“As intended, the 1984 Bail Reform Act was effective in increasing pretrial detention.”) [hereinafter Baradaran, *Restoring the Presumption of Innocence*]. As codified, the Bail Reform Act does not state a clear purpose either for or against release. *Infra* page 251.

¹⁶ S. REP. NO. 98-225, at 6–7 (1983).

¹⁷ James R. Marsh, *Reducing Unnecessary Detention: A Goal or Result of Pretrial Services?*, 65 FED. PROB. 16, 16 (2001). This presumption also only applies when a judicial officer finds it applies; it is not statutorily required. *Id.*

¹⁸ *See* 18 U.S.C. § 3142(j) (“Nothing in this section shall be construed as modifying or limiting the presumption of innocence.”).

¹⁹ *See* Baradaran, *Restoring the Presumption of Innocence*, *supra* note 15, at 746–54 (discussing the Bail Reform Act’s new concept of release based on community safety and allowance of guilt-based determinations).

²⁰ *See id.* at 752–54 (explaining how at least one court based its detention determination on a finding that the defendant was guilty rather than the risk of his nonappearance or danger to the community).

²¹ The Bail Reform Act specifically uses the term “release” to distinguish from money bond. *See* S. REP. NO. 98-225, *supra* note 16, at 4 (“Instead of using the term ‘bail’, this provision and other provisions in this chapter use the term ‘release’ in order to distinguish between money bond (i.e., ‘bail’) and conditional release (often referred to as ‘release on bail’).”). And the Bail Reform Act itself expressly prevents imposition of “a financial condition that results in the pretrial detention of the person.” 18 U.S.C. § 3142(c)(2). Money bail in state systems is a massive problem, leading to painful divisions between wealthy and indigent defendants. Just like the federal system, the impact of money bail goes beyond affecting the poor; it bleeds into society as a whole. For an in-depth look at the relationship between money bail and poverty, one facet of how money bail affects society, *see generally* BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INSTITUTE, *DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME* (2016), <https://www.prisonpolicy.org/reports/DetainingThePoor.pdf>.

which are only seized upon the individual's failure to appear, as well as bail bonds.²² While money can be a barrier for release at either the state or federal level, the Bail Reform Act specifically prohibits money from preventing release, unlike the state money bail systems.²³ This Note instead focuses on other barriers to release involving money that arise in the federal system, specifically the ability to pay for certain mitigating conditions, because the Bail Reform Act is here to stay.²⁴

Part I explores Jeffrey Epstein's bail package and tie decision in *United States v. Boustani*. Part II looks at the current state of the law surrounding pretrial detention. Part III briefly looks at the problem of inequity in the pretrial system. Part IV, in three subparts, provides the three different lenses, purposeful, practical, and societal, for reassessing the Bail Reform Act. The last part concludes.

I. A TWO-TIERED SYSTEM

On July 6, 2019, Jeffrey Epstein was arrested and charged with sex trafficking.²⁵ His lawyers prepared and argued a bond package, which

²² 18 U.S.C. §§ 3142(b), (c)(1)(B)(xi)–(xii).

²³ *Id.* at § 3141(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person."). See Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 77–80 (2019) (discussing the effect of parole and probation-based requirements on the ability to vote and how wealth factors into systemic disenfranchisement).

²⁴ In *United States v. Salerno*, the Supreme Court of the United States upheld the Bail Reform Act as constitutional. 481 U.S. 739 (1987). The Court, through Chief Justice Rehnquist, rejected Anthony Salerno's argument that preventative detention was unconstitutional. First, the Court held that the Bail Reform Act did not violate the Due Process Clause of the Fifth Amendment. The Court noted that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest" such that it passed a facial challenge. *Id.* at 748, 752. By framing the issue as such, the Court did not perceive detention as a form of conviction-free punishment. Second, the Court held that the Act did not violate the Excessive Bail Clause of the Eighth Amendment. It rejected an argument "that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release." *Id.* at 753. The Court held that "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight [i.e., danger to the community] . . . the Eighth Amendment does not require release on bail." *Id.* at 754–55.

This is an astonishing statement. Justice Marshall's powerful and eloquent dissent points out that under the majority's logic, *reductio ad absurdum*, Congress can justify sweeping regulations that infringe upon individual freedom by simply stating it is attempting to regulate and protect, not punish. *Id.* at 760 (Marshall, J., dissenting). While Justice Marshall's call-out of the majority's fallacy remains true, the constitutionality of the Bail Reform Act and the implications of *Salerno* are now beyond question. The current question is how to prevent Justice Marshall's horrifying regulatory state from becoming a reality.

Now, ironically, *Salerno* serves as a potential pathway to challenge state and local money bail systems; reformers challenging state and local municipal challenges can use the rhetoric and logic from *Salerno* to raise substantive due process arguments even though *Salerno* itself did not directly engage in this analysis. For more information on this use of *Salerno* and the role of the federal courts in deciding the constitutionality of state and local bail systems, see Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1104–08 (2019).

²⁵ Patricia Mazzei & William K. Rashbaum, *Jeffrey Epstein, Financier Long Accused of Molesting Minors, is Charged*, N.Y. TIMES (July 6, 2019), <https://www.nytimes.com/2019/07/06/nyregion/jeffrey-epstein-arrested-sex-trafficking.html>. Epstein was specifically charged with two counts of sex trafficking under 18 U.S.C. §§ 1591(a), (b)(2), conspiracy to commit sex trafficking, and sex trafficking of minors,

included home detention, electronic monitoring, an extradition waiver, a bond secured by Epstein's \$77 million Manhattan home, his private jet, his brother's West Palm Beach mortgage, a friend's investment interests on two properties, a grant for pretrial and government services to randomly access his house, scheduled reporting to pretrial services, a prohibition on anyone other than Epstein and his attorneys entering the home, a trustee or trustees living with him, and more.²⁶ Because Epstein's charges involved trafficking of minor victims, there was a rebuttable presumption for his detention mandated by the Bail Reform Act.²⁷

On July 18, 2019, Epstein's bail was denied.²⁸ In a detailed order, Judge Berman of the District Court for the Southern District of New York found that Epstein was both a danger to the community²⁹ and a flight risk.³⁰ Judge Berman then found that the proposed bail package was not enough to rebut the presumption of detention.³¹ Notably, the court stated that "[t]he defense bail package proposes excessive involvement of the Court in routine aspects of Mr. Epstein's proposed home confinement. This is not the Court's function."³²

For Epstein's bail package to be successful, he needed to rebut the presumptions of *both* flight and danger; rebutting one is not enough under the Bail Reform Act. The crux of Epstein's case, as noted by Judge Berman, was danger to the community prong.³³ Epstein's history and characteristics, including his vast fortune³⁴ as well as the seriousness of the offense, weighed strongly against him.

Yet there is a strong argument that Epstein's bail package mitigated his risk of flight by the required preponderance of the evidence. Epstein's package mandated: 24/7-armed security guards, electronic monitoring, a trustee in the home with him, daily check-ins with probation, cameras mounted at the front and rear entrances, a waiver of rights against

which triggered the rebuttable presumption of the Bail Reform Act. Indictment at 11–12, *United States v. Epstein*, No. 1:19-cr-00490-RMB (S.D.N.Y. July 02, 2019), ECF No. 2.

²⁶ Letter Motion at 3–4, *United States v. Epstein*, No. 1:19-cr-00490-RMB (S.D.N.Y. July 11, 2019), ECF No. 6 [hereinafter *Epstein Bail Package*].

²⁷ 18 U.S.C. § 3142(e). *See also* *Epstein Bail Package*, *supra* note 26, at 5 (explaining that the rebuttable presumption only shifts the burden of production to the defendant, with the government retaining the ultimate burden of persuasion).

²⁸ Benjamin Weiser & Ali Watkins, *Jeffrey Epstein is Denied Bail in Sex Crimes Case*, N.Y. TIMES (July 18, 2019), <https://www.nytimes.com.2019/07/18/nyregion/jeffrey-epstein-bail-hearing.html>.

²⁹ Decision & Order Remanding Defendant at 10–21, *United States v. Epstein*, No. 1:19-cr-00490-RMB (S.D.N.Y. July 18, 2019), ECF No. 32 [hereinafter *Epstein Order*].

³⁰ *Id.* at 21–28.

³¹ *Id.* at 29.

³² *Id.* at 30 (citing *United States v. Zarrab*, 15 Cr 867 (RMB), 2016 WL 3681423, at *10 (S.D.N.Y. June 16, 2016)).

³³ *Id.* at 10 (“The Court begins with ‘dangerousness’ because that concept is at the heart of this case.”); Transcript of Bail Decision hearing at 3:6–8, *United States v. Epstein*, No. 1:19-cr-00490-RMB (S.D.N.Y. July 26, 2019), ECF No. 40 (“I think it is fair to say that it is the heart of this decision, that is to say, dealing with danger to the others and to the community.”).

³⁴ His defense counsel represented his total assets to be \$559,120,954. *Epstein Order*, *supra* note 29, at 5.

extradition, requiring him to turn in his passport and restricting him from applying for another, and demobilizing all means of transportation.³⁵ Each of these conditions cuts against fears of Epstein absconding by essentially creating a private prison. Despite his vast wealth, the court-controlled aspects of this package, such as the electronic monitoring, trustee, bonds, random check-ins, and “[a]ny other condition the Court deems necessary to reasonably assure Mr. Epstein’s appearance,” together take away his power to exercise his privileges to flee.³⁶ Removing Epstein’s agency, despite his fame and fortune, arguably rebuts the presumption of flight, despite his history and characteristics and the severity of the crime.

Whether the bail package mitigates danger to the community is more difficult. While the conditions above mitigate anyone’s leaving or entering the property, there are other ways in which Epstein poses a threat to the community. As the Government points out in its motion for detention, Epstein had a history of witness intimidation.³⁷ There was nothing in the package that could reasonably prevent either Epstein or someone acting on his behalf from harassing witnesses telephonically.³⁸ This is where his bond package failed to check his agency; no condition prevented him from harassing witnesses from his home. But witness harassment remains a risk even from prison. If he were to have harassed witnesses in this case, Epstein would have likely used the exact same tactics of harassment from his home or jail.³⁹ And home detention with cameras at all entry and egress points, as well as a trustee reporting to the court, mitigated any potential harm to victims or potential targets by Epstein’s hand.

This is not to say that he should have been released; his history and characteristics, the severity of the crimes, his lack of compliance with sex offender requirements, and the presumption for detention all weigh strongly against any potential mitigating conditions. But one thing that should not, in this instance, have cut against his release was wealth. One of, if not the most, common thread in the Government’s opposition and Judge Berman’s Order was Epstein’s wealth. The court saw his wealth as opening up avenues for escape and further harm. But as Epstein’s attorneys pointed out in their motion for pretrial release, “the Bail Reform Act . . . authorizes release for

³⁵ Epstein Bail Package, *supra* note 26, at 3–4.

³⁶ *Id.* at 4.

³⁷ Letter Motion at 11, *United States v. Epstein*, No. 1:19-cr-00490-RMB (S.D.N.Y. July 12, 2019), ECF No. 11.

³⁸ The Government notes in its motion that this had happened in Epstein’s previous case. *Id.*

³⁹ Chiefly, recruiting someone else to threaten witnesses. *See* VERA INST. OF JUST., PROSECUTING WITNESS TAMPERING, BAIL JUMPING, AND BATTERING FROM BEHIND BARS 3–5 (2006), https://www.vera.org/downloads/Publications/prosecuting-witness-tampering-bail-jumping-and-battering-from-behind-bars/legacy_downloads/Prosecuting.pdf (detailing the depth and pervasiveness of witness intimidation and tampering from behind bars in domestic violence cases). *See also supra* note 38 (noting the witness harassment in Epstein’s prior case).

even wealthy defendants facing serious charges who travel and own property abroad.”⁴⁰ His attorneys have a point.⁴¹

Yet on August 1, 2019, a week after Epstein’s appeal, the Second Circuit issued *United States v. Boustani*.⁴² The decision was almost certainly targeted at Epstein; the Second Circuit had already affirmed the Eastern District of New York’s order to detain Jean Boustani, a wealthy defendant found to be a flight risk, on May 16, 2019.⁴³ The timing of the issuance of this opinion and the clear effect that it had on Epstein’s appeal indicate that the Second Circuit seemed to be preempting any arguments for wealth discrimination that would be raised on appeal.⁴⁴

Jean Boustani is “a wealthy international businessman . . . [and] a citizen of Lebanon, Antigua, and Barbuda and has no ties to the United States.”⁴⁵ He was arrested while en route to the Dominican Republic and charged “in connection with a \$ 2 billion fraud, bribery, and money laundering scheme.”⁴⁶ Before a magistrate judge, he proposed a bail application of \$2 million cash and a bond amount to be determined by the court.⁴⁷ The magistrate judge found that Boustani “failed to present credible sureties to ensure his appearance and the safety of the community,” and so he was detained.⁴⁸ Boustani subsequently appealed his decision to the district court.⁴⁹ His new bail package included: a \$20 million personal recognizance bond with \$1 million in cash, surrendering all of his and his wife’s travel documents, supervision by pretrial services, home confinement with GPS monitoring secured by Guidepost Solutions, twenty-four hour armed former or off-duty law enforcement officers with two officers per shift, limiting visitors, and a consent to use of force.⁵⁰ The court found that despite the package and Boustani’s assertion that it would be “impossible . . . to flee,”⁵¹ he was a flight risk. In part of its finding that there was no set of conditions that would reasonably assure Boustani’s appearance in court, the district court noted that “although this Defendant has vast financial resources to construct his own ‘private prison,’ the Court is not convinced ‘disparate

⁴⁰ Epstein Bail Package, *supra* note 26, at 2.

⁴¹ The Bail Reform Act does allow the courts to consider “financial resources” as part of a defendant’s history and characteristics. 18 U.S.C. § 3142(g)(3)(A).

⁴² *Boustani II*, 932 F.3d 79, 79 (2d Cir. 2019).

⁴³ *Id.* at 80.

⁴⁴ See Dan Mangan, *Jeffrey Epstein’s Long-Shot Bid to Get Bail for Child Sex Traffic Case Just Got Tougher Because of New Appeals Court Decision*, CNBC: POLITICS (Aug. 1, 2019, 4:02 PM), <https://www.cnbc.com/2019/08/01/jeffrey-epstein-bid-for-bail-in-sex-case-hurt-by-appeals-ruling.html> (discussing the effect of *Boustani II* on Epstein’s appeal).

⁴⁵ *United States v. Boustani (Boustani I)*, 356 F. Supp. 3d. 246, 249 (E.D.N.Y. 2019).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 250.

⁵¹ *Id.* at 251 (emphasis omitted).

treatment based on wealth is permissible under the Bail Reform Act.”⁵² The district court focused on what it believed would be disparate treatment between a wealthy individual who could mitigate his flight risk through conditions he paid for, including security guards, and an indigent defendant who would be detained because of an inability to pay for these mitigating conditions.⁵³

On appeal, Boustani challenged the idea that no conditions could mitigate the finding that he was a flight risk, not the actual finding that he was a flight risk.⁵⁴ In May 2019, the Second Circuit affirmed the district court by order. Two months later, and again, one week after Epstein’s appeal of his detention, the Second Circuit issued a full opinion “to explain that decision and to clarify the circumstances under which the Bail Reform Act permits a district court to release a defendant pending trial pursuant to a condition under which the defendant would pay for private armed security guards.”⁵⁵ The Second Circuit explicitly rejected the concept of “a two-tiered bail system in which defendants of lesser means are detained pending trial while wealthy defendants are released to self-funded private jails.”⁵⁶ Judge José A. Cabranes, author of the *Boustani II* opinion, noted that:

It is a fundamental principle of fairness that the law protects “the interests of rich and poor criminals in equal scale, and its hand extends as far to each.” To interpret the Bail Reform Act as requiring district courts to permit wealthy defendants to employ privately funded armed guards where an otherwise similarly situated defendant without means would be detained would violate this core principle.⁵⁷

The language of the *Boustani II* opinion extends far beyond the capacity to pay for armed guards. It expresses the concern for “granting bail to defendants because of their wealth.”⁵⁸ The idea being that releasing defendants on conditions that they can afford because of their wealth creates a disparate effect between them and indigent defendants.⁵⁹ The finding that no set of conditions could assure Boustani’s appearance was, in part, based upon the court’s desire to avoid disparate treatment between Boustani and his codefendants.⁶⁰

⁵² *Id.* at 258 (quoting *United States v. Bruno*, 89 F. Supp. 3d 425, 432 (E.D.N.Y. 2015)).

⁵³ *Id.* (citing *United States v. Esposito*, 749 F. App’x 20, 24 (2d Cir. 2018) (summary order)).

⁵⁴ *Boustani II*, 932 F.3d 79, 82 (2d Cir. 2019).

⁵⁵ *Id.* at 80.

⁵⁶ *Id.* at 82.

⁵⁷ *Id.* (citation omitted).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 83; see also *Boustani I*, 356 F. Supp. 3d. 246, 258 (E.D.N.Y. 2019) (“Although courts in this jurisdiction have permitted private jail solutions where there was no possibility one ‘defendant might be detained while a wealthy defendant could be released with a private guard solution,’ Defendant’s release could very well produce disparate treatment based on wealth, as other co-defendants may not

The only exception that the *Boustani II* court carved out is “where the defendant is deemed to be a flight risk primarily *because of his wealth*.”⁶¹ This loops back to *United States v. Sabhnani*, where the Second Circuit held that defendants of means could not be designated as flight risks because of their resources where indigent defendants would most likely have been released.⁶² The *Sabhnani* court purposefully did not address “whether it would be ‘contrary to principles of detention and release on bail’ to allow wealthy defendants ‘to buy their way out by constructing a private jail.’”⁶³ The *Boustani II* court carefully noted that courts cannot detain individuals where “*but for*” their wealth they would have been released in the spirit of *Sabhnani*.⁶⁴

The ramifications of *Boustani II* go beyond Jeffrey Epstein. What the Second Circuit has essentially held is that individuals who are otherwise releasable will now be detained because of their wealth, despite the exception the court carved out to prevent individuals from being detained because of their wealth as in *Sabhnani*. The consequence of the *Boustani II* logic is that *even if* conditions that can be purchased would mitigate detention for a wealthy individual, they *must* be detained because they can afford those conditions, while indigent defendants cannot. Because of their wealth, certain criminal defendants are able to create bail packages that mitigate a finding of either flight or danger; under the Bail Reform Act, they are thus releasable.⁶⁵ The Second Circuit instead focused on the disparate impact this path—the one explicitly authorized by the Bail Reform Act—would have. Section 3142(c)(1) says that a “judicial officer *shall* order the pretrial release . . . (B) subject to the *least restrictive* further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of . . . the community.”⁶⁶ The Bail Reform Act mandates release when there are conditions that afford it, even if it leads to the disparate effects the *Boustani II* court feared. And the Bail Reform Act mandates that this be done under the “*least restrictive*” conditions possible.⁶⁷

The Second Circuit correctly noted that the Bail Reform Act was not meant to be a tool to further disenfranchisement or wealth-based discrimination or disparities.⁶⁸ But the court’s reasoning and result also cut against the purpose of the Bail Reform Act by now detaining people who can propose and afford bail

currently possess the financial capacity to pay for the private jail solution Defendant requests.” (citation omitted).

⁶¹ *Boustani II*, 932 F.3d at 82.

⁶² *United States v. Sabhnani*, 493 F.3d 63, 78 n.18 (2d Cir. 2007) (“We note, however, that in the instant case, defendants of lesser means, lacking the resources to flee, might have been granted bail in the first place.”).

⁶³ *Id.* (citation omitted).

⁶⁴ *Boustani II*, 932 F.3d at 82.

⁶⁵ 18 U.S.C. § 3142(c)(1)(B).

⁶⁶ *Id.* (emphasis added).

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Boustani II*, 932 F.3d at 82.

packages that "reasonably assure the appearance of the person as required and the safety of any other person and the community."⁶⁹

These two cases create and illuminate the tension between bail decisions and wealth; *Boustani II* specifically creates the problem that this Note seeks to address. How can the Bail Reform Act be read in order to maximize release for all defendants, irrespective of wealth?

II. LAW GOVERNING THE PRETRIAL DETENTION PROCESS

It is worthwhile to first explain how pretrial detention works and what judges consider when deciding whether to detain someone. First, a defendant must be released if the court finds that a personal recognizance or unsecured bond is enough to ensure the defendant's appearance at trial.⁷⁰ There is no finding of flight risk or danger to the community needed; § 3142(b) mandates release just on personal recognizance or unsecured bond.⁷¹ It is only if the court finds that the defendant is a flight risk or a danger to the community where additional conditions are warranted.⁷² But there is still a presumption for release because § 3142(c) says that if a personal recognizance or unsecured bond is not enough to mitigate flight risk or danger to the community, the "judicial officer shall order the pretrial release of the person" subject to conditions.⁷³

In the *Boustani I* district court opinion, the court describes the analysis under the Bail Reform Act:

A district court undertakes a two-step inquiry when evaluating an application for bail. *See* 18 U.S.C. § 3142(e). *First*, the Court must determine whether the Government has established the defendant presents a danger to the community or a risk of flight. *See* 18 U.S.C. § 3142(e). *Second*, if the Government meets its initial burden, the Court must determine whether no conditions or combination of conditions of release could reasonably assure the defendant will not flee or will not endanger others. *See United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007).⁷⁴

To make this determination, § 3142(g) provides factors the factors the court considers: the nature and circumstances of the offense; the weight of the evidence; the defendant's history and characteristics, including family

⁶⁹ 18 U.S.C. § 3142(c)(1)(B).

⁷⁰ *Id.* § 3142(a)–(b).

⁷¹ *Id.* § 3142(b) (mandating release on personal recognizance "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community").

⁷² *Id.* § 3142(c).

⁷³ *Id.*

⁷⁴ *Boustani I*, 356 F. Supp. 3d. 246, 251 (E.D.N.Y. 2019).

ties to the area, employment, finances, past conduct, substance abuse, criminal history, and prior probation violations; and the danger to the community if the defendant were released.⁷⁵ Because courts are not bound by the rules of evidence for bail determinations, they can also consider information provided by proffer and uncharged conduct.⁷⁶ The categories of flight risk and danger to the community have different standards of proof. The court must find that the conditions mitigate a danger to the community by clear and convincing evidence,⁷⁷ whereas it finds the conditions mitigate a flight risk by a preponderance of the evidence.⁷⁸

Under §§ 3142(e)(2) and (e)(3), there are rebuttable presumptions when “no condition or combination of conditions will reasonably assure the safety of any other person and the community”⁷⁹ and when the defendant is charged with narcotics and firearms charges.⁸⁰ These categories also help determine whether the defendant is a flight risk (as a previous violator) or a danger to the community (based upon the charge).⁸¹ In rebuttable presumption cases, “a defendant bears a limited burden of production—not a burden of persuasion—to rebut that presumption by coming forward with evidence that he does not pose a danger to the community or a risk of flight.”⁸² The rebuttable presumption then becomes a factor that the court weighs along with the others under § 3142(g), and the government bears the ultimate burden of persuasion that the defendant is a flight risk or danger to the community by the respective standards of proof.⁸³ This means the defendant could still be detained even after successfully rebutting the presumption.⁸⁴

Section 3142(f) contains a defendant’s pretrial procedural rights. It includes the right to representation, an opportunity to testify, present witnesses, cross-examine, and proffer information, not covered by the rules of evidence.⁸⁵ A defendant detained by a magistrate judge may appeal the decision to a district judge and may request permission for an interlocutory appeal to appeal the bail decision to a circuit court.⁸⁶ Sections 3145(b) and

⁷⁵ 18 U.S.C. § 3142(g); U.S. CTS., ORDER OF DETENTION PENDING TRIAL (2016) [hereinafter *Form AO 472*], <https://www.uscourts.gov/sites/default/files/ao472.pdf>.

⁷⁶ See *United States v. Rodriguez*, 950 F.2d 85, 88 (2d Cir. 1991) (rejecting the requirement of a nexus between the charge and the conduct for it to be considered during the bail hearing).

⁷⁷ 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 750 (1987).

⁷⁸ *Boustani I*, 356 F. Supp. 3d at 251.

at 251.

⁷⁹ *Form AO 472*, *supra* note 75, at pt. II(A).

⁸⁰ *Id.* at pt. II(B).

⁸¹ *Id.* at pt. II(A)–(B).

⁸² *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001).

⁸³ *Id.*

⁸⁴ *Form AO 472*, *supra* note 75, at pt. II(C) (“The defendant has presented evidence sufficient to rebut the presumption, but after considering the presumption and the other factors discussed below, detention is warranted.”).

⁸⁵ 18 U.S.C. § 3142(f).

⁸⁶ 18 U.S.C. § 3145(b)–(c).

(c) govern the appellate rights that a detained defendant has, including expedited review.⁸⁷

Historically, pretrial detention was meant to ensure appearance at trial.⁸⁸ This ideology began to shift with the emergence of the 1966 Bail Reform Act.⁸⁹ Although there was still a presumption for release in noncapital cases, the 1966 Bail Reform Act introduced the concept of weighing the evidence against the defendant in order to determine release.⁹⁰ The 1984 Bail Reform Act capitalized on this concept and shifted the presumption for release only when the defendant’s “presence at trial could be reasonably guaranteed.”⁹¹ But the 1984 Bail Reform Act does not actually have the purpose or requirement to prevent or reduce unnecessary pretrial detention.⁹² Yet the Senate Report notes “[t]he decision to provide for pretrial detention is in no way a derogation of the importance of the defendant’s interest in remaining at liberty prior to trial.”⁹³ The idea of preventative detention is “that a defendant’s interest in remaining free prior to conviction is, *in some circumstances*, outweighed by the need to protect societal interests,”⁹⁴ namely the risk of flight and danger to the community.

Pretrial detention is covered by the Constitution, but in a confused manner. It falls somewhere between the protections of the Fourth, Fifth, Sixth, and Eighth Amendments.⁹⁵ The Supreme Court in *United States v. Salerno* held that the Bail Reform Act did not facially violate the Due Process Clause or the Excessive Bail Clause.⁹⁶ The Court did not explicitly address substantive due process, but Professor Kellan Funk advocates for a strong reading of *Salerno*, meaning the safeguards that the *Salerno* court found sufficient to uphold the Act are a floor; he uses this to argue that “[b]ecause substantive due process analysis turns on the fundamental nature of the right involved—pretrial liberty and its related rights to prepare a defense and be presumed innocent pending trial—an unaffordable bail amount may trigger heightened procedures even if the defendant is relatively wealthy.”⁹⁷

⁸⁷ *Id.*

⁸⁸ Baradaran, *Restoring the Presumption of Innocence*, *supra* note 15, at 728–34. Even *Salerno* recognizes that flight is the core of pretrial bail. *See* *United States v. Salerno*, 481 U.S. 739, 753 (1987) (“While we agree that a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release.”).

⁸⁹ Baradaran, *Restoring the Presumption of Innocence*, *supra* note 15, at 739–45.

⁹⁰ *Id.* at 739–40.

⁹¹ *Id.* at 747 (citation omitted).

⁹² Marsh, *supra* note 17, at 16.

⁹³ S. REP. NO. 98-225, *supra* note 16, at 7.

⁹⁴ *Id.* (emphasis added).

⁹⁵ Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1014–18 (2013). It should also be noted that at the state level, the Fourteenth Amendment would also be implicated, but because this Note only focuses on federal pretrial detention, it is irrelevant here.

⁹⁶ *United States v. Salerno*, 481 U.S. 739, 752 (1987).

⁹⁷ Funk, *supra* note 2424, at 1107–08.

While there are standards for police treatment during an arrest and standards for the treatment of sentenced criminals, there is a gap regarding the standards for treating pretrial detainees.⁹⁸ The *Salerno* court found that pretrial detention is not penal but administrative in nature.⁹⁹ This is based upon *Bell v. Wolfish*.¹⁰⁰ In *Bell*, the Supreme Court of the United States held that punishment of pretrial detainees is unacceptable, but any other treatment, as long as it is reasonably related to a legitimate government purpose, is allowed.¹⁰¹ This has splintered into various approaches to claims, depending upon the time in detention, relating pretrial detention either closer to the arrest and Fourth Amendment context or the Eighth Amendment punishment context.¹⁰² It is understood “that at some point after arrest and prior to trial, the Fourth Amendment’s protections cease and substantive due process principles begin to govern the treatment of pretrial detainees.”¹⁰³ So while it is clear and indisputable that pretrial detainees are covered by the Constitution, the boundaries of their rights are hazy.

The interaction between these rights and the government’s interest in the safety of the community and in fair adjudication drives the need for a case-by-case assessment. Because of the compelling balance of interests at stake, “courts must be vigilant not to unduly rely upon a proffer of a set of accusations and weighty evidence in support thereof to substantiate an order of pretrial detention.”¹⁰⁴ This requires “a careful balancing of all of the relevant factors . . . to ensur[e] that not even one defendant is unnecessarily deprived of her interest in liberty pending trial, all while protecting the community at large, and, by extension, ensuring the integrity of and respect for the criminal system.”¹⁰⁵

III. INEQUALITY AND INEQUITY AT THE PRETRIAL LEVEL

The Second Circuit’s *Boustani II* decision quickly received backlash because of the court’s leveling down approach.¹⁰⁶ *Boustani II*’s approach

⁹⁸ Struve, *supra* note 95, at 1014–18.

⁹⁹ *Salerno*, 481 U.S. at 746–47.

¹⁰⁰ *Bell v. Wolfish*, 441 U.S. 520, 530–43 (1979); *see also Salerno*, 481 U.S. at 746–47 (citing to *Bell*).

¹⁰¹ *Bell*, 441 U.S. at 538 (“A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.”); *see also Struve*, *supra* note 95, at 1014–18 (discussing *Wolfish* and the ambiguity the decision created).

¹⁰² *See Struve*, *supra* note 95, at 1018–32 (tracing the different ways lower courts have approached and decided detention cases).

¹⁰³ *Id.* at 1023.

¹⁰⁴ *United States v. Paulino*, 335 F. Supp. 3d 600, 603–04 (S.D.N.Y. 2018).

¹⁰⁵ *Id.* at 604.

¹⁰⁶ *See Catherine Foti, All Defendants Are Created Equal Under the Bail Reform Act—Or Are They?*, FORBES (Aug. 14, 2019, 2:15 PM), <https://www.forbes.com/sites/insider/2019/08/14/all-defendants-are-created-equal-under-the-bail-reform-act-or-are-they/#7a768f604262> (arguing that the Bail Reform Act is inherently inequitable, meaning the *Boustani II* court thus misconstrued the Act); Alexander Klein, *2nd Circ.’s Approach to Bail Is Backward*, LAW360 (Aug. 4, 2019, 8:02 PM) <https://www.law360.com/articles/1184921/2nd-circ-s-approach-to-bail-is-backward> (noting that the “least restrictive” condition should have been met through hiring armed guards and the outcome is now

means that wealthy defendants who are otherwise releasable must be detained in order to prevent "a two-tiered system."¹⁰⁷

The inequality problem here is the reverse of what is found in the state money-bail systems. In the state systems, many indigent defendants are detained because they cannot afford bail, thus being detained because of their wealth, or lack thereof.¹⁰⁸ The *Boustani II* court explicitly held that in the federal system, wealthy defendants can be detained because of their wealth: "A similarly situated defendant of lesser means surely would be detained pending trial, and Boustani is not permitted to avoid such a result by relying on his own financial resources to pay for a private jail."¹⁰⁹

The equality problem that *Boustani II* creates is that wealthy and indigent defendants are now being treated differently solely because of wealth. This is a problem on both sides. On one, individuals are being detained when they might otherwise be releasable solely because of their wealth. On the other, indigent individuals might be detained just because they cannot afford to create their own "private jails." Both scenarios are problematic. The aim should be "rising all boats rather than sinking them."¹¹⁰

Under *Boustani II*, wealth has now become the rate-limiting factor despite the language of the Bail Reform Act.¹¹¹ There is obviously a problem with treating individuals differently because of their wealth, whether rich or poor. But in this instance, disparate treatment of the wealthy leads to inequity for all. This is because the word "shall" is now being taken suggestively.¹¹² As written in § 3142(c)(1)(B), if the judicial officer finds that flight risk and danger to the community have been mitigated, they "shall" release the defendant.¹¹³ Under *Boustani II*, courts can now refuse release, despite this "shall" language, for whatever larger, societal, moral reason the court may find. This broad discretion is a huge blow to the Bail Reform Act, making its mandates mere suggestions.

that an individual is detained because of his wealth). See *supra* Part I for a discussion of the *Boustani II* case.

¹⁰⁷ *Boustani II*, 932 F.3d. 79, 82 (2d Cir. 2019).

¹⁰⁸ See Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1301 (2012) (telling the story of a New Jersey barber who could not afford \$1,000 bail and was murdered in detention); Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, ATLANTIC (Apr. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/> (showing that nine out of ten individuals detained pretrial are detained because they cannot post bond).

¹⁰⁹ *Boustani II*, 932 F.3d. at 83.

¹¹⁰ Klein, *supra* note 106.

¹¹¹ "The Bail Reform Act requires a defendant-specific analysis that is unavoidably inequitable." Foti, *supra* note 106.

¹¹² "Shall," in the legal context, is often understood to be mandatory. Bryan Garner, *Shall We Abandon Shall?*, ABA J. (Aug. 1, 2012, 7:20 AM), https://www.abajournal.com/magazine/article/shall_we_abandon_shall. But it has not always been interpreted as such. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005) ("We do not believe that these provisions of Colorado law [stating that police "shall" act in certain ways] truly made enforcement of restraining orders mandatory.").

¹¹³ 18 U.S.C. § 3142(c)(1)(B).

There is a large problem with releasing wealthy defendants while indigent defendants remain locked up.¹¹⁴ But there is also a problem with detaining individuals presumed innocent because of their wealth. This is where “least restrictive” can be seen as the key to release for both wealthy and indigent defendants alike.

This Note fits into a larger scheme of recent work in bail reform. As pretrial detention rates increase, more scholars are diverting their focus specifically to the assessment of defendants and findings of flight or dangerousness.¹¹⁵ A significant portion of pretrial bail scholarship is focused on the cash bail system and the inequities it creates.¹¹⁶ Some focus on criminology and the later effects of detention on the case outcome.¹¹⁷ But discussions of release conditions and the overall role of bail are increasing as well. That is where this Note fits in; this Note seeks to expand upon the discussion of release conditions.

IV. “LEAST RESTRICTIVE” AS A KEY TO EQUALITY

Within the Bail Reform Act, the key to equalization lies within one phrase: “least restrictive.”¹¹⁸ Tucked into the section on release conditions, the phrase “least restrictive” imposes a requirement on judges for *how* they shall release defendants. Under § 3142(c)(1)(B), a judge shall impose the “least restrictive further condition[s]” on a defendant if the requirements in § 3142(b)¹¹⁹ do not mitigate findings of flight risk or danger to the community. This is the crux of the Bail Reform Act’s flexibility. The

¹¹⁴ See Appleman, *supra* note 108, at 1299–1301 (discussing the dichotomy between the treatment and release of wealthy defendants such as Martha Stewart, Bernie Madoff, Rod Blagojevich, and others with the detention of a New Jersey barber for unpaid parking tickets and failure to register a new car).

¹¹⁵ See *supra* note 4 and accompanying text (discussing scholarship on risk assessment).

¹¹⁶ See *supra* notes 3, 21 (discussing money bail); see also Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24, 24–25 (2020) (commenting that most pretrial bail reform, including scholarship, is focused on money bail).

¹¹⁷ See Holmes Didwania, *supra* note 116, at 57 (finding “that federal pretrial detention appears to significantly increase sentences, decrease the probability that a defendant will receive a below-Guidelines sentence, and decrease the probability that they will avoid a mandatory minimum sentence if facing one”); Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUST. POL’Y REV. 59, 59, 70–72 (2012) (finding that pretrial detention “significantly and negatively affects the length of the sentence”); Jacqueline G. Lee, *To Detain or Not to Detain? Using Propensity Scores to Examine the Relationship Between Pretrial Detention and Conviction*, 30 CRIM. JUST. POL’Y REV. 128, 146–50 (2019) (detailing the results of a study finding that detention, independent from propensity scores, has an increased risk of a longer conviction in six counties in Florida).

¹¹⁸ 18 U.S.C. § 3142(c)(1)(B).

¹¹⁹ This section allows defendants to be released “on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. . . .” 18 U.S.C. § 3142(b).

conditions themselves¹²⁰ are often key in the decision to detain or release. This Note suggests several different ways to approach the same conclusion: defendants should not be detained due to their wealth if they can be released. It is easy to read the “defendant-specific analysis” of the Bail Reform Act as “unavoidably inequitable.”¹²¹ But at the same time, the “defendant-specific analysis” affords flexibility to the judicial official deciding whether to grant or deny release.¹²² And if the Bail Reform Act is read in a way that favors release, then this specific analysis can be tailored to allow for a wider range of release based upon the conditions and what “least restrictive” means for that specific defendant. This means wealth can be factored into and out of the release calculus as needed, while not serving as the lynchpin for the decision to release or detain.

First, the term “least restrictive” should be read in light of the original purpose of pretrial detention, guaranteeing appearance at trial, while taking into account the liberty-focused language of the Senate Report regarding the 1982 Bail Reform Act. Second, practical approaches about the Bail Reform Act and pretrial detention process suggest that the ability to afford conditions with independent money should not be a defining factor to release; the mere ability to afford conditions should not be considered, while the conditions themselves should. Finally, key societal concerns demonstrate that “least restrictive” should be read in favor of release whenever any findings of flight risk or danger to the community are mitigated, regardless of wealth.

A. *A Purposeful Approach to Release*

As originally enacted in 1966, the Bail Reform Act favored release.¹²³ With the adoption of the 1984 Bail Reform Act and the category of “danger to the community” came a shift in legislative purpose.¹²⁴ One obvious way to read “least restrictive” is in light of the presumption of innocence contained within the Act with the intention of furthering release and the original idea of detention only as a means to assure trial appearance.

“Least restrictive” lies in the eye of the judge. While the 1984 Bail Reform Act is more strict than its predecessors, detention was still meant

¹²⁰ See *supra* Part II for a discussion of the pretrial detention process and the role that conditions play.

¹²¹ Foti, *supra* note 106.

¹²² *Id.*

¹²³ Baradaran, *Restoring the Presumption of Innocence*, *supra* note 15, at 739. Release before trial was the norm before the 1980s. See *id.* at 728–39 (discussing historical understandings of the presumption of innocence); Appleman, *supra* note 108, at 1323–35 (discussing the history of bail).

¹²⁴ S. REP. NO. 98-225, *supra* note 16, at 3 (“The adoption of these changes marks a significant departure from the basic philosophy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings.”). There is a large body of scholarly work challenging the underlying assumption of this statement: recidivism. For instance, 49.7% of prisoners released in 2005 “had either a parole or probation violation or an arrest for a new offense within 3 years [of release] that led to imprisonment.” MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SYNDER, U.S. DEP’T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 1 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

“[o]nly in rare circumstances . . . and doubts regarding the propriety of release should be resolved in the defendant’s favor.”¹²⁵ This rationale was reaffirmed by the Supreme Court of the United States in *United States v. Salerno*.¹²⁶ But the Court noted that the Bail Reform Act’s preventative detention was only meant for “the most serious of crimes.”¹²⁷ The *Salerno* Court used this factor to find that the Bail Reform Act did not violate substantive due process, without using so many words.¹²⁸

This language and rationale restore a purpose of release to the Bail Reform Act. The Court’s rationale is rooted in the idea that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”¹²⁹ The crux of the Court’s reading of constitutionality was based upon the idea that pretrial detention was a limited option. By limiting preventative detention to only rebuttable presumption cases, the Supreme Court found the Bail Reform Act constitutional because it does not “deny [] the right to bail altogether.”¹³⁰ This is because, in the Supreme Court’s reading, the Bail Reform Act authorizes release for everyone except those who committed offenses listed in § 3142(f). It is axiomatic that bail cannot be altogether denied if it is supposed to be granted but for limited situations.

Yet modern courts are detaining more than ever. One of the key effects of modern day pretrial detention is that it essentially serves as a “mini-trial.”¹³¹ Judges are allowed to weigh the evidence against a defendant in order to decide whether to release or detain.¹³² And the decision to detain

¹²⁵ *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991).

¹²⁶ 481 U.S. 739; *see also supra* note 24.

¹²⁷ *Id.* at 747 (citing 18 U.S.C. § 3142(f)). *See also* Funk, *supra* note 24, at 1105–07 (discussing the *Salerno* Court’s reasoning).

¹²⁸ Funk, *supra* note 24, at 1106 (“*Salerno* came right up to the precipice of engaging in a substantive due process analysis without explicitly invoking those terms.”).

¹²⁹ *Salerno*, 481 U.S. at 755. But compare this to Justice Marshall’s fiery dissent, where he states that the majority has allowed

a person innocent of any crime [to] be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future.

Id. at 755 (Marshall, J., dissenting).

¹³⁰ Funk, *supra* note 24, at 1107.

¹³¹ *See* Baradaran, *Restoring the Presumption of Innocence*, *supra* note 15, at 752–54, 770–72 (detailing the advent of the weighing of the evidence as part of the 1984 Bail Reform Act and arguing as part of her thesis that judges should not weigh the evidence, essentially determining guilt, in determining bail). Some courts have minimized the importance that the weight of the evidence plays in the bail determination because of these concerns. *See United States v. Paulino*, 335 F. Supp. 3d 600, 613 (S.D.N.Y. 2018) (“To avoid punishment for a crime for which a defendant ‘has not yet been shown to have committed,’ many courts have suggested that the weight of the evidence is the least important of the various factors.” (citations omitted)).

¹³² *Form AO 472*, *supra* note 7579, at Part II(C).

has a domino effect on the rest of the criminal process.¹³³ But, on principle, judges "must be vigilant not to unduly rely upon a proffer of a set of accusations and weighty evidence in support thereof to substantiate an order of pretrial detention."¹³⁴ The rise of the finding of a danger to the community and the rebuttable presumption for detention have shifted the burden away from the Government to prove that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."¹³⁵

The rise of modern detention can be linked to a shift in charging. As Matthew Rowland, Chief of the Probation and Pretrial Services Office notes: "The risk of flight and criminogenic profile of defendants in the federal system has steadily worsened over the years, in part because of the focus of federal prosecutions."¹³⁶ The shift to charging repeat offenders or the offenses that were enumerated as serious crimes within the act, such as "drug and human trafficking, violence, weapons, [and] sex crimes" correlates with the rise of detention.¹³⁷ What was meant to be detention in "rare circumstances" has now become the norm.¹³⁸

Because the focus of prosecutions has shifted, it is paramount that the focus of the Bail Reform Act shifts. While the 1984 Bail Reform Act may have been more restrictive than its predecessor, detention was not intended to be the norm. In order to return to the norm of detention in only extreme circumstances, a purposeful approach for release must be implemented. This in turn helps to equalize the pretrial detention process. The criteria for detention or release may be objective,¹³⁹ but the demographics of those detained are disproportional because of those who are being charged. Returning to a purpose of release helps even this playing field and undoes the damage of prosecutorial focus.

Equalizing release may come from a counterintuitive concept: release of wealthy defendants. One major reason why there is such an inherent reaction

¹³³ Stephanie Holmes Didwania conducted a survey across seventy-one federal jurisdictions and discovered three ways in which pretrial detention affects sentencing. First, it can affect sentencing by hindering a defendant's ability to engage in their own defense. Second, released defendants can more easily engage in post-offense rehabilitative efforts, which can be used for mitigation at sentencing. Third, detained defendants may suffer representativeness bias as being more likely to recidivate than released defendants. For more about her study, see Holmes Didwania, *supra* note 116116, at 25–26.

¹³⁴ *Paulino*, 335 F. Supp. 3d at 604 (Carter, Jr., J.) (addressing, on remand from the Second Circuit, his rationale for releasing the defendant and his perceptions of the standards within the Bail Reform Act).

¹³⁵ 18 U.S.C. § 3142(e)(1).

¹³⁶ Rowland, *supra* note 2, at 18.

¹³⁷ *Id.* Rowland also notes the shift in focus also includes illegal entry into the United States, but this is outside the scope of the Bail Reform Act.

¹³⁸ *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991). See also Rowland, *supra* note 2, at 17 (noting that the § 3142(e) rebuttable presumption cases are "growing larger than the rule in favor of release").

¹³⁹ *But see* Rowland, *supra* note 2, at 14 n.5 ("Note, not everyone considers the statutory factors to be unbiased. Some civil rights organizations argue that factors such as prior failures to appear and rearrest are more reflective of police and prosecutors' decisions than the conduct of the defendants (Pretrial Justice)").

to the idea of releasing wealthy defendants based on conditions they can afford is the idea they are being released to “a very expensive form of private jail.”¹⁴⁰ Courts have recently struggled with the idea that the conditions necessary to release wealthy defendants have become so extensive that home release has become another form of detention.¹⁴¹ Take for example *United States v. Valerio*, where the court addressed “whether a defendant, if she is able to perfectly replicate a private jail in her own home at her own cost, has a right to do so under the Bail Reform Act and the United States Constitution.”¹⁴² The issue is essentially: when do restrictions become more than the “least restrictive” possible?

In light of the purpose of the Bail Reform Act, “least restrictive” actually becomes quite expansive. There is nothing in the language of the Act to restrict the conditions besides judicial discretion.¹⁴³ There is a set list of conditions that judicial officers can apply, but § 3142(c)(1)(B)(xiv) allows for defendants to “satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.”¹⁴⁴ And judicial officers can apply “any other condition that is reasonably necessary” in order to find the defendant releasable.¹⁴⁵ The Federal Probation and Pretrial Services Office came up with a comprehensive list of conditions that can be imposing, showing how defendant specific they can be.¹⁴⁶ The issue raised in *United States v. Valerio* takes effect when a judge imposes a laundry list of conditions in order to ensure release.

Reading “least restrictive” in light of the purpose for release, “least restrictive” becomes more of a requirement on fairness than quantity of conditions. This means that to counterbalance the inequity of who is being charged and detained, certain conditions can help shift the purpose of the Act to focus on release. In response to the *Valerio* court’s concern, there is nothing in the Bail Reform Act that says house arrest is not an acceptable condition,¹⁴⁷ the problem comes when wealth is added to the picture. “Least restrictive” here does not mean a restriction on the conditions themselves.

¹⁴⁰ *United States v. Zarrab*, 15 CR 867 (RMB), 2016 WL 3681423, at *10 (S.D.N.Y. June 16, 2016).

¹⁴¹ *Id.* (discussing the approaches in *United States v. Banki*, 369 F. App’x 152 (2d Cir. 2010) and *United States v. Valerio*, 9 F. Supp. 3d 283 (E.D.N.Y. 2014)).

¹⁴² *Valerio*, 9 F. Supp. 3d, at 292.

¹⁴³ 18 U.S.C. § 3142(c)(1)(B). If the restrictions in § 3142(b) are inadequate, a “judicial officer shall order the pretrial release of the person . . . subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will” mitigate flight or danger to the community.

¹⁴⁴ 18 U.S.C. § 3142(c)(1)(B)(xiv).

¹⁴⁵ *Id.*

¹⁴⁶ See generally PROBATION & PRETRIAL SERVS. OFFIC., ADMIN. OFFIC. OF THE U.S. CTS., OVERVIEW OF PROBATION AND SPECIALIZED RELEASE CONDITIONS (2016), https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf [hereinafter PROBATION CONDITIONS]. Some conditions are incredibly specific, including computer and internet restrictions, gambling-related conditions, and restrictions on viewing sexually explicit materials, to name a few. *Id.*

¹⁴⁷ See *id.* at 72–73 (listing home detention and home incarceration as type of location monitoring conditions).

Instead, it is meant to be a low bar for judges in order to establish release without unduly burdening defendants. One way to help ground this perspective is to note that since the Federal Pretrial Services Act and of 1982 and the Bail Reform Act, both the number of individuals monitored and detained have increased, even though they likely would have been released prior to these acts.¹⁴⁸

There is nothing specific within the Bail Reform Act that prevents defendants from being placed under house arrest, even if the option is only available because of the defendant's wealth. While the *Valerio* court's concern is valid that the conditions themselves can become so restrictive, they are akin to detention, that is not an affront to the Bail Reform Act. "Least restrictive" in this context is a floor, not a ceiling; as long as the conditions are such that they are the least that the judge finds mitigates any finding of flight or danger, it is in line with the Act. And, in the imposition of "least restrictive" conditions, judges "must be clear-eyed about the precise risks they are trying to avoid or mitigate."¹⁴⁹

Because the Bail Reform Act should be read in light of a purpose to release, bearing in mind the origin of pretrial detention, the release of wealthy defendants should not be seen as inequitable. It instead should be seen as an opportunity to further the release of *all* defendants, regardless of wealth, by focusing on releasing all defendants through the imposition of fair, and not overly burdensome, conditions.

B. *A Practical Approach to Release*

Another way to address pretrial release and wealth disparities is to approach the Bail Reform Act practically. Reading "least restrictive" in a practical, methodical way allows for the release of both wealthy and indigent defendants, without harm to the other.

"Practical," in this sense, means refocusing on the language of the Bail Reform Act. "Least restrictive" practically means that defendants should be released as long as there are conditions they can be released under. But even before that, a practical reading means noting that this section of the Act does not, and should not, even apply to all defendants. As noted above, the "least restrictive" language *only* applies when there is first a finding of flight risk or danger to the community.¹⁵⁰ And even if the least restrictive requirement applies, it is still under the presumption of release.¹⁵¹ To practically interpret the Bail Reform Act would mean to read the language of the Act as written and find that release is required if: (a) there are conditions that mitigate a finding of flight risk or danger to the community; and (b) the charge does

¹⁴⁸ James Byrne & Jacob Stowell, *The Impact of the Federal Pretrial Services Act of 1982 on the Release, Supervision, and Detention of Pretrial Defendants*, 71 FED. PROB. 31, 32 (2007).

¹⁴⁹ Lauryn P. Gouldin, *Defining Flight Risk*, 85 UNIV. CHI. L. REV. 677, 741 (2018).

¹⁵⁰ See *supra* p. 453–55 (discussing how the Bail Reform Act functions).

¹⁵¹ See 18 U.S.C. § 3142(c)(1) (utilizing the term "shall" to mandate release).

not fall under § 3141(f)(1). Courts have also held that in considering the factors listed in determining mitigation in the Bail Reform Act,¹⁵² a “court should bear in mind that it is only a ‘limited group of offenders’ who should be denied bail pending trial.”¹⁵³ Thus, a practical approach, one that most closely models the language of the text, is one that allows for release for the majority of defendants.

And even if a case falls under § 3142(f)(1), the language again asks “whether any condition or combination of conditions set forth in subsection (c) of this section [where our “least restrictive” language is] will reasonably assure the appearance of such person as required and the safety of any other person and the community.”¹⁵⁴ While there is a higher hurdle in rebuttable presumption cases, it is just a hurdle, not a bar to release.¹⁵⁵ It again relies upon whether there are conditions that mitigate flight risk or danger to the community. And, even in rebuttable presumption cases, “[t]he Government retains the ‘ultimate burden of persuasion’ that” the defendant is a flight risk or danger to the community.¹⁵⁶

This is all to say that allowing wealthy defendants to pay for conditions is allowable by the Bail Reform Act if it mitigates a finding of flight risk or danger to the community. There is a very strong case to say twenty-four-hour home detention under watch by a security company approved by the government would do so.¹⁵⁷

In *United States v. Tajideen*, the District Court for the District of D.C. specifically noted the defendant’s “financial means[,] even though some of those funds may not be available to him” as a reason for concluding “that no condition or combination of conditions would in fact ensure [the defendant’s] appearance before this Court for future proceedings.”¹⁵⁸ In its analysis, the court focused on the fact that there was nothing to suggest that a \$2 million cash bond and posting the defendant’s brother’s home as security “would impact [the defendant] sufficiently to ensure [his] presence

¹⁵² See *supra* pp. 485–87 (listing court’s analysis at this stage and the factors to be considered).

¹⁵³ *United States v. Shakur*, 817 F.2d 189, 195 (2d Cir. 1987) (quoting S. REP. NO. 98-225, *supra* note 16, at 7).

¹⁵⁴ 18 U.S.C. § 3142(f).

¹⁵⁵ See Rowland, *supra* note 2, at 17 (relating that § 3142(e) is an exception now swallowing the presumption for release). Rowland also cites studies that show “that the enumerated offenses [in § 3142(e)] may not be the best predictors of risk of flight or danger to the community.” *Id.*

¹⁵⁶ Epstein Order, *supra* note 29, at 9 (citation omitted).

¹⁵⁷ This option has been called “a magic pill” for release because of how it completely mitigates fears of flight risk or danger to the community. Klein, *supra* note 106. For this option to actually be “guaranteed release,” there needs to be no concern that the security company will look the other way if a defendant slips out the back door. It may be in certain cases that the imposition of armed guards alone is not enough because of this worry, or other conditions are more reliable. This, however, is beyond the scope of this Note. This Note advocates not for one specific condition, but a reconsideration of the way judges impose conditions.

¹⁵⁸ *United States v. Tajideen*, No. 17-46 (RBW), 2018 WL 1342475, at *3 (D.D.C. Mar. 15, 2018) (alterations in original).

at trial” because of his vast resources.¹⁵⁹ The court rejected the defendant’s argument “that he should not be prevented from obtaining pretrial release due to [his] wealth.”¹⁶⁰ The court instead found “that permitting a vastly wealthy defendant ‘to basically buy [his] way out of pretrial detention by coming up with a plan consistent with what is being proposed here’ to be wholly ‘inconsistent with [the purpose and] the reason for . . . the Bail Reform Act’”¹⁶¹ Here, the court first used the defendant’s wealth to find that he was a flight risk,¹⁶² then used his wealth to say that he should not be allowed to buy his way out of detention. This means that the deciding factor in Tajideen’s detention was his wealth.

That is not to say that Tajideen should have been released. In Tajideen’s case, he was charged with serious offenses including unlawful transactions with terrorists and aiding and abetting terrorist acts.¹⁶³ He was also “a citizen of Belgium, Sierra Leone, and Lebanon and has no significant ties to the District of Columbia or the United States.”¹⁶⁴ The court instead focused on the tie to Lebanon, a non-extradition country, only cursorily in its discussion of the security company Tajideen proposed to monitor him.¹⁶⁵ The problem with the court’s analysis in this case is its focus on his wealth as the factor for his flight risk and detention. Again, Tajideen might have fairly been detained; but finding he was wealthy and therefore a flight risk—and finding he was wealthy and therefore not releasable—is not equalizing the system.

The ability to pay for certain conditions does not and should not always mitigate certain findings of flight or danger to the community. In Epstein’s case, the fake passport and possession of private planes, even if one was posted as a bond, lends credence to the idea that he would be a flight risk even if he had a GPS monitor and armed guards.¹⁶⁶ And, in cases where there is a rebuttable presumption for detention, like in Epstein’s, possession of a fake passport and a plane does not rebut the presumption that he was not a flight risk despite his mitigating conditions.

¹⁵⁹ *Id.* at *4 (alterations in original) (quoting *United States v. Hong Vo*, 978 F. Supp. 2d 41, 46 (D.D.C. 2013)).

¹⁶⁰ *Id.* at *6 (internal quotation marks omitted) (citation omitted).

¹⁶¹ *Id.* The court also quoted *Allen v. United States*, saying that “[r]espect for law and order is diminished when the attainment of pretrial liberty depends solely upon the financial status of an accused.” 386 F.2d 634, 637 (D.C. Cir. 1967). This analysis, however, cuts both ways. This is no different than the *Boustani II* court saying that because of wealth, the defendant would be detained.

¹⁶² One recent, powerful argument has also focused on redefining how courts interpret what it means to be a flight risk. This is also a crucial aspect of increasing defendant’s release pretrial, as the rebuttable presumption for detention only applies when a defendant is found to be a flight risk or a danger to the community. *See generally* Gouldin, *supra* note 149 (creating three categories for flight to recenter court’s approach and separate findings of flight and danger).

¹⁶³ *Tajideen*, 2018 WL 1342475, at *1.

¹⁶⁴ *Id.* at *2.

¹⁶⁵ *Id.* at *7.

¹⁶⁶ *See supra* Part I (discussing Epstein’s bail package).

“Least restrictive” factors in by looking practically at the statistics of pretrial misconduct with the language of the Bail Reform Act.¹⁶⁷ From 2008 to 2010, only 1% of federal defendants released pretrial failed to make their court appearances.¹⁶⁸ But in cases with wealthy defendants, their wealth plays a factor in finding them flight risks.¹⁶⁹ Another way to phrase the debate is this: does wealth truly make an individual a flight risk?¹⁷⁰ There is no data on the wealth of the 1% of released defendants who fail to make court appearances. Courts’ consideration of wealth in relation to detention is cyclical. Because of the defendant’s wealth, courts require *more* conditions in order to find that the danger of a flight risk is mitigated. Even though flight risk is to be met by a preponderance of the evidence, the mere factor of wealth appears to make a finding of mitigation impossible.

Flight is a real concern; there is a (very small) group of defendants who flee, regardless of wealth.¹⁷¹ And, in rebuttable presumption cases like Epstein’s, courts have a statutory duty to assess the case under the presumption that there is no set of conditions that would mitigate flight. But courts should focus their energy back on the language of the Bail Reform Act, especially in light of the low statistics of flight in wealthy cases: “whether any condition or combination of conditions . . . will *reasonably assure* the appearance of such person as required and the safety of any other person and the community.”¹⁷² This is a purposefully high bar for rebuttable presumption cases. The language of the Bail Reform Act reflects that it must be *impossible* to impose *any* conditions that will mitigate either flight risk or danger to the community to detain. And the court only needs to find these conditions mitigated by a reasonable assurance, not an absolute. This language implies that even “private prisons” would be acceptable because it is a condition that would reasonably assure both appearance and a minimized danger to the community.

Take again *Sabhnani*. There, a wealthy couple was charged with forced labor and harboring undocumented immigrants for holding two women as captives for domestic labor.¹⁷³ The district court, after multiple proceedings

¹⁶⁷ Pretrial misconduct is defined as “[i]nstances in which a released defendant violated their pretrial release conditions.” THOMAS H. COHEN, U.S. DEP’T OF JUST., PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010 19 (2012), <https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf>.

¹⁶⁸ *Id.* at 1.

¹⁶⁹ Gouldin, *supra* note 149, at 709 n.172 (giving examples from the First and Ninth circuits where courts have analyzed a defendant’s resources in evaluating flight risk); Appleman, *supra* note 108, at 1299 (“Notwithstanding crime, the decision to imprison a defendant before trial all too often hinges on wealth and power.”).

¹⁷⁰ In her article, Professor Gouldin puts wealthier defendants in the category of “true flight risks” because of their resources. Gouldin, *supra* note 149, at 727. But she also advocates for a defendant and context-specific approach, calling for research to “study and evaluate whether selectively applying financial conditions can effectively discourage flight for released defendants who have resources.” *Id.* This is in line with the approach this Note advocates for.

¹⁷¹ *Id.* at 683.

¹⁷² 18 U.S.C. § 3142(f) (emphasis added).

¹⁷³ *United States v. Sabhnani*, 493 F.3d 63, 65 (2d Cir. 2007).

and some back and forth between the parties, found that no conditions could mitigate a flight risk based upon the defendants' financial disclosures, ability to conduct business overseas, the strength of the evidence and lengthy prison sentence if convicted, and a conclusion "that home detention was impractical because it would require the imposition of onerous monitoring conditions on defendants' children, none of whom was charged with criminal conduct."¹⁷⁴ Judge Reena Raggi eloquently simplified the issue before the court and rejected any further arguments from the government:

The Sabhnanis do not challenge the district court's finding that, if released, they pose a serious risk of flight. Rather, they challenge its conclusion that no conditions can be imposed that would reasonably assure their presence at trial. We generally accord considerable deference to such a district court conclusion. In this case, however, defendants' argument has been cast in a new light by the government's identification in this court of the further conditions it deems necessary to ameliorate the risk of flight The government's ability to identify such conditions and the defendants' willingness to accede to them preclude a conclusion in this case that no conditions of release would reasonably assure the defendants' presence at trial.¹⁷⁵

This quite aptly sums up why home detention is not a problem under the Bail Reform Act: because home detention means that there are conditions that can be imposed that mitigate findings of flight. "Private prisons" in one's home are acceptable under this practical view of the Bail Reform Act because the creation of a "private prison" means that there are conditions which can be imposed to merit release. This reading fits with § 3142(c)(1)(B). Within § 3142(c)(1)(B), there is no limitation on what "least restrictive" means. For a practical reading towards release, "least restrictive" might actually be quite expansive; all that matters is that it is the *least restrictive* means under which the mitigation is met.

One of the issues raised in the *Epstein* opinion is that the imposition of such intensive restrictions is "not the Court's function."¹⁷⁶ But home detention is not uncommon for pretrial release.¹⁷⁷ Notably, in 1987, the Federal Judicial Board¹⁷⁸ found that "home confinement may often qualify as the least restrictive method of accomplishing the purposes of pretrial

¹⁷⁴ *Id.* at 73.

¹⁷⁵ *Id.* at 64–65.

¹⁷⁶ Epstein Order, *supra* note 29, at 30.

¹⁷⁷ See PROBATION CONDITIONS, *supra* note 146, at 72–73 (listing the different methods of home confinement as conditions).

¹⁷⁸ Interestingly, this Board included then District Judge José Cabranes, author of the Second Circuit's *Boustani II* opinion. PAUL J. HOFER & BARBARA S. MEIERHOEFER, FED. JUD. CTR., HOME CONFINEMENT: AN EVOLVING SANCTION IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1987).

release conditions.”¹⁷⁹ Since then, the Pretrial Services Office has recommended and monitored home confinement, with room for improvement.¹⁸⁰ While home confinement for wealthy individuals might not be the least restrictive means, the *Sabhnani* opinion shows the kind of defendant-specific analysis required by the Bail Reform Act in considering home confinement for the wealthy. The *Sabhnani* court carefully distinguished *United States v. Orena*, a prior Second Circuit opinion where the court “expressed serious reservations about the adequacy of home confinement as a substitute for detention in cases involving violent crime.”¹⁸¹ The *Sabhnani* court found that there was a presumption for release under the Bail Reform Act, that there were conditions such as visual surveillance and electronic monitoring to minimize circumvention, that the defendants proposed to pay all costs, that the government chose the private security firm, and that the circumstances of violence in the underlying cases were incomparable.¹⁸²

One practical implication of an increase in conditions is “e-carceration.” E-carceration is a new movement focusing on the negative impact of conditions, including racial and social divides.¹⁸³ The argument is centered around the idea that electronic monitoring conditions, namely an electronic ankle monitor, serve “as net-widening correctional strateg[ies]” expanding the reach of the carceral system.¹⁸⁴ One major problem with location monitoring—often a facet of home release—is that “it replaces less-restrictive forms of pretrial release or parole and saddles people with the stigma and expense of ankle monitors.”¹⁸⁵ As Professor Arnett notes, there is a correlation between pretrial detention reform and electronic

¹⁷⁹ *Id.* at 14.

¹⁸⁰ See Marsh, *supra* note 17, at 17 (commenting on how detention alternatives “were not always used or used effectively,” specifically noting that home confinement was imposed when it was not the least restrictive condition). Home incarceration, according to the Federal Probation and Pretrial Services office, is “24-hours-a-day lock-down except for medical necessities and court appearances or other activities specifically approved by the court.” PROBATION CONDITIONS, *supra* note 146, at 73. This is different from home detention, which “requires the defendant to remain at home at all times except for pre-approved and scheduled absences for employment, education, religious activities, treatment, attorney visits, court appearances, court-ordered obligations, or other activities as approved by the probation officer.” *Id.*

¹⁸¹ *United States v. Sabhnani*, 493 F.3d 63, 77 (2d Cir. 2007) (citing *United States v. Orena*, 986 F.2d 628, 632–33 (2d Cir. 1993)).

¹⁸² *Id.* at 78.

¹⁸³ See Jessica Eaglin, *Is E-Carceration a Problem? Confronting the Shortcomings of Technological Criminal Justice Reforms*, JOTWELL (Aug. 2, 2019) (reviewing Professor Arnett’s article)). But see NAT’L INST. OF JUST., U.S. DEP’T OF JUST., ELECTRONIC MONITORING REDUCES RECIDIVISM 1 (2011) (noting a study of Florida offenders “found that monitoring significantly reduces the likelihood of failure under community supervision” by a 31% decrease in the likelihood of failure).

¹⁸⁴ Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 641 (2019).

¹⁸⁵ E.A. Gjelten, *House Arrest and Ankle Monitors: How Home Detention Works and When It’s Used*, LAWYERS.COM (Feb. 27, 2019), <https://www.lawyers.com/legal-info/criminal/criminal-law-basics/home-confinement-as-an-alternative-to-prison.html>.

monitoring.¹⁸⁶ The crux, as he explains it, is the goal of fighting an increase in incarceration, the vast majority of which is pretrial detainees, as aforementioned.¹⁸⁷ The problem then comes as electronic monitoring "shifts the site and costs of imprisonment from state facilities to vulnerable communities and households of color"¹⁸⁸ and further entrenching marginalized groups via surveillance.

The concerns of "e-carceration" guide what our release for indigent defendants should look like through a practical lens. Because the government is saved from the cost of detention by putting it onto wealthy defendants, theoretically, it eases the burden on the government such that more money can potentially be spent on conditions for indigent defendants to mitigate the *Boustani* problem. One suggested idea has been a give a guard, get a guard idea where wealthy defendants released to home detention chip into a pot, the proceeds of which go to paying for conditions for indigent defendants so they can also be released.¹⁸⁹ This idea assumes that guards "virtually guarantee[]" the defendant's appearance at court, thus immediately mitigating any flight risk.¹⁹⁰ There is also an argument that in the case of defendants detained because of a flight risk, they have a right to be monitored in order to avoid detention.¹⁹¹ By having wealthy defendants, as part of their conditions for release, chip in money to a general probation fund means that the government can more easily take on the cost of electronic surveillance and avoid putting the burden on minority communities. And, if more individuals are overall released, as is the goal of this Note, then whatever money they government would have spent on defendants pretrial can go to funding their conditions or helpful programs, discussed more below. It does mitigate some of Professor Arnett's concern about cost imposition but does nothing to lift the worry of stigmatization and entrenchment in marginalized groups. A security guard in this instance is no different than an ankle monitor, and home still won't be home.¹⁹² But it allows a defendant to escape prison, potentially continue employment, and engage in more post-arrest rehabilitative measures that have been shown to play a role in sentencing.¹⁹³

There is also a concern that expanding the breadth of conditions imposed is unduly restrictive, and, being impossible to meet, essentially guarantee a

¹⁸⁶ Arnett, *supra* note 184, at 651.

¹⁸⁷ *Id.* at 648. See also Onyekwere, *supra* note 1 (stating that about 70% of the current prison population is pretrial detainees).

¹⁸⁸ Arnett, *supra* note 184, at 655.

¹⁸⁹ Klein, *supra* note 106.

¹⁹⁰ *Id.*

¹⁹¹ See Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1348 (2014) (proposing "reverse" arguments in favor of electronic monitoring to allow for release for defendants found to be a flight risk).

¹⁹² Arnett, *supra* note 184, at 643.

¹⁹³ See *infra* Section III.C for a discussion of the effects of prison.

defendant will be incarcerated pretrial for failing to meet the conditions. This is a major concern, but the requirement of “least restrictive” hopefully serves as a check on undue conditions. Conditions should only be imposed to the extent they are needed to check any potential finding that triggers a rebuttable presumption; anything more violates the Bail Reform Act and the spirit of this Note.

Reading the Bail Reform Act practically means that courts need to focus on conditions authorizing release. Courts need to return to the defendant-specific approach championed by *Sabhnani*.¹⁹⁴ Practically reading the Bail Reform Act for release for the wealthy, as this Section has argued, includes reading release for the indigent. A practical reading means refocusing on the language of the Bail Reform Act pointing towards release and utilizing it in a defendant-specific context; this applies regardless of the defendant’s wealth.

C. *A Societal Approach to Release*

“Least restrictive” can also be read to provide positive pathways for defendants to be rehabilitated, causing long-term positive changes for their lives going forward. Reading “least restrictive” in light of societal needs means that courts should focus not only on release but on rehabilitative conditions. If a court can consider the vast conditions that a wealthy individual could afford as part of setting bail, then a court should be able to consider rehabilitative factors available upon release for indigent defendants. This resolves the disparate pretrial treatment between wealthy and indigent defendants created by *Boustani II*. By advocating for generalized decarceration and allowing for more release, this allows defendants to take advantage of the rehabilitative conditions and programs available through pretrial services which “help[] defendants acquire and use prosocial life skills with a focus on cognitive and choice awareness, recognition of the motive and influence of others, problem solving and deductive reasoning.”¹⁹⁵ Leveling up the meaning of “least restrictive” to a broad array of conditions positively impacts both groups of defendants, and society as a whole.

While federal prisons do have rehabilitative programming, released defendants have greater access to community resources, as well as interactive programs such as Support Court, which is not open to incarcerated individuals. And the rehabilitative programs within the Bureau of Prisons are voluntary. Having program attendance be a condition of release requires defendants to participate, which can provide them with

¹⁹⁴ One way to engage in this defendant specific analysis would be through risk assessment tools. However, this Note will not discuss risk assessment tools because recent articles have exposed how unreliable and discriminatory these tools can be. For examples of articles discussing risk assessment in the pretrial context, see *supra* note 4.

¹⁹⁵ Rowland, *supra* note 2, at 18.

services that they would not have otherwise sought out for themselves. Viewing "least restrictive" in this light adds a new weight to the bail determination balance: an interest in rehabilitation. This again allows "least restrictive" to become quite expansive and encapsulate conditions other than those that go directly toward flight and danger prevention, to those that actually *benefit* the defendant. As part of setting conditions of release, a judge can have a defendant actively seek employment, continue or start an education program, get medical or psychiatric treatment, participate in inpatient or outpatient programs, or any other condition as the court and pretrial services see fit.¹⁹⁶ And some positive conditions also simply are not available in prison. While defendants may be able to have a job in prison, they are likely not able to *keep* the job they had before being charged, whereas release allows that opportunity. Family access is also incomparable; family members may be able to visit a defendant in prison, but that is a far cry from what a familial relationship looks like in our society. Maintaining employment and family relationships are crucial for rehabilitating a defendant and preventing future crime.¹⁹⁷

Arguing for wealthy defendants to be released based upon conditions they can afford then allows for a broader consideration of what conditions actually mitigate flight and danger across the board.¹⁹⁸ This opens up more consideration for mitigating and rehabilitative conditions such as these and serves as a pathway for increased release.

Mass incarceration is a massive problem in the United States, and pretrial detention is a large part of that. It is in society's best interest to read the Bail Reform Act in this context and in light of each defendant's role in society. This includes wealthy defendants; arguing for the release of wealthy defendants based upon the conditions they can afford can help further the overall societal interest in decarceration, which positively affects indigent defendants. Another incarcerated individual is a burden on the system, whether rich or poor. In this context, *any* release where the defendant does not pose more societal harm is beneficial; even releasing defendants to a private jail.

When reading "least" restrictive in a societal manner, courts should incorporate the costs of incarceration when considering whether factors mitigate flight risk or danger to the defendant.¹⁹⁹ Doing so adds further

¹⁹⁶ U.S. CTS., ADDITIONAL CONDITIONS OF RELEASE (2011), <https://www.uscourts.gov/sites/default/files/ao199b.pdf>.

¹⁹⁷ Gjelten, *supra* note 185.

¹⁹⁸ This obviously says nothing of the important considerations of *who* is considered a flight risk and *what* is considered a danger to the community. See generally Gouldin, *supra* note 169 (redefining what it means to be a flight risk by creating three categories); Rowland, *supra* note 2, at 17 (noting that the list of charges subject to a rebuttable presumption might not actually predict danger to the community).

¹⁹⁹ The federal government spends around \$1.5 billion on pretrial detention compared to \$177 million on community supervision and "\$134 million on contract services to assist defendants with basic life necessities, needed medical and addiction treatment, and employment services." Rowland, *supra* note 2, at 13, 16, 17. Presumably, more money will be spent on community supervision and contracts if more defendants are released while the cost of incarceration will decrease. The money spent may not be

context for considering whether certain conditions are indicated. This then raises the bar for what “least restrictive” means by incorporating advancing societally beneficial goals into its meaning. “Least restrictive,” just as the approaches above suggested, then expands to include those conditions that the judge finds would keep a defendant, of any means, out of jail.

The costs of incarceration are notably high. Federal pretrial detention centers are overcrowded and understaffed, leading to “neglect and violence.”²⁰⁰ In 2019, there were roughly 51,000 individuals being monitored by the U.S. Marshals, the office responsible for monitoring pretrial detainees.²⁰¹ Pretrial detainees are housed in detention centers, correctional centers, federal transfer centers, private prisons, and sometimes even local jails,²⁰² with the U.S. Marshall service renting around 26,200 jail cells to house pretrial detainees.²⁰³

Incarceration has been linked to an increase in depression and an increased risk of self-harm and suicide in younger detainees.²⁰⁴ Detention is linked to wrongful convictions, longer sentences, and recidivism.²⁰⁵ Pretrial detention also “has a corrosive effect on defendants—separating them from their legal team, family, and other potentially prosocial connections in the community.”²⁰⁶ Incarceration, even pretrial, affects employment.²⁰⁷ It also leads to an increase in suspicion and aggression on the part of the defendant.²⁰⁸ Those who have been incarcerated face stigma after their release, and the poverty, unemployment, and social isolation resulting from incarceration lead to an increased risk of health problems.²⁰⁹ And these effects are disproportionately borne by “poor, uneducated people of color, about half of whom suffer from mental health problems.”²¹⁰ Roughly 45% of federal prisoners suffer from mental illnesses,²¹¹ and 10–25% of prisoners

decreased overall, but there is a stark difference in what that money does for defendants who are incarcerated versus released.

²⁰⁰ BARRY HOLMAN & JASON ZIEDENBERG, JUST. POL’Y INST., *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES* 2 (2006).

²⁰¹ WENDY SAWYER & PETER WAGNER, PRISON POL’Y INITIATIVE, *MASS INCARCERATION: THE WHOLE PIE* 2019 3 (2019).

²⁰² *Id.*

²⁰³ JOSHUA AIKEN, PRISON POL’Y INITIATIVE, *ERA OF MASS EXPANSION: WHY STATE OFFICIALS SHOULD FIGHT JAIL GROWTH*, 5–8 (2017).

²⁰⁴ HOLMAN & ZIEDENBERG, *supra* note 200, at 8–9.

²⁰⁵ *See id.* (detailing the specific risks of increased recidivism for detained youth); Rowland, *supra* note 2, at 13 (“Researchers have connected pretrial detention to wrongful convictions, potentially longer-than-necessary prison sentences and higher recidivism rates.” (citations omitted)). For studies finding the same, see *supra* note 120.

²⁰⁶ Rowland, *supra* note 2, at 13.

²⁰⁷ Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115, 117 (2007); HOLMAN & ZIEDENBERG, *supra* note 205, at 9–10.

²⁰⁸ Schnittker & John, *supra* note 207, at 117.

²⁰⁹ *Id.*

²¹⁰ Lorna Collier, *Incarceration Nation*, 45 MONITOR ON PSYCH. 56, 56 (2014).

²¹¹ *Id.* at 59. This number is especially significant considering that 75% of federal prisoners are pretrial detainees. Rowland, *supra* note 2, at 13.

have serious mental illnesses including schizophrenia.²¹² Black defendants specifically are "more likely to be incarcerated before trial."²¹³ Incarceration also affects the families left behind, as they feel anger and shame, affecting intrapersonal relationships.²¹⁴ Additionally, the children of incarcerated defendants have increased risks of poverty, mental health problems, and behavioral issues, which increase the likelihood that they will be incarcerated later on.²¹⁵

Because of "increased discretion and a lack of public scrutiny" associated with pretrial detention, "the potential of racial bias impacting this decision is increased."²¹⁶ While this is most keenly felt in the state systems, the federal system is not immune. As Professor Cynthia Jones has documented, even at the federal level, with objective statutory factors to consider, notable racial disparities in bail determinations exist.²¹⁷ The documented study from the early 1990s notes that while "race did not significantly affect pretrial release outcomes," white defendants received more benefit from stratification factors, such as education income, as opposed to Black defendants with comparable backgrounds.²¹⁸ And, as noted previously, the racial disparities are more keenly seen today through the types of charges being brought and the impact those charges have on the statutory factors and the detention decision.²¹⁹

In this context, "least restrictive" then becomes almost a ceiling, meaning a judge can impose the conditions necessary to keep a defendant out of jail in light of the aforementioned problems, though limited by the considerations of *over* conditioning mentioned above. This then treats both wealthy and indigent defendants in the same manner and advocates for the release of both. The idea of the wealthy building a "private prison" then becomes less of a quandary if indigent defendants are also taken care of. The beauty of releasing wealthy defendants to these home prisons is that the

²¹² Collier, *supra* note 210, at 60.

²¹³ *Id.* at 59. See also Rowland, *supra* note 2, at 14–15 (discussing demographic disparities in pretrial detention).

²¹⁴ Schnittker & John, *supra* note 207, at 117.

²¹⁵ Collier, *supra* note 210, at 62. Collier notes that 40% of the incarcerated population is Black, a figure over representative of the United States, where the Black population only makes up 13.2%. *Id.* at 59. Hispanic individuals are also overrepresented in the prison population, as they account for 20% of the prison population but only 17.1% of the U.S. population. *Id.* Collier notes that the absence of a father figure due to incarceration results in "higher rates of poverty and the likelihood of mental health and behavioral issues for the younger generation. That can lead to their incarceration and perpetuate the cycle of imprisonment." *Id.* at 62. That means that the brunt of the "cycle of imprisonment" falls on children of color.

²¹⁶ Tina L. Freiburger, Catherine D. Marcum & Mari Pierce, *The Impact of Race on the Pretrial Decision*, 35 AM. J. CRIM. JUST. 76, 77 (2010).

²¹⁷ Cynthia E. Jones, "Give Us Free": *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 938 n.100 (2013).

²¹⁸ Freiburger et al., *supra* note 216, at 79; see also Jones, *supra* note 217, at 940 (discussing the same study and the disparate benefit to white defendants over black defendants).

²¹⁹ See *supra* page 257 (commenting on the shift in increase in detention related to the shift in charges and prosecutorial focus).

wealthy defendant pays for the conditions, reducing the cost on the government. An increase in wealthy at home detention would then mean more money for positive pretrial programs for indigent defendants. Sentencing mitigation programs are a new phenomenon, and “24 districts now have formal judge-involved intervention and treatment programs, with even more informal programs of various sizes.”²²⁰ One example is the District of Connecticut’s Support Court. The program brings together federal judges, the United States Attorney’s Office, the Federal Defender’s Office, and the Pretrial Services Office to support and aid defendants with substance abuse treatment at the pretrial and post-conviction stages.²²¹ Support Court works with defendants who have substance abuse problems to serve as a “comprehensive treatment program,”²²² with goals such as having defendants: remain drug-free, be law-abiding, improve their employability and education, improve their social skills, enhance their self-esteem, learn relapse warnings signs and develop a relapse plan, improve their financial education and responsibility, cope with problems, and develop time management skills.²²³ Under a societal approach, the conditions for release for indigent defendants can become rehabilitative.

Considering the societal impact and effect of incarceration is an important gloss that allows courts to read “least restrictive” in a manner that cuts against the idea of a “private prison” and instead allows for societal improvement through a decrease in government spending, a decrease in incarceration, and, hopefully, an increase in rehabilitative pretrial programs for indigent defendants.

CONCLUSION

“Freedom comes from human beings, rather than from laws and institutions.”²²⁴ While the Bail Reform Act provides the essential framework, it is ultimately within judicial (human) discretion to detain or release. It is imperative that considerations of wealth are not allowed to factor in a judge’s mind. As this Note sought to demonstrate, detaining wealthy individuals in order to prevent a “two-tiered bail system” is not the answer. Nor is releasing wealthy defendants at the expense of indigent defendants. Instead, the answer is to read “least restrictive” with the Bail Reform Act with an eye toward release. And in order to force this perspective, the lens must be shifted. Detaining everyone to avoid disparities does nothing for any party: defendant, prosecutor, judge, or civilian.

²²⁰ Rowland, *supra* note 2, at 20.

²²¹ SUPPORT COURT PARTICIPANT ORIENTATION PACKET, DIST. OF CONN. 2 (revised Feb. 23, 2016).

²²² *Id.*

²²³ *Id.* at 4–5.

²²⁴ CLOSING ARGUMENT OF CLARENCE DARROW IN THE CASE OF *PEOPLE V. HENRY SWEET*, https://defensewiki.ibj.org/images/c/e5/Clarence_Darrow-_Sweet_Closing.pdf.

Releasing everyone leads to risks of flight, and in rare cases, recidivism. It is possible to find a balance. *Boustani II*'s holding does not solve inequitable treatment. It makes injustice equal.

