Bail and Time-Served Plea Offers

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Abstract

Defendants in criminal cases are routinely detained pending trial because they are deemed dangerous. In some of these cases, these defendants are detained without bail, in others, bail is set at an amount which defendants are unable to pay. These determinations are made after brief, minimal hearings, often based on the charging documents and the defendant's prior criminal record. To those defendants who are detained, prosecutors frequently make time-served plea offers—effectively giving them the option to go free in exchange for a conviction. Refusing the offer, however, means the defendant remains in custody due to the court's dangerousness determination.

This is absurd. For pretrial release purposes, these defendants are too dangerous to release, but for plea purposes, these defendants can be deemed to have served their time and go free upon accepting the offer. I propose that time-served plea offers trigger a mandatory, immediate review of defendants' pretrial release conditions. Unless a court confirms that it would reject the plea outright, the defendants' dangerousness cannot be a part of this reconsideration. Defendants who might otherwise be detained on inapplicable dangerousness grounds may consider the time-served offer without the pressure of remaining in jail. More broadly, this reform requires courts and prosecutors to reckon with otherwise routine release determinations that often determine the outcome of criminal cases.

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I. Introduction

Robert Ryan Ford was arrested for shoplifting from a Walmart in 2016.[1] Harris County Pretrial Services performed a risk assessment the day after his arrest, recommending that he be detained due to "[s]afety issues that conditions can't mitigate."[2] Ford's bail was set at $5,000—an amount he could not pay, and an amount confirmed by a Hearing Officer after a 50-second hearing.[3] Three days later, Ford appeared before a judge, was "sentenced to time served," and was released at 12:30 am the following day.[4]

Ford's case represents one out of more than fifty thousand misdemeanor cases in which bail was set in Harris County alone.[5] Many were remanded to custody due to an inability to pay, and nearly half were detained "from arrest until their first appearance before a County Judge," as Ford was.[6] Of these defendants, eighty-four percent "plead guilty at their first appearance," and sixty-seven percent of these defendants were released within a day."[7] The District Court for the Southern District of Texas emphasized the impact of this practice, finding that "thousands of misdemeanor defendants each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention."[8]

Ford's case represents an inconsistency that arises when defendants who are detained because they're deemed to present a public safety risk receive time-served offers. Ford was incarcerated pending trial because of indeterminate "safety issues," that supposedly[9] warranted setting bail.[10] Because he was unable to pay the bail amount, he would remain in jail for the remainder of the proceedings. His loss of

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[1] ODonnell v. Harris County, Texas, 251 F. Supp. 3d 1052, 1062 (S.D. Tex. 2017).
[2] *Id*.
[3] *Id*. at 1062-63
[4] *Id*. at 1063.
[5] *See id.* at 1095 (noting that there were "nearly 51,000 arrests with bail set" in Harris County in 2015).
[6] *See id.* at 1112-13.
[7] *Id*. at 1114.
[8] *Id*. at 1107.
[9] As the court ultimately determined and the Fifth Circuit affirmed, Harris County's near-automatic reliance on bail schedules mean that defendants like Ford were incarcerated merely because they could not pay bail, which violated their constitutional rights. *See id*. at 1154 ("The court concludes that Harris County does not provide due process for indigent or impecunious misdemeanor defendants it detains for their inability to pay a secured financial condition of release. Those who cannot pay the secured money bail set at the probable cause hearing before a Hearing Officer must wait days, sometimes weeks, before a County Judge provides a meaningful hearing to review the bail determination."); ODonnell v. Harris County, 892 F.3d 147, 159 (5th Cir. 2018) (affirming the district court's conclusion that Harris County's procedures violated defendants' due process rights) (overruled on other grounds in Daves v. Dallas County, Texas, 64 F.4th 616 (5th Cir. 2023)).
[10] *See* ODonnell v. Harris County, Texas, 251 F. Supp. 3d 1052, 1062-63 (S.D. Tex. 2017).

freedom was (again, supposedly) outweighed by the danger he purportedly posed to the public.

That is—until Ford's appearance before the criminal court judge five days after his arrest. At that appearance, Ford was offered, and accepted, a "time-served" plea—an agreement to plead guilty in exchange for a term of incarceration he'd already served in the time he'd spent in jail up until that point.[11] As a result of his plea, Ford was set free (almost) immediately.[12] The "safety issues" which had, up until this point, warranted keeping Ford in jail, were apparently no longer reason enough to keep Ford locked up. The prosecutor implicitly took this position by making the offer, and the court agreed by approving the sentence. Yet had Ford refused the plea, his bail would have almost certainly remained in place, and he would have remained in custody until the dismissal of his case, a verdict following trial, or his acceptance of the offer at a later proceeding.[13]

Critics of bail practices rightly argue that imposing bail often results in people being detained not because they are dangerous or unlikely to return to court, but simply because they lack the funds necessary to secure their release.[14] Overreliance on predetermined schedules of bail amounts leads to automated determinations, without regard to factors that state law requires courts to consider.[15] Courts that have struck down bail schemes often focus on failures to account for defendants' inability to pay.[16]

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[11] *See id.* at 1063; Eric S. Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L.J. 1884, 1924 (2024) (discussing plea and sentencing practices in the prosecution of undocumented immigrants, and noting the use of time-served sentencing offers which "mean[] no additional jail time"); *see also* Kimberly Kessler Ferzan, *The Trouble With Time Served*, 48 BYU L. REV. 2001, 2023-24 (2023) (describing how defendants receive sentence credit for time already served in jail).

[12] *See* ODonnell, 251 F. Supp. 3d at 1063 (noting that Ford agreed to a time-served sentence during an appearance on May 23, and was released at 12:30 am on May 24).

[13] *See* Jeffrey Bellin, *The Changing Role of the American Prosecutor*, 18 OHIO ST. J. CRIM. L. 329, 348 (2020) (noting that defendants in situations like Ford's face the option of "get[ting] out of jail today if they plead guilty" or "sit[ting] in jail for another couple weeks or months to get a trial").

[14] *See* Cynthia E. Jones, *Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention*, 82 ALB. L. REV. 1063, 1066 (2019) ("The overuse and abuse of money bail by state courts in cases involving nonviolent indigent defendants, particularly those charged with petty offenses, is at the center of the national bail reform movement and the current wave of federal civil rights litigation on behalf of indigent pretrial detainees."); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (describing the rise of public defender office bail funds, which "grew out of frustration with the inability of their indigent clients to make any true 'choices' when confronted with indefinite pretrial detention because of inability to pay bail"); *see also* Kenechukwu Okocha, *Nationwide Trend: Rethinking the Money Bail System*, 90 WIS. LAWYER 30, 33 (2017) (detailing examples of defendants detained due to an inability to pay bail, and contrasting these examples with wealthy defendants who were able to pay high bail amounts and then flee).

[15] Chrstine S. Scott-Hayward & Sarah Ottone, *Punishing Poverty: California's Unconstitutional Bail System*, 70 STANFORD L. REV. ONLINE 167, 173 (2018) (concluding that most bail hearings surveyed by the authors lacked individualized attention to the defendants and appeared to reach results based primarily on "the county bail schedule").

[16] *See* ODonnell v. Harris County, Texas, 251 F. Supp. 3d 1052, 1154 (S.D. Tex. 2017).

The practice of holding people on bail or ordering them detained pending trial, only to offer them a chance to go free so long as they plead guilty is an acute illustration of how pretrial detention serves to extract convictions rather than accomplish goals of reappearance and safety. Ford's case is one of them. And there are plenty others.[17] Courts frequently set bail or order defendants detained out of a stated concern that the defendants pose a danger to particular individuals or to the public at large.[18] A substantial majority of state statutory schemes include danger to the public or other individuals as a consideration when setting bail, with many states mandating courts to consider these risks.[19]

Ford's case is far from the only example of prosecutors seeking bail or pretrial detention, only to then let the defendant walk free with a sentence of time-served.[20] Keeping people detained pretrial while making time-served offers is an ongoing issue, with prosecutors leveraging the inherent discomfort of jail and concerns over jail conditions (such as the spread of COVID-19) to extract guilty pleas through these offers.[21] This raises significant concerns because the bail determination is a crucially important stage of the criminal case—particularly in low-level misdemeanor or felony offenses. Bail and pretrial release determinations often decide whether a defendant will go free, or whether they'll remain in jail for the duration of their case. Those who remain in detention—whether because they are ordered detained or because they cannot pay bail—are far more likely to be convicted than other defendants. The prospect of remaining in jail until whenever the court is able to hear procedural motions or hold a trial is unpleasant, especially to defendants who are concerned about remaining employed or who have dependent family members.[22] For those who

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[17] *See, e.g.*, CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 61-67, 84 (2021) (describing examples of defendants detained pending trial who were offered time-served pleas).

[18] *See* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 862-64 (noting that judges "continue to set unpayable bai lfigures to manage perceived public safety risk" and that judges continue to use bail "as a back-door means to manage dangerousness, even in cases where there is no serious risk of flight"); *see also* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 4-5 (1985) (describing the United States' gradual adoption of a bail regime that took dangerousness into account).

[19] *See*, *infra*, Section II.A.1.

[20] *See* Robert J. Levy, *The Dynamics of Child Sexual Abuse Prosecution: Two Florida Case Studies*, 7 J.L. & FAM. STUD. 57, 108 (2005) (discussing a case in which the prosecutor "vehemently opposed bail when the case was in its initial stages," yet "agreed to a plea bargain with credit for only forty-two days of time served").

[21] *See* Tarika Daftary-Kapur, Kelsey S. Henderson, & Tina M. Zottolo, *COVID-19 Exacerbates Existing System Factors that Disadvantage Defendants: Findings from a National Survey of Defense Attorneys*, 45 L. & HUM. BEHAV. 81, 90 (2021) (recounting a defense attorney's response to a survey regarding criminal proceedings during COVID-induced court lockdowns who reported that prosecutors were "making time served offers for people in jail, but simultaneously oppos[ing] defense request for bail reductions (because why not—if they plead guilty, they will get out, why not allow for due process?)")

[22] Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 871 (2020); *see also* Peter Edelman, *The Criminalization of Poverty and the People Who Fight Back*, 26 GEO. J.

hope to take their case to trial, remaining in custody makes the defense of one's case far more challenging.[23]

Faced with these prospects, defendants often agree to "time-served" offers. Under these pleas, defendants plead guilty and agree to a sentence equivalent to the time they've already spent in jail. That time spent in pretrial custody is then credited against their sentence, allowing them to go free immediately.[24] Given the choice of remaining in custody for an unknown amount of time, the challenges of defending a case from custody, and the potential for a heftier sentence should the case go to trial, it's little surprise that defendants are eager to accept the time-served offer and its guarantee of immediate release.[25] Even those who are innocent may be tempted to plead guilty and get on with their lives.[26]

Time-served offers have drawn criticism—typically arising from concerns that they're used to pressure unwarranted guilty pleas,[27] or (more recently) for the puzzles

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POVERTY L. & POL'Y 213, 221 (2019) (arguing that courts use bail to pressure defendants into pleading guilty).

[23] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2493 ("Detained defendants find it harder to meet and strategize with their lawyers and to track down witnesses, for example. Thus, pretrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial. In other words, the shadow of pretrial detention looms much larger over these small cases than does the shadow of trial."); *see also* Blanche Bong Cook, *Jeffrey Epstein: Pedophiles, Prosecutors, and Power*, 26 J. GENDER, RACE & JUSTICE 311, 346 (2023) ("If a defendant loses a bail hearing, the additional burden of pretrial incarceration adds more pressure to accept a plea, e.g. the social stigma of incarceration, the loss of income or employment, the pressures of pretrial incarceration, the inability to fraternize with friends and family, and the inability to participate fully in their own defense.").

[24] Russell M. Gold, *Paying for Pretrial Detention*, 98 N.C. L. REV. 1255, 1271 (2020).

[25] *See* William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1077-78 (2019) ("The defendant who can take a plea for time served or chance a fifteen-year sentence after trial lacks a meaningful alternative to pleading guilty, and it is hard to imagine (given the prosecutor's willingness to accept time served) that the fifteen-year post-trial sentence on the books serves any purpose other than to induce pleas.")

[26] John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 173 (2014) (including, as two "principal reasons why innocent defendants plead guilty," those defendants charged with "relatively minor offenses [who] often plead guilty in order to get out of jail" and avoid other hassles, and defendants "who were wrongfully convicted, but have their conviction vacated on direct appeal or in post review proceedings," who "plead guilty to receive a sentence of time served and obtain their immediate (or at least imminent) freedom")

[27] *See* Russell D. Covey, *Toward a More Comprehensive Plea Bargaining Regulatory Regime*, 101 OR. L. REV. 257, 299-300 (2023); Vida B. Johnson, *A Plea for Funds: Using* Padilla*,* Lafler*, and* Frye *to Increase Public Defender Resources*, 51 AM. CRIM. L. REV. 403, 409 (2014) ("Plea offers with a sentence of 'time served' or probation can therefore be very appealing to those defendants facing lengthy pre-trial detention or other hardships."); Keith A. Findley, Maria Camila Angulo Amaya, Gibson Hatch, & John P. Smith, *Plea Bargaining in the Shadow of a Retrial: Bargaining Away Innocence*, 2022 WIS. L. REV. 533, 597 (2022); Courtney Cross, *Criminalizing Battered Mothers*, 2018 UTAH L. REV. 259, 300-01 (2018) ("Although a guilty plea to a misdemeanor with a sentence of time served or probation may be appealing, especially to a mother who has been separated from her children, even a low level conviction for custodial interference can result in a denial of custody or a termination of parental rights."); Sandra Guerra Thompson, *Do Prosecutors Really Matter?: A Proposal to Ban One-Sided Bail*

they raise over whether pretrial detention constitutes punishment.[28] Here, I focus on a more specific issue. Time-served offers, when given to defendants detained pretrial out of concerns of dangerousness, reveal a profound contradiction in courts' and prosecutors' treatment of defendant dangerousness. Detaining someone pretrial—whether through ordering their detention or setting bail that they are unable to pay—suggests that the defendant is too dangerous to be let out into the community as their case is proceeding. Yet making a time-served offer suggests the opposite, as all the defendant must do is admit guilt, at which point they will be released. Those defendants who refuse these offers, however, remain in custody pursuant to the court's prior determination of their dangerousness—a determination belied by the time-served offer. These defendants remain in custody solely because they wish to fight their case, raising significant due process, state constitutional, and state statutory concerns.[29]

Beyond identifying and critiquing the practice of time-served offers to people detained pending trial, I propose a solution to counter courts' and prosecutors' contradictory behavior. In any instance where a prosecutor makes a time-served offer to a defendant who is detained pending trial, the court should hold a mandatory and immediate review of the defendant's bail and pretrial release conditions. During this review, the court cannot consider the defendant's dangerousness unless it concludes that it would reject the time-served offer. The court must reach this renewed determination of release conditions before the defendant agrees to the time-served offer—allowing those for whom bail requirements are reduced or rescinded to contemplate the offer from the perspective of their newfound freedom from custody. Those defendants who remain detained following this review should then be monetarily compensated for their continued detention, with payments directly to the defendants, but potentially with payments offsetting fines and fees should the defendant ultimately be convicted.

Requiring immediate review forces courts and prosecutors to reckon with the implications of time-served offers on prior determinations of dangerousness. In instances where defendants are only in custody because of dangerousness concerns, the bail review hearing grants them an opportunity for release and more genuine consideration of their options. More fundamentally, this approach discourages an automated and inconsiderate approach to bail—impressing on courts and prosecutors that each pretrial release determination is individualized and complex.[30] Courts

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Hearings, 44 HOFSTRA L. REV. 1161, 1172-73 (2016) ("Nothing encourages (one might say, coerces) people to plead guilty like pretrial detention, especially when a guilty plea will result in immediate release on 'time served.'")

[28] *See, e.g.*, Kimberly Kessler Ferzan, *The Trouble With Time Served*, 48 BYU L. REV. 2001 (2023); Raff Donelson, *Natural Punishment*, 100 N.C. L. REV. 557 (2022); Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141 (2013).

[29] *See*, *infra*, notes 198-201 and accompanying text.

[30] *See*, *infra*, Section IV.A.

retain control and the ability to tailor each renewed determination to the case's circumstances (which is why I propose bail review hearings rather than automatic release).[31] But this reform demands that courts take a harder look at defendant dangerousness in light of the prosecution's sentencing posture.

Section II provides background on bail and pretrial release schemes. Most state bail statutes set forth a list of factors for courts to consider when determining pretrial release conditions. I survey the laws of each state and find that a substantial majority require or permit courts to consider the risk that defendants pose to the public or to victims. Courts in states with statutes that don't mention dangerousness often consider dangerousness anyway by developing these factors in their common law, or by reading dangerousness considerations into other statutory factors (such as the defendant's "character or reputation" or requirements that courts consider the defendant's criminal conviction record). Section II also discusses time-served pleas, detailing their use as devices to encourage or compel guilty pleas, and the limited, yet growing, literature critiquing the coherence of credit for time served.

Section III elaborates on the contradiction that occurs when prosecutors make time-served offers to defendants who are detained because of their perceived dangerousness. These offers implicitly admit that the defendant is safe enough to be set free—yet those defendants who refuse these offers remain in custody because they are supposedly too dangerous to be let into the community. Section IV sets forth my proposal for addressing this contradictory approach to defendant dangerousness, setting forth requirements for automatic, mandatory review of pretrial release conditions upon the making of a time-served offer, and requiring monetary compensation for those who remain detained following this review.

Section V considers objections and alternative reforms.[32] Mandatory bail review isn't without its risks. Prosecutors may refuse to plea or offer harsher sentences to avoid the time and effort needed to engage in bail review hearings. Reforms may need to account for efforts to game the system—such as offering one-time-only time-served, plus one day sentences meant to circumvent the review requirements. And concerns about cost and efficiency will likely cause courts and prosecutors to balk at this proposal.

I argue that these objections, while worth considering, are likely outweighed by the potential benefits of the proposal. Plea offers, including time-served offers, will remain appealing not only to defendants but also to prosecutors who rely on these offers to maintain their heavy caseloads. Further bail review hearings will add time and procedural burdens to existing systems, but these existing systems are efficient

[31] For more on this issue, as well as my rejection of a broader reform that would involve automatic release upon the making of a time-served offer, *see*, *infra*, Section V.E.

[32] The alternative reforms which I consider and reject include a narrower approach of limiting bail review hearings to cases in which dangerousness plays a role in the initial pretrial release determination, and a broader approach of automatically releasing defendants once a time-served offer is made. *See*, *infra*, Sections V.D and V.E.

only because they rely on cutting corners and contradictory accounts of defendant dangerousness. What critics may paint as "inefficiency" is, instead, the process required in cases where defendants' freedom and criminal record is at stake.

One point I will not address at much length is the issue of punishment and how it relates to time-served sentences and related pleas. There are important and ongoing discussions over how to square time-served sentences with theories of punishment, and whether pretrial incarceration should be treated as punishment.[33] While these discussions are worthwhile, they are not my focus here, as it is not the nature or existence of punishment that prompts my call for reform. What drives my argument is, instead, an inconsistency in treatment—the simultaneous claim that a defendant is too dangerous to be set free, yet safe enough to warrant a time-served offer. Whether or not pretrial incarceration is punishment, this inconsistency remains.

II. Bail Considerations and Time-Served Pleas

Before setting forth the problem and my proposed reforms, some context on bail, pretrial release, and plea negotiations is necessary. Beyond providing this background, this section surveys every state's law regarding bail and pretrial release considerations (along with the laws of the District of Columbia and Puerto Rico) to determine how state statutes address the issue of defendant dangerousness in the pretrial release context. My findings—that nearly every state permits or requires the consideration of dangerousness to some extent—confirm that the problem I address in this Article is likely to arise in most jurisdictions.

This is not to say that every bail or pretrial release determination will be based on defendants' perceived dangerousness. There may be instances where defendants are detained because there are genuine concerns about reappearance—say, because they pose a flight risk or have a history of failures to appear. Claiming that all bail determinations are based on dangerousness isn't something I hope to prove. Yet, as this section details, dangerousness is an available consideration in many jurisdictions, and many factors that courts are required or advised to consider boil down to the risk the defendant may pose to victims, law enforcement, or the general public.

[33] For examples of articles addressing these issues, see, Kimberly Ferzan, *The Trouble with Time Served*, 48 BYU L. REV. 2001 (2023); Raff Donelson, *Natural Punishment*, 100 N.C. L. REV. 557 (2022); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297 (2012).

A. Bail Factors and Dangerousness

This Article focuses on situations where bail and pretrial release conditions are set based on considerations of defendants' perceived dangerousness. Accordingly, any discussion of the scope of the proposed reforms must first account for how many jurisdictions require or permit court to consider dangerousness when setting bail. This subsection surveys each state's law regarding bail and pretrial release and identifies those states that mandate or permit consideration of the defendant's perceived dangerousness when setting bail. As the survey demonstrates, the vast majority of states permit consideration of the defendant's perceived dangerousness, and even those states that don't explicitly list dangerousness as a statutory factor allow it through common law means or through other factors that implicate dangerousness considerations.

Many states' bail schemes include a list of factors that applies both to the determination of whether the defendant should be released and the conditions of release (such as whether bail should be imposed and the amount of bail).[34] While my focus here is on the amount of bail and the imposition of other release conditions, the determination of whether pretrial release should be permitted is a relevant consideration. Accordingly, where states do not include considerations of dangerousness or public safety in their schemes for determining the amount of bail or the nature of other release conditions, I note whether those states address the issue of dangerousness in the determination of whether to release defendants or to hold them without bail pending trial.

1. States that Include Dangerousness as a Factor to Consider

Forty-one states and Puerto Rico have statutes setting forth bail factors that explicitly require or suggest that courts consider the danger the defendant poses to the public, the victim, or law enforcement. These states are Alabama,[35] Alaska,[36]

[34] *See, e.g.*, IDAHO CRIM. R. 46(c) ("The determination of whether a defendant should be released on the defendant's own recognizance or admitted to bail, and the determination of the amount and conditions of bail, if any, may be made after considering any of the following factors").

[35] ALA. CODE § 15-13-3(f)(4) ("The nature and seriousness of the danger to any person or the community if the defendant is released.")

[36] ALASKA STAT. § 12.30.011(c)(10) ("[T]he effect of the offense on the victim, any threats made to the victim, and the danger that the person poses to the victim")

Arizona,[37] Arkansas,[38] California,[39] Colorado,[40] Connecticut,[41] Delaware,[42] Florida,[43] Georgia,[44] Idaho,[45] Indiana,[46] Iowa,[47] Kansas,[48] Louisiana,[49] Maine,[50] Maryland,[51]

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[37] ARIZ. R. CRIM. PROC. 7.3(d)(2) (requiring courts to consider "risk of harm to others or the community" when setting monetary bail). Arizona law also allows the imposition of non-monetary release conditions upon a finding that "the condition "is reasonably necessary to secure the defendant's appearance or to protect another person or the community from risk of harm by the defendant.") *Id*. at (d).

[38] ARK. R. CRIM. PROC. 9.2(c)(viii) (requiring a consideration of "the risk that the defendant will commit a serious crime, intimidate witnesses, harass or take retaliatory action against any witness, or otherwise interfere with the administration of justice or pose a danger to the safety of any other person").

[39] CAL. CONST. art. I, § 28(f)(3) (requiring that judges or magistrates setting bail "take into consideration the protection of the public," and that "[p]ublic safety and the safety of the victim shall be the primary considerations"); CAL. PENAL CODE § 1275(a)(1) ("In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration.")

[40] COLO. STAT. 16-4-103(5)(h), (i) (permitting courts to consider whether the defendant is likely to violate the law if released without conditions and whether "the defendant is likely to intimidate or harass possible witnesses").

[41] CONN. STAT. § 54-64a(a)(2) (prohibiting the imposition of bail in misdemeanor cases absent specified findings by the court, including findings that the defendant will threaten or injure witnesses or jurors or "will engage in conduct that threatens the safety of himself or herself or another person"); *Id*. at (b)(2) (in felony cases, permitting the consideration of "the arrested person's history of violence," and whether the person will commit further offenses while released on bond).

[42] 11 DEL. STAT. § 2105(b) (requiring courts to consider whether a "substantial risk to the safety of the community" exists when making pretrial release determinations).

[43] FLA. STAT. § 903.046(2)(e) (requiring courts setting bail or release conditions to consider "[t]he nature and probability of danger which the defendant's release poses to the community")

[44] GA. STAT. § 17-6-1(e)(1)(B) (authorizing courts to release a defendant on bail upon a finding that the defendant does not pose a "significant threat or danger to any person, to the community, or to any property in the community")

[45] IDAHO CODE § 19-2904(3)-(4) (requiring courts to consider "the protection of victims and witnesses" and "[e]nsuring public safety" when setting bail or imposing release conditions); *see also* IDAHO CRIM. R. 46(c)(8) (permitting courts to consider "any facts indicating the possibility of violations of law if defendant is released without restrictions").

[46] IND. CODE 35-33-8-4(b) (requiring that bail be set to assure reappearance or "to assure the physical safety of another person or the community if the court finds by clear and convincing evidence that the defendant poses a risk to the physical safety of another person or the community").

[47] IOWA CODE § 811.2(2) (requiring courts to consider "which conditions of release will reasonably assure the defendant's appearance and the safety of another person or persons").

[48] KAN. STAT. 22-2802(8) (requiring the court setting conditions of release to consider "the likelihood or propensity of the defendant to commit crimes while on release, including whether the defendant will be likely to threaten, harass or cause injury to the victim of the crime or any witnesses thereto")

[49] LA. CODE CRIM. PROC. art. 316(5) (requiring courts setting bail amounts to consider "[t]he nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release.")

[50] 15 ME. REV. STAT. § 1026(4)(C)(9-A) (requiring courts setting bail to "take into account the available information concerning . . . [a]ny evidence that the defendant poses a danger to the safety of others in the community")

[51] MD. R. 4-216.1(f)(2)(H)-(I) (requiring courts setting release conditions to consider "the danger of the defendant to an alleged victim, another person, or the community" as well as "to the defendant's self");

Massachusetts,[52] Michigan,[53] Minnesota,[54] Mississippi,[55] Missouri,[56] Montana,[57] Nebraska,[58] Nevada,[59] New Jersey,[60] New Mexico,[61] North Carolina,[62] North

see also MD. CODE CRIM. PROC. § 5-201(a)(1) (requiring courts setting bail to "consider including, as a condition of pretrial release for a defendant, reasonable protections for the safety of the alleged victim").

[52] 276 MASS. GEN. L. § 42A (requiring courts setting bail to consider "the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror"); 276 MASS. GEN. L. § 57 ("Except in cases where the person is determined to pose a danger to the safety of any other person or the community under section 58A, bail shall be set in an amount no higher than what would reasonably assure the appearance of the person before the court after taking into account the person's financial resources"); 276 MASS. GEN. L. § 58A (setting forth procedures for ordering pretrial detention or setting release conditions "based on dangerousness," in cases involving offenses involving an element of "the use, attempted use, or threatened use of physical force against the person of another").

[53] MICH. COMP. L. 765.6(1)(c) (requiring courts setting bail to "consider and make findings on the records as to . . . "[t]he previous criminal record and the dangerousness of the person accused").

[54] MINN. STAT., R. CRIM. PROC. 6.02(2)(k)-(m) (when "determining conditions of release the court must consider . . . (k) the victim's safety; (l) any other person's safety; (m) the community's safety").

[55] MISS. CODE § 99-5-11(5)(b) (permitting the release of defendants charged with misdemeanors on their own recognizance unless the court finds that releasing them "would constitute a special danger to any other person or to the community"); MISS. RULES CRIM. PROC. 8.4(b) (permitting the imposition of additional release conditions, including an appearance bond, when doing so is "reasonably necessary to . . . protect the public").

[56] MO. STAT. § 544.453(1) (requiring courts setting bail to consider whether "[a] defendant poses a danger to a victim of a crime, the community, any witness to the crime, or to any other person")

[57] MONT. CODE § 46-9-301(3) (requiring that the amount of bail set be "sufficient to protect any person from bodily injury").

[58] NEB. REV. STAT. § 29-901.01 (courts setting bail "may . . . take into account . . . "any information to indicate that the defendant might engage in additional criminal activity or pose a threat to himself or herself").

[59] NEV. REV. STAT. § 178.4853(8) (requiring courts to consider "[t]he nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing" when reviewing a defendant's custody status). Courts setting bail are required to consider the factors listed in this section when determining the amount of bail. See Nev. Rev. Stat. §§ 178.4851, 178.498

[60] N.J. STAT. 2A:162-20(d) (permitting courts considering bail and pretrial release conditions to consider "[t]he nature and seriousness of the danger to any other person or the community that would be posed by the eligible defendant's release, if applicable"); *see also* N.J. CONST. art. I, ¶ 11 (Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination . . . would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community").

[61] N.M. R. DIST. CT. R. CRIM. PROC. § 5-401(C)(4) (permitting courts determining release conditions to consider information regarding "the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release").

[62] N.C. GEN. STAT. § 15A-534(b) (requiring courts to set certain types of release conditions—none of which include a secured bond—unless the court makes a determination that the conditions "will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses").

Dakota,[63] Ohio,[64] Oklahoma,[65] Puerto Rico,[66] Rhode Island,[67] South Carolina,[68] South Dakota,[69] Tennessee,[70] Texas,[71] Utah,[72] Vermont,[73] Virginia,[74] Washington,[75] and Wyoming.[76]

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[63] N.D. R. CRIM. PROC. 46(a)(3)(G) (requiring courts to consider "the nature and seriousness of the danger to any person or the community posed by the person's release").

[64] OHIO CONST. art. I, § 9 (requiring that courts determining bail amounts "consider public safety, including the seriousness of the offense, and a person's criminal record"); OHIO REV. CODE § 2937.011(E)(6) (requiring courts setting bail to consider "[t]he considerations required under Ohio Constitution, Article I, Section 9"); *see also* OHIO REV. CODE § 2937.222(C)(4) (in proceedings for defendants to be held without bail, requiring courts to consider "[t]he nature and seriousness of the danger to any person or the community that would be posed by the person's release").

[65] *See* 22 OKLA. STAT. § 1105.3(E)(2) (requiring pretrial services programs to "provide reliable information to the judge relating to the person applying for pretrial release so a reasonable decision can be made concerning the amount and type of bail appropriate for pretrial release. The information provided shall be based upon facts relating to the person's risk of danger to the community and the risk of failure to appear for court") These recommendations are to be provided when defendants cannot post bail in the amount of bail schedules established by judicial districts pursuant to Oklahoma's Pretrial Release Act. *See* 22 OKLA. STAT. § 1105.3(B) (calling for recommendations by the pretrial program when defendants haven't posted bail); 22 OKLA. STAT. § 1105.2 (setting for the bail schedule development and review procedures). Some statutes require considering dangerousness when defendants are charged with particular offenses. *See, e.g.*, 22 OKLA. STAT. § 1105(B) (requiring courts in domestic violence cases and protective order violations to consider, "[t]o the extent that any of the . . . information is available to the court . . . [w]hether the person is potentially a threat to any other person," among other factors).

[66] 34A P.R. L. Ap. II, § 218(b)(3) (requiring courts setting bail amounts to consider "[t]he character, dangerousness and mental condition of the person charged of an offense").

[67] R.I. ST. CT. R. BAIL GUIDELINES II, III (requiring release on personal recognizance unless the court determines that the defendant "will endanger the safety of any other person, property, or the community" and permitting monetary bail under certain conditions, including the court being "reasonably satisfied that the defendant will engage in other criminal conduct dangerous to the person or property of others"); *see also* R.I. GEN. L. § 12-13-1.3(c) (requiring the collection of information on defendants' prior criminal record and potential danger to the community by the Department of Corrections and providing these findings to the court in bail proceedings); R.I. GEN. L. § 12-13-5.1 (setting forth a presumption of dangerousness for defendants charged with certain drug offenses in instances where the court determines "that the proof of guilt is evident or the presumption great.")

[68] S.C. CODE § 22-5-510(C) (setting forth factors to consider when determining whether "release would constitute an unreasonable danger to the community or an individual").

[69] S.D. CODIFIED L. § 23A-43-4 (requiring courts setting release conditions to consider "the risk that the defendant will flee or pose a danger to any person or to the community").

[70] TENN. CODE § 40-11-115(a)(2), (b)(5) (requiring courts making bail and pretrial release determination to "give first consideration to ensuring the safety of the community" and permitting these courts to consider "[t]he nature of the offense, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance and the safety of the community"); TENN. CODE § 40-11-118(b)(7) (requiring that bail be set at an amount "necessary to reasonably assure the appearance of the defendant while at the same time protecting the safety of the public," and whether the defendant's "prior criminal record" indicates that "the defendant will pose a risk of danger to the community").

[71] TEX. CODE CRIM. PROC. art. 17.15(a)(5) ("The future safety of a victim of the alleged offense, law enforcement, and the community shall be considered.")

[72] UTAH. CODE § 77-20-205(8)(b)(iii) (permitting courts setting pretrial release conditions to consider "the potential danger to another individual, or individuals, posed by the release of the individual").

Twenty-eight of these states, and Puerto Rico, mandate that courts consider dangerousness when setting bail. These states include Alabama,[77] Alaska,[78] Arizona,[79] Arkansas,[80] California,[81] Delaware,[82] Florida,[83] Idaho,[84] Iowa,[85] Kansas,[86]

[73] 13 VT. STAT. § 7554(a)(2), (b)(2) (where a court determines that "conditions of release imposed to mitigate the risk of flight will not reasonably protect the public," allowing for the imposition of further conditions and the consideration of additional factors, including the "character and mental history" of the defendant, and noting that "[r]ecent history of actual violence or threats of violence may be considered by the judicial officer as bearing on the character and mental condition of the accused").

[74] VA. CODE § 19.2-121(A) (requiring courts setting bail to consider "whether the person is likely to obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness, juror, or victim").

[75] WASH. CRRLJ 3.2(a), (e) (requiring, in instances where courts determine that there is a substantial danger the accused will commit a violent crime, intimidate witnesses, or interfere with the administration of justice, that courts setting release conditions consider factors including prior threatening behavior and evidence of present threats or intimidating behavior).

[76] WYO. STAT. R. CRIM. PROC. 46.1(d)(4) (requiring courts setting release conditions to assure "the safety of any other person and the community" and requiring them to account for "available information concerning . . . [t]he nature and seriousness of the danger to any person or the community that would be posed by the person's release").

[77] ALA. CODE § 15-13-3(f) & (f)(4) (requiring courts to consider all listed factors when setting pretrial release conditions, including "[t]he nature and seriousness of the danger to any person or the community if the defendant is released").

[78] ALASKA STAT. § 12.30.011(c) (stating that "the court shall consider" all twelve listed factors).

[79] ARIZ. R. CRIM. PROC. 7.3(d)(2) (requiring courts to consider "risk of harm to others or the community" when setting monetary bail).

[80] ARK. R. CRIM. PROC. 9.2(c)(viii) (requiring a consideration of "the risk that the defendant will commit a serious crime, intimidate witnesses, harass or take retaliatory action against any witness, or otherwise interfere with the administration of justice or pose a danger to the safety of any other person").

[81] CAL. CONST. art. I, § 28(f)(3) (requiring that judges or magistrates setting bail "take into consideration the protection of the public," and that "[p]ublic safety and the safety of the victim shall be the primary considerations"); CAL. PENAL CODE § 1275(a)(1) ("In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration.")

[82] 11 DEL. STAT. § 2105(b) (requiring courts to consider whether a "substantial risk to the safety of the community" exists when making pretrial release determinations).

[83] FLA. STAT. § 903.046(2)(e) (stating that courts setting bail or release conditions "shall consider" . . . [t]he nature and probability of danger which the defendant's release poses to the community")

[84] IDAHO CODE § 19-2904(3)-(4) (requiring courts to consider "the protection of victims and witnesses" and "[e]nsuring public safety" when setting bail or imposing release conditions).

[85] IOWA CODE § 811.2(2) (requiring courts to consider "which conditions of release will reasonably assure the defendant's appearance and the safety of another person or persons").

[86] KAN. STAT. 22-2802(8) (requiring the court setting conditions of release to consider "the likelihood or propensity of the defendant to commit crimes while on release, including whether the defendant will be likely to threaten, harass or cause injury to the victim of the crime or any witnesses thereto")

Louisiana,[87] Maine,[88] Maryland,[89] Massachusetts,[90] Michigan,[91] Minnesota,[92] Missouri,[93] Montana,[94] Nevada,[95] North Dakota,[96] Ohio,[97] Oklahoma,[98] Puerto Rico,[99] South Dakota,[100] Tennessee,[101] Texas,[102] Virginia,[103] Wisconsin,[104] and Wyoming.[105]

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[87] LA. CODE CRIM. PROC. art. 316(5) (requiring courts set bail "in an amount that will ensure . . . the safety of any other person and the community" and which "ha[s] regard to. . . [t]he nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release.")

[88] 15 ME. REV. STAT. § 1026(4)(C)(9-A) (requiring courts setting bail to "take into account the available information concerning . . . [a]ny evidence that the defendant poses a danger to the safety of others in the community")

[89] MD. R. 4-216(f)(2)(H)-(I) (requiring courts setting release conditions to consider "the danger of the defendant to an alleged victim, another person, or the community" as well as "to the defendant's self")

[90] 276 MASS. GEN. L. § 42A (requiring courts setting bail to consider "the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror").

[91] MICH. COMP. L. 765.6(1)(c) (stating that courts setting bail "shall consider and make findings on the records as to . . . "[t]he previous criminal record and the dangerousness of the person accused").

[92] MINN. STAT., R. CRIM. PROC. 6.02(2)(k)-(m) (when "determining conditions of release the court must consider . . . (k) the victim's safety; (l) any other person's safety; (m) the community's safety").

[93] MO. STAT. § 544.453(1) (requiring courts setting bail to consider whether "[a] defendant poses a danger to a victim of a crime, the community, any witness to the crime, or to any other person")

[94] MONT. CODE § 46-9-301(3) (requiring that the amount of bail set be "sufficient to protect any person from bodily injury").

[95] NEV. REV. STAT. § 178.4853(8) (requiring courts to consider "[t]he nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of not appearing" when reviewing a defendant's custody status).

[96] N.D. R. CRIM. PROC. 46(a)(3)(G) (requiring courts to consider danger to people or the community "on the basis of available information").

[97] OHIO CONST. art. I, § 9 (requiring that courts determining bail amounts "consider public safety, including the seriousness of the offense, and a person's criminal record"); OHIO REV. CODE § 2937.011(E)(6) (requiring courts setting bail to consider "[t]he considerations required under Ohio Constitution, Article I, Section 9").

[98] 22 OKLA. STAT. § 1105.3(E)(2) (requiring pretrial services programs to provide information regarding defendants' "risk of danger to the community and the risk of failure to appear for court")

[99] 34A P.R. L. Ap. II, § 218(b)(3) (requiring courts setting bail amounts to consider "[t]he character, dangerousness and mental condition of the person charged of an offense").

[100] S.D. CODIFIED L. § 23A-43-4 (requiring courts setting release conditions to consider "the risk that the defendant will flee or pose a danger to any person or to the community").

[101] TENN. CODE § 40-11-115(a)(2) (requiring courts making bail and pretrial release determination to "give first consideration to ensuring the safety of the community").

[102] TEX. CODE CRIM. PROC. art. 17.15(a)(5) ("The future safety of a victim of the alleged offense, law enforcement, and the community shall be considered.")

[103] VA. CODE § 19.2-121(A) (requiring courts setting bail to consider "whether the person is likely to obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness, juror, or victim").

[104] WIS. STAT. §§ 969.01(1)(b)(2), 969.01(4) (permitting courts to consider "the need to protect members of the community from serious harm" when setting bail in cases where a defendant is accused of committing a violent crime, and permitting conditions of release "other than monetary conditions," in other cases for the purpose of "protecting members of the community from serious harm").

[105] WYO. STAT. R. CRIM. PROC. 46.1(d)(4) (requiring courts setting release conditions to assure "the safety of any other person and the community" and requiring them to account for "available

Some states mandate the consideration of the risk a defendant poses in limited circumstances. North Carolina's pretrial release statute includes several required considerations, including the nature of the offense charged, the defendant's conviction record, and "any other evidence relevant to the issue of pretrial release," among other considerations.[106] It's only when a defendant is charged with a felony offense that the statute mandates a "determin[ation of] whether the defendant poses a danger to the public."[107] West Virginia does not explicitly state that a defendant's perceived threat to a particular person or the community is a permissible consideration for courts setting bail restrictions, though its factors include related considerations such as "[w]hether the alleged acts were violent in nature,"[108] and the defendant's "prior record of criminal convictions and delinquency adjudications, if any."[109]

In twelve states, bail and pretrial release conditions are listed as optional considerations. These states include Colorado,[110] Connecticut,[111] Georgia,[112] Indiana,[113] Mississippi,[114] Nebraska,[115] New Jersey,[116] New Mexico,[117] Rhode

information concerning . . . [t]he nature and seriousness of the danger to any person or the community that would be posed by the person's release").

[106] N.C. GEN. STAT. § 15A-534(c).

[107] *Id*. at (d2).

[108] W.V. CODE § 62-1C-1a(a)(3)(D).

[109] W.V. CODE § 62-1C-1a(a)(3)(E).

[110] COLO. STAT. 16-4-103(5) (stating that courts "may" consider the listed criteria when determining bail and release conditions).

[111] CONN. STAT. § 54-64a(a)(2) (presenting a finding of dangerousness as a necessary precondition for requiring bail, rather than as a factor courts must consider); *Id*. at (b)(2) (in felony cases, stating that courts "may" consider a defendant's "history of violence" and the likelihood that the defendant will commit further crimes if released).

[112] GA. STAT. § 17-6-1(e)(1)(B) (authorizing courts to release a defendant on bail upon a finding that the defendant does not pose a "significant threat or danger to any person, to the community, or to any property in the community")

[113] IND. CODE 35-33-8-4(b) (listing a number of mandatory considerations, none of which include violence, but noting—above the list—that courts may consider whether "the defendant poses a risk to the physical safety of another person or the community").

[114] MISS. CODE § 99-5-11(5)(b) (permitting the release of defendants charged with misdemeanors on their own recognizance unless the court finds that releasing them "would constitute a special danger to any other person or to the community"); MISS. RULES CRIM. PROC. 8.4(b) (permitting the imposition of additional release conditions, including an appearance bond, when doing so is "reasonably necessary to . . . protect the public").

[115] NEB. REV. STAT. 29-901.01 (courts setting bail "may . . . take into account . . . "any information to indicate that the defendant might engage in additional criminal activity or pose a threat to himself or herself").

[116] N.J. STAT. 2A:162-20(d) (stating that courts "may take into account information concerning . . . [t]he nature and seriousness of the danger to any other person or the community that would be posed by the eligible defendant's release, if applicable").

[117] N.M. R. CRIM. PROC. § 5-401(C)(4) (permitting courts to consider information regarding "the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release").

Island,[118] South Carolina,[119] Utah,[120] and Wisconsin.[121] Vermont's statute is a mix, mandating the consideration of additional factors related to defendant dangerousness, but only requiring these factors' consideration upon an initial finding by the court that measures to ensure the defendant's return will not adequately protect the public.[122] Washington's scheme is similar to Vermont's, as it also triggers additional, mandatory factors for consideration upon a determination that a defendant "will commit a violent crime" or intimidate witnesses.[123]

Oregon requires courts making pretrial release determinations to consider various primary and secondary "release criteria,"[124] which include, as a primary consideration, "[a]ny facts indicating the possibility of violations of law if the defendant is released without regulations."[125] Oregon's courts have interpreted this statutory scheme to permit consideration of whether "a particular accused person will commit further crimes" when deciding whether "to release the person on recognizance or conditional release," but not to the determination of the amount of bail.[126]

Illinois is an outlier because of its relatively recent abolition of cash bail.[127] Still, "the nature and seriousness of the real and present threat to the safety of any person or persons or the community" is a factor that courts are required to consider when setting conditions of pretrial release.[128] Accordingly, while Illinois has moved away from the cash bail scheme employed in most other states, findings of

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[118] R.I. ST. CT. R. BAIL GUIDELINES II, III (requiring release on personal recognizance unless the court determines that the defendant "will endanger the safety of any other person, property, or the community" and permitting monetary bail under certain conditions, including the court being "reasonably satisfied that the defendant will engage in other criminal conduct dangerous to the person or property of others").

[119] S.C. CODE § 22-5-510(C) (permitting courts to determine whether release conditions will assure reappearance or whether release will "constitute an unreasonable danger to the community or an individual").

[120] UTAH. CODE § 77-20-205(8)(b)(iii) (permitting courts setting pretrial release conditions to consider "the potential danger to another individual, or individuals, posed by the release of the individual").

[121] WIS. STAT. §§ 969.01(1)(b)(2), 969.01(4) (permitting courts to consider "the need to protect members of the community from serious harm" when setting bail in cases where a defendant is accused of committing a violent crime, and permitting conditions of release "other than monetary conditions," in other cases for the purpose of "protecting members of the community from serious harm").

[122] 13 VT. STAT. § 7554(a)(2), (b)(2) (where a court determines that "conditions of release imposed to mitigate the risk of flight will not reasonably protect the public," allowing for the imposition of further conditions and the consideration of additional factors, including the "character and mental history" of the defendant, and noting that "[r]ecent history of actual violence or threats of violence may be considered by the judicial officer as bearing on the character and mental condition of the accused").

[123] WASH. CRRLJ 3.2(a), (e).

[124] OR. REV. STAT. § 135.245(3)

[125] OR. REV. STAT. § 135.230(7)(d).

[126] *See* Gillmore v. Pearce, 731 P.2d 1039, 1042 (Or. 1987).

[127] See Peter Hancock, *1 Year After End of Cash Bail in IL, Early Research Shows Impact Less Than Many Hoped or Feared*, ABC EYEWITNESS NEWS (Sept. 18, 2024) https://abc7chicago.com/post/cash-bail-illinois-year-after-end-early-research-shows-impact-less-many-hoped-feared/15321213/ (noting that Illinois was "the first state in the nation to eliminate the use of cash bail").

[128] 725 ILL. COMP. STAT. 5/110-5(a)(4).

dangerousness remain relevant to the continued incarceration or imposition of pretrial release conditions on criminal defendants.

The District of Columbia explicitly prohibits the imposition of monetary bail "to assure the safety of any other person or the community."[129] Dangerousness is, however, a consideration in preventive detention hearings involving violent crimes and instances where there is a "serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror."[130] In those instances, if "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," the defendant may be detained pending trial.[131]

2. States Without Statutory Dangerousness Bail Factors

States that do not explicitly list dangerousness in determining the amount of bail include Hawaii,[132] Kentucky,[133] New York,[134] Pennsylvania,[135] and West Virginia (in most cases).[136] Still, considerations of dangerousness play a role in most of these states. Hawaii's bail scheme includes a permissive provision allowing courts to consider "all available information," when setting bail, and provides an inclusive list of factors.[137] Bail may also be denied when "the charge is for a serious crime" and there "is a serious risk that the person poses a danger to any person or the community."[138]

Kentucky's list of bail amount factors includes a requirement that courts consider "the past criminal acts and the reasonably anticipated conduct of the defendant if released."[139] While this does not explicitly list dangerousness, "reasonably anticipated conduct" is likely to encompass predicted future danger to the public—particularly as it appears immediately alongside the consideration of the defendant's criminal history. Additionally, Kentucky's bail amount factors do not apply to defendants "who [are] found by the court to present a flight risk or to be a

[129] DC CODE § 23-1321(c)(3).
[130] DC CODE § 23-1322(b)(1).
[131] *Id*. at (b)(2).
[132] *See* HAW. REV. STAT. § 804-9.
[133] *See* KY. REV. STAT. § 431.525(1).
[134] *See* NY R. CRIM. PROC. 510.10.
[135] *See* PA. STAT. R. CRIM. PROC. § 523
[136] W.V. CODE § 62-1C-1a(a)(3)
[137] *See* HAW. REV. STAT. § 804-9.
[138] HAW. REV. STAT. § 804-3(b)(3).
[139] KY. REV. STAT. § 431.525(1)(d).

danger to others,"[140] as these defendants are subject to additional potential release conditions under a separate statute.[141]

Pennsylvania's statutory bail scheme includes a list of criteria that courts are required to consider when determining whether to release a defendant and what conditions of release are appropriate.[142] The list does not mention the defendant's dangerousness to victims, particular people, or the general public.[143] Even so, Pennsylvania's Supreme Court permits courts to consider "anticipated criminal activity . . . in setting the amount of bail," although that consideration alone "cannot stand as a grounds for the denial of bail."[144]

As already discussed, West Virginia's list of bail considerations does not include an explicit mention of a defendant's dangerousness,[145] though the risk a defendant poses to victims must be considered in domestic violence cases.[146] West Virginia's case law, however, emphasizes the existence of factors beyond those contained in the statute and the uniqueness of factors applicable to each case.[147]

3. Dangerousness Considerations Beyond Explicit Bail Factors

Beyond listing dangerousness as an explicit consideration, bail factor statutes and provisions may also include factors that indirectly implicated the perceived risk defendants pose to the public. Alaska, for example, requires courts to consider twelve factors when setting release conditions.[148] In addition to considering the danger the defendant poses to the victim, the statute also requires courts to consider "the nature and circumstances of the offense charged,"[149] "the person's record of convictions and any pending criminal charges,"[150] "the person's reputation, character, and mental condition,"[151] and "the pretrial risk assessment provided by a pretrial services officer, if available."[152] Other state bail schemes have broad, catch-all factors that permit courts to consider any other relevant information beyond the listed factors.[153]

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[140] *Id*. at (6).
[141] KY. REV. STAT. § 431.520 (permitting the imposition of further conditions for defendants determined to pose a flight risk or to be "a danger to others").
[142] PA. STAT. R. CRIM. PROC. § 523.
[143] *Id*.
[144] Com. v. Truesdale, 296 A.2d 829 (Pa. 1972).
[145] *See* W.V. CODE § 62-1C-1a(a)(3).
[146] W.V. CODE § 62-1C-17c(b).
[147] *See* State ex rel. Bennett v. Whyte, 258 S.E.2d 123, 127 (W.V. 1979) ("Because each bail case may involve unique factors, we stated in *Hutzler* that more precise rules cannot be formulated.")
[148] ALASKA STAT. § 12.30.011(c).
[149] *Id*. at (c)(1).
[150] *Id*. at (c)(6).
[151] *Id*. at (c)(9).
[152] *Id*. at (c)(12).
[153] *See, e.g.*, HAW. REV. STAT. 804-9 (requiring that bail "be set in a reasonable amount based upon all available information").

Conditions like these may involve considerations of the defendant's dangerousness. For example, a court may consider the nature and circumstances of the charged offense to warrant higher bail for those charged with violent crimes out of a concern that they may carry out further violence if released with no or little bail.[154] A court might consider a history of violent convictions to indicate that a defendant might engage in further violence upon release.[155] To be sure, these factors touch on considerations other than violence (one might have a reputation for refusing to follow directions or court orders, rather than a reputation for violence, for example). But a statute (or court's bail justification) need not explicitly mention the risk of violence for that consideration to play a role in the determination.

States that purport to focus on likelihood of reappearance also have a way of bringing dangerousness into the discussion. Arkansas, for instance, requires courts to "take into account all facts relevant to the risk of willful nonappearance," but includes factors like prior violent criminal history and the risk that the defendant will commit crimes or harm witnesses as factors purportedly "relevant to the risk of nonappearance."[156] Despite the statute's insistence otherwise, these considerations don't relate to whether someone will or will not appear at a future proceeding—they instead relate to whether a defendant will harm someone if released. This comes through in Arkansas courts' decisions regarding bail and pretrial release, which permit courts to "consider the character and reputation and the criminal activities and tendencies of the person charged as factors bearing upon the security required to insure his appearance."[157]

The tendency to smuggle perceived dangerousness into likelihood of reappearance determinations is important for courts and states that purport to rely only on likelihood of reappearance when setting bail and pretrial release conditions. New York, for example, is often presented as "the only state where judges are not supposed to consider a person's dangerousness when deciding their bail."[158] New York

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[154] *See, e.g.*, OHIO REV. CODE § 2937.011(E)(1) (requiring courts to consider "[t]he nature and circumstances of the crime charged, and specifically whether the defendant used or had access to a weapon").

[155] *See, e.g.*, ARK. R. CRIM. PROC. 9.2(c)(vi) (requiring courts to consider the defendant's "prior criminal record, including history of violence, if any").

[156] *See id.* at (c)(vi) & (viii).

[157] Allen v. State, 541 S.W.2d 675 (Ark. 1976).

[158] Ali Bauman, *Gov. Kathy Hochul Blames Judges for Misunderstanding Bail Laws; Critics Say Governor Doesn't Understand Her Own Law*, CBS NEWS (March 7, 2024, 8:26 PM) https://www.cbsnews.com/newyork/news/new-york-governor-kathy-hochul-bail-laws-misunderstanding-judges/; *see also* Ames Grawert & Noah Kim, *The Facts on Bail Reform and Crime Rates in New York State*, BRENNAN CENTER FOR JUSTICE (Jan. 26, 2024) https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-and-crime-rates-new-york-state ("When deciding whether to release a person or set bail, the law requires judges to focus solely on the conditions that will ensure that the person returns to court. That means, unlike most other states, New York judges cannot consider their subjective view of a person's 'dangerousness' when deciding what release conditions to set."

law, however, requires courts to consider defendants' "criminal conviction record, if any,"[159] the defendant's "history of use or possession of a firearm,"[160] and "[w]hether the charge is alleged to have caused serious harm to an individual or group of individuals."[161] With considerations like these, it's little surprise to see accounts of courts considering the risk of harm defendants might pose—even though this consideration is, by law, irrelevant to the determination of release conditions under New York law.[162]

B. Time-Served Pleas

For purposes of this article, a "time-served" plea occurs when the prosecution offers to sentence a defendant to a period of incarceration equivalent to the time the defendant has spent incarcerated pretrial—effectively allowing the defendant to leave custody immediately in exchange for a guilty plea.[163] The harsh conditions of pretrial detention, coupled with the difficulties of preparing one's defense while in jail, lead most defendants to enter into agreements to plead guilty—particularly in instances where the sentence is effectively equivalent to the time already served.[164] "Time-served" sentences may, in some jurisdictions, denote instances where a defendant is released without any conditions. For this Article, I also include offers in which a person is released from custody with certain conditions (for example, violate no laws, submit to search and seizure, or stay away from a certain person or place) under the umbrella of the "time-served" label.[165]

While time-served pleas may be more common in misdemeanor and low-level felony cases, they also may also occur in more serious crimes—such as when a prosecutor hopes to obtain a conviction despite a weak or weakened case.[166] Decades

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[159] NY R. CRIM. PROC. 510.10(1)(c).
[160] *Id*. at (1)(h).
[161] *Id*. at (1)(i).
[162] *See* New York State Justice Task Force, Report on Bail Reform 6 (Feb. 2019) (available at https://www.nyjusticetaskforce.org/pdfs/ReportBailReform2019.pdf) (noting that "as a practical matter, there is a perception that courts do take into account threats to the public or physical safety when considering the monetary conditions of bail").
[163] Russell M. Gold, *Paying for Pretrial Detention*, 98 N.C. L. REV. 1255, 1271 (2020).
[164] Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1356 (2014); *see also* Wayne P. Fuller, *A Different Perspective*, 57 IDAHO L. REV. 609, 611-12 (2021) (describing a criminal case in which a delayed hearing on a motion to suppress, coupled with the prospect of freedom through a time-served offer, led the defendant to change his plea and end up getting sentenced to prison and ultimately deported).
[165] *See, e.g.*, *Misdemeanor (Summary & Informal) Probation*, SHOUSE CALIFORNIA LAW GROUP, https://www.shouselaw.com/ca/defense/probation/misdemeanor-probation/ (describing California misdemeanor probation practices and contrasting misdemeanor probation with felony probation).
[166] *See* Keith A. Findley, Maria Camila Angulo Amaya, Gibson Hatch, & John P. Smith, *Plea Bargaining in the Shadow of a Retrial: Bargaining Away Innocence*, 2022 WIS. L. REV. 533, 537-48 (2022) (discussing the case of Kerry Max Cook who accepted an Alford plea for twenty-two years of

of years in prison may hang in the balance for defendants contemplating a time-served offer.[167]

Time-served offers are attractive to defendants who are incarcerated pending trial, "no matter the merits of the case."[168] Certain defendants might find them particularly appealing. Roxy Davis's survey of 500 randomized cases in Santa Cruz County, California revealed that most homeless defendants pleaded guilty to time-served offers (compared with 28 percent of housed defendants), which "contribute[d] to longer custodial sentences than those served by housed defendants."[169] Davis's explanation for this phenomenon captures why time-served offers appeal to defendants:

> Homeless defendants earn days toward their sentence as they spend time in pretrial detention, and as time goes on, a credit for time served offer is likely to become more attractive to both the defendant and the prosecutor, as the defendant will eventually get to the point where they have served as much or more time pretrial than they would be sentenced to if convicted. This raises the concern that homeless defendants may be at an elevated risk to plead guilty due to pretrial detention when they otherwise would not: Credit for time served offers may prove enticing to defendants who are eager to get out of jail, and this pressure is likely to increase as the defendant's detention goes on.[170]

To be sure, not every unhoused person may accept an initial time-served offer.[171] But Davis's point reflects the disproportionate burden faced by people of limited means who cannot pay bail, or who must choose between affording bail and affording food.[172]

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time served on a rape and murder case, despite repeatedly proclaiming his innocence and multiple conviction reversals); Keith A. Findley, *Reducing Error in the Criminal Justice System*, 48 SETON HALL L. REV. 1265, 1287-88 (2018) (noting that prosecutors make time-served offers "even on serious homicide charges" when new evidence of innocence arises).

[167] *See id.* at 558-59 (describing the results of a survey of defendants whose cases were reversed who then agreed to pleas, noting that 88 percent of the defendants agreed to time-served offers, and that the defendants "had served an average of 14.7 years but still had remaining an average of 36.4 years to serve on the upper end of the sentences originally imposed").

[168] William Ortman, *The Prosecution Bar*, 101 WASH. U. L. REV. 123, 134 (2023).

[169] Roxy W. Davis, *Homelessness and Pretrial Detention Predict Unfavorable Outcomes in the Plea Bargaining Process*, 46 L. & HUM. BEHAV. 201, 204, 210 (2022).

[170] *Id*. at 210.

[171] *See* Alan Abramowitz, *Expanding Lawyers' Role*, 33 FLA. BAR NEWS (No. 18, Sept. 15, 2006) (recounting a prior client who refused a time-served offer "because he was doing fine and wanted to stay [in jail] longer, at least until it wasn't so cold.")

[172] *See* Terry Skolnik, *Criminal Justice and the Erosion of Constitutional Rights*, 66 BOSTON COLLEGE L. REV. 1679, 1716-20 (2025) (describing how bail requirements disproportionately affect those of limited means and those without employment who are often unable to pay the required bail amount).

For defendants facing pretrial detention due to a detention order or the inability to pay bail, a time-served offer is enticing. The restrictions on liberty one suffers when incarcerated before trial are substantial.[173] To be sure, proceeding to trial or challenging evidence or the prosecution on procedural grounds might succeed and result in the dismissal of the charges altogether. But these outcomes are not guaranteed, and proceeding to trial could be disastrous,[174] particularly if prosecutors threaten to seek a higher sentence should defendants reject their offers.[175] Indeed, defense attorneys are likely to encourage their clients to accept time-served offers rather than proceeding to trial and risking a lengthy sentence.[176]

Whatever one's perceived chances of a successful defense or procedural challenge might be, any time these measures take is time the defendant will spend behind bars.[177] Going free at the cost of pleading guilty will often seem preferable to the guarantee of further time in jail.[178] Even those who are innocent may be inclined to accept a time-served offer—particularly if they perceive the case to be a low-level offense or if they've already been incarcerated for a long time.[179] Indeed, the

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[173] *See* Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 749-51 (2022) (summarizing survey results regarding the perceived severity of harm resulting from detention as compared with the harms of various crimes).

[174] *See* William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1077-78 (2019) ("The defendant who can take a plea for time served or chance a fifteen-year sentence after trial lacks a meaningful alternative to pleading guilty, and it is hard to imagine (given the prosecutor's willingness to accept time served) that the fifteen-year post-trial sentence on the books serves any purpose other than to induce pleas.")

[175] *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2561 (2004) (describing judges' and prosecutors' role in "impos[ing] harsh penalties on defendants who go to trial").

[176] *See* United States v. Wahhaj, 728, F. Supp. 3d 1215, 1222 (D.N.M. 2024) ("[I]n a felony criminal case where the Government can easily meet its burden of proof, any experienced criminal defense lawyer would strenuously attempt to convince a client to take a time-served plea offer instead of proceeding to trial—whereupon conviction, the statutorily required sentence of life in prison must be imposed.")

[177] *See* Paul Heaton, Sandra Mayson, & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STANFORD L. REV. 711, 771-72 (2017) (noting that many detained people will accept time-served offers, as the "costs of staying in jail to fight a charge are simply overwhelming").

[178] Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS. L. REV. 277, 308 (2011) ("Incarcerated individuals will find it difficult to ignore the call of immediate freedom, particularly if the person is unaware of the myriad collateral consequences of the guilty plea and thus does not factor these consequences into the cost-benefit analysis of an immediate guilty plea.")

[179] *See* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 173 (2014) (including, as two "principal reasons why innocent defendants plead guilty," those defendants charged with "relatively minor offenses [who] often plead guilty in order to get out of jail" and avoid other hassles, and defendants "who were wrongfully convicted, but have their conviction vacated on direct appeal or in post review proceedings," who "plead guilty to receive a sentence of time served and obtain their immediate (or at least imminent) freedom"); *see also* Stephanos Bibas, *Small Crimes, Big Injustices*, 117 MICH. L REV. 1025, 1029 (2019) ("Even innocent defendants may find plea offers of time served irresistible.")

implications of pleading guilty, which can be severe even for misdemeanor offenses,[180] are often unknown to those going through the process.[181]

Time-served offers may also appeal to courts and prosecutors, as defendants' acceptance of the offers may free up time and resources of an overloaded system.[182] The passage of time may "weaken witnesses' and victims' memories and willingness to cooperate with prosecutors," which may incentivize prosecutors to offer lower punishments than might otherwise be attainable following a successful trial.[183] Defendants' incentives to avoid continued detention and prosecutors' incentives to process cases quickly and efficiently make time-served offers and plea agreements a common phenomenon.[184]

Despite the prevalence of time-served offers, their appeal to participants in the criminal legal system, and the implications they have for conviction rates and collateral consequences, these offers get relatively little individualized attention in the scholarly literature. Kimberly Kessler Ferzan's work engages at length with time-served sentences—addressing contradictions and harms that arise from crediting people with time served and ultimately arguing for the abolition of time-served credit in favor of a detention-compensation scheme.[185] Zina Makar advances a similar proposal, noting that existing time-served credits only compensate those "who served time prior to a conviction" through the reduction of sentences—leaving innocent people without a remedy for their deprivation of liberty.[186] Others address the seeming contradiction between the Supreme Court's designation of pretrial detention as non-punitive and sentencing courts' practice of giving credit toward criminal sentences based on time spent detained.[187]

The remainder of this Article advances a different sort of critique against time-served offers—addressing a distinct contradiction that arises when prosecutors make these offers to defendants detained pretrial. These defendants are simultaneously

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[180] *See, e.g.*, Norman L. Reimer, *Inside NACDL*, 32 CHAMPION 51, 51 (2008) (discussing "Operation Streamline," in which those who cross the border illegally are asked to plead guilty to misdemeanor time-served sentences, leaving them with "criminal convictions and the ensuing collateral consequences that may make it impossible for them to ever again enter the United States legally").

[181] John D. King, *The Meaning of a Misdemeanor in a Post-Ferguson World: Evaluating the Reliability of Prior Conviction Evidence*, 54 GA. L. REV. 927, 941 (2020) ("But because of the woeful state of indigent defense, especially in low-level cases, many defendants enter guilty pleas with no understanding of the likely consequences of this action.")

[182] James J. Fyfe, *Testing the Limits of Law Enforcement*, 82 MICH. L. REV. 1113, 1117-17 (1984).

[183] *Id*. at 1118

[184] *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1322 (2012) ("[M]any arrestees plead guilty to petty offenses in exchange for a sentence of time served as a way of terminating what might otherwise be a longer period of incarceration than the offense carries.")

[185] *See generally* Kimberly Kessler Ferzan, *The Trouble With Time Served*, 48 BYU L. REV. 2001 (2023).

[186] Zina Makar, *Unnecessary Incarceration*, 98 OR. L. REV. 607, 634 (2020).

[187] *See* Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1142 (2013) (outlining this apparent inconsistency); Raff Donelson, *Natural Punishment*, 100 N.C. L. REV. 557, 582-83 (2022) (discussing the apparent "transform[ation" of pretrial detention from non-punishment to punishment through time-served credit practices).

treated as too dangerous to release pending trial, yet safe enough to warrant a plea agreement that results in their immediate release upon agreeing to plead guilty. After detailing and critiquing this contradictory behavior, I turn to how courts may change their bail review procedures to assure a more sensible approach to pretrial release.

III. Squaring Time-Served Offers with Continued Bail

A. Pretrial Detention Plus Time-Served Offers

Zina Makar presents a hypothetical scenario that illustrates the tension between pretrial detention and time-served offers:

> Imagine an individual is charged with a crime that holds a maximum penalty of five years. She is held without bail, pursuant to her state's preventive detention statute, for one year as she awaits trial. At this time, the prosecutor offers her a plea deal--that she plead guilty in exchange for four years of the maximum penalty suspended and credit for one of the five years as time already served. In other words, this deal would allow the defendant to walk out of jail as a free person in exchange for affirming her guilt.
>
> To laypeople, the idea of allowing accused criminals to go free in exchange for a mere admission of guilt seems almost laughable (after all, the defendant was deemed dangerous enough to be held prior to trial). But to institutional players, it is barely noticed and is one of the most common exchanges in day-to-day courtroom proceedings.[188]

Defendants may be held pretrial without bail (as in Makar's scenario). But many more people may fall into similar circumstances. Defendants may also be detained because courts considered their dangerousness when setting bail (as permitted in most states)[189] and are unable to pay the bail amount.

New Jersey Supreme Court Chief Justice Stuart Rabner describes the case of the pseudonymous Craig Mallon, who was charged with joyriding and was "[u]nable to post 10 percent of a $2,500 bail."[190] After serving 124 days in jail, Mallon, who had "maintain[ed] his innocence" up to that point, accepted a plea agreement "that allowed him to become a free man right away" by "plead[ing] guilty in exchange for a

[188] Zina Makar, *Unnecessary Incarceration*, 98 OR. L. REV. 607, 633 (2020)
[189] *See*, *supra*, Section II.A.1.
[190] Stuart Rabner, *Criminal Justice Reform is About Fairness*, 57 JUDGES' J. 12, 12 (2018).

sentence that amounted to time served and no probation."[191] Rabner suggests that Mallon's incarceration made a significant difference, stating that his "inability to post a modest amount of bail likely affected the outcome of his case as much as the weight of the evidence against him did."[192]

Consider a third hypothetical defendant, Jenny Smith.[193] Smith is charged with felony possession of cocaine after a police officer conducted a baseless stop and frisk and finds a bag containing powdered sugar (from a previously eaten brownie) in her pocket. A field drug test indicated that the substance was not sugar, but cocaine—an all-too-common occurrence.[194] While the sugar has been sent to the state crime lab for further testing, it will be months until the results are in.[195]

While Smith's alleged crime involves nothing more than the possession of contraband, it's still a felony, and Smith has a history of assault and battery convictions. Based on her conviction record, the court concludes that Smith poses a danger to the community and orders her to pay a $10,000 bond to secure her release. Smith is unable to pay and is remanded to custody. After two weeks in jail, Smith appears in court for a pretrial conference. A chat with her public defender confirms that things aren't looking good: Smith can either file a motion to suppress based on the unlawful search—a motion which won't be heard until at least a month or two later—or wait however long it will take for the crime lab to confirm the identity of the sugar. During this time, Smith will remain in jail.

The prosecutor, however, gives Smith a third option. She can plead guilty to a time-served offer and walk out of jail subject only to an eighteen-month term of informal probation. If she refuses, she will remain in custody for however long it takes to move to suppress the sugar or for the lab results to come in. Remember, Smith is only in jail because she is considered a danger to the community due to the nature of the charge (a felony!) and her prior convictions for assault and battery. But if she takes the offer, she'll be out of custody despite her criminal record (which will be one felony conviction longer).

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[191] *Id.*

[192] *Id.*

[193] No relation. For a discussion of a case involving similar factual circumstances, see ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 91-92 (2018) (discussing the case of Amy Albritton, who pled guilty after a three-week pretrial detention on drug charges resulting from a false positive result of a field drug test).

[194] *See* Ross Miller, Paul Heaton, & Haley Sturges, Guilty Until Proven Innocent: Field Drug Tests and Wrongful Convictions 32-33 (Dec. 2023) (available at https://www.law.upenn.edu/live/files/12890-fdt-guilty-until-proven-innocent) (finding—based on overly conservative estimates of field drug tests' false-positive rates—that at least 28,800 arrests per year involve "a person not possessing a controlled substance who was falsely implicated by a presumptive drug test").

[195] *See* Brooke Park, *Bexar County Crime Lab Running More Than Year Behind*, SAN ANTONIO EXPRESS-NEWS (Aug. 30, 2024) https://www.expressnews.com/news/article/bexar-county-crime-lab-marijuana-19733419.php (reporting on delays of up to a year in testing and analysis in Bexar County's Criminal Investigation Laboratory).

Squaring time-served offers with continued pretrial incarceration is difficult.[196] Making time-served offers to defendants detained pretrial on dangerousness grounds is absurd. These defendants have been deemed dangerous—so dangerous that it is acceptable to curtail their liberty and detain them pending trial. Acceptance of a time-served offer, however, would result in their immediate release from custody. Accordingly, the time-served offer indicates that the state no longer considers the defendant dangerous enough to remain incarcerated. And yet, defendants who refuse the offer remain in jail—incarcerated solely because they wish to go to trial or challenge the charges on procedural grounds.

Existing bail and pretrial release practices leave much to be desired. The bail determination is crucially important—significantly impacting the outcome of the case, and impacting the defendant's liberty, employment, and family relationships.[197] Yet hearings to determine bail and release conditions are often brief, with courts doing little to account for defendants' individualized circumstances.[198] Cursory hearings, crowded dockets, and overreliance on bail schedules lead to frequent instances of defendants being detained simply because they cannot afford bail.[199] This occurs despite state laws requiring courts to consider defendants' ability to pay bail.[200]

Smith's scenario (along with Robert Ryan Ford's case, detailed in the introduction) take these shortcomings with bail and pretrial release to the extreme. Detaining defendants solely because they cannot pay bail is generally portrayed as something to be avoided.[201] But that's explicitly what is happening when a defendant

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[196] *See* Jeffrey Bellin, *The Changing Role of the American Prosecutor*, 18 OHIO ST. J. CRIM. L. 329, 348 (2020) (describing giving someone a time-served offer with the alternative that they remain in custody pending trial as "crazy if you think about it").

[197] *See* SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 5 (2018) (describing the importance and implications of the bail determination).

[198] *See* CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 38-39 (2019) (surveying several studies of bail hearing length and noting that hearings are short—often averaging five minutes or far less); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 58 (2019) ("All too often, however, little attention is paid to what kinds of risks people actually pose. Instead, prosecutors and judges reflexively set bail amounts . . . with little thought given to risk, and those people who cannot pay bail (regardless of risk) are the ones who get locked up.")

[199] Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 21, 22-23, 25-26, 32 (Eric Luna ed., 2018).

[200] *Compare* Tex. Code Crim. Pro. Art. 17.15 (requiring courts setting bail to consider multiple factors, including the defendant's ability to pay) *with* ODonnell v. Harris County, Texas, 251 F. Supp. 3d 1052, 1129-31 (finding that Harris County, Texas hearing officers and judges mechanically apply bail schedules in misdemeanor cases, resulting in many defendants' detention due to their inability to pay).

[201] *See, e.g.*, In re Humphrey, 482 P.3d 1008, 1013 (Cal. 2021) ("What we hold is that where a financial condition is nonetheless necessary, the court must consider the arrestee's ability to pay the stated amount of bail — and may not effectively detain the arrestee 'solely because' the arrestee 'lacked the resources' to post bail.")

detained out of dangerousness concerns remains in custody following a time-served plea offer. The only reasons those defendants for whom bail is ordered remain in custody is because they cannot pay and because they wish to take the time to defend their case or raise a procedural challenge. For those defendants ordered detained without bail, it is only the desire to mount a defense that continues their custody.

Forcing people to remain in jail due to a prior dangerousness determination rendered inapplicable by a time-served offer runs contrary to the proclamations of myriad courts that defendants should not be detained solely because they cannot pay.[202] It is also contrary to state constitutional rights to bail,[203] state statutes requiring courts to consider defendants' ability to pay,[204] and statutory proclamations that bail shall not be oppressive.[205]

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[202] *See, e.g.*, In re Humphrey, 482 P.3d 1008, 1013 (Cal. 2021); Pugh v. Rainwater, 572 F.2d 1053, 1056 (5th Cir. 1978) ("[I]mprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."); Rasmussen v. Garrett, 489 F. Supp. 3d 1131, 1163 (D. Or. 2020) ("A state . . . cannot not imprison an individual awaiting trial solely on account of his indigency because doing so serves no compelling state interest."); Caliste v. Cantrell, 329 F. Supp. 3d 296, 314 (E.D. La. 2018) (finding that the failure to inquire into criminal defendants' ability to pay when setting bail violated the defendants' procedural due process rights); McNeil v. Community Probation Services, LLC, No. 1:18-cv-00033, 2019 WL 633012, at *16 (M.D. Tenn., Feb. 14, 2019) (finding that plaintiffs challenging the enforcement of bail requirements had established a strong likelihood of success on their constitutional claims by demonstrating a pattern of detaining arrestees "otherwise deemed eligible for release, solely due to the inability to pay the secured bail amount on the arrest warrant") (affirmed, McNeil v. Community Probation Services, LLC, 945 F.3d 991 (6th Cir. 2019).; *see also* Bearden v. Georgia, 461 U.S. 660, 671 (1983) (ruling that a state cannot incarcerate a person on probation solely because they are unable to pay a fine, as doing so "would be little more than punishing a person for his poverty").

[203] *See, e.g.*, ALA. CONST. § 16 (recognizing a right to bail with delineated exceptions, as well as a prohibition on excessive bail); CAL. CONST. art. I, § 12 (same); MISS. CONST. art. 3, § 29(1) (same); *See also Pretrial Release: State Constitutional Right to Bail*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 14, 2025) https://www.ncsl.org/civil-and-criminal-justice/pretrial-release-state-constitutional-right-to-bail (surveying state constitutional rights to bail).

[204] *See, e.g.*, ME. R. U. CRIM. PROC. R. 46 (b)(2) (requiring the release of those unable to pay bail who are otherwise "qualified to be released upon personal recognizance or upon execution of an unsecured appearance bond"); OHIO REV. CODE § 2937.011(E)(4) (requiring consideration of the defendant's "financial resources"); TEX. CODE CRIM. PROC. 17.15(a)(4) ("The ability to make bail shall be considered, and proof may be taken on this point.")

[205] *See* DEL. CODE § 2107(a) ("In determining the amount of bail . . . the court may not require oppressive bail but shall require such bail as will reasonably assure the defendant's appearance at court proceedings"); KY. REV. STAT. § 431.525(1)(b) ("The amount of bail shall be . . . [n]ot oppressive"); MICH. COMP. L. 780.64(1)(b) ("The amount of bail shall be . . . [n]ot oppressive"); MONT. CODE § 46-9-301(4) ("In all cases in which bail is determined to be necessary, bail must be reasonable in amount and the amount must be . . . not oppressive"); TEX. CODE CRIM. PROC. 17.15(a)(2) ("The power to require bail is not to be used to make bail an instrument of oppression"); *see also* R.I. ST. CT. R. BAIL GUIDELINES I ("Bail shall not be set in sums that are excessive and for the purpose of pre-trial punishment.")

B. Initial Thoughts on Reform

While the second half of this paper will dig into the mechanics of how courts and legislatures might account for the problem of needless pretrial detention on dangerousness grounds, it's worth considering what recognizing the problem might do. From accounts of pretrial detention and time-served offers, both in the literature, and from my own and others' experience in criminal practice, detaining people as dangerous while simultaneously offering them the opportunity to plead guilty and go free is a common practice. Yet the contradiction underlying this practice is one that actors tend not to recognize or take seriously.

One initial step toward improving the system is for everyone involved to acknowledge the absurdity of time-served offers for purportedly dangerous pretrial detainees. Defense counsel should look out for these instances and call them out in bail and pretrial release arguments. Courts should be receptive to these arguments and hold prosecutors to account when these situations arise. And prosecutors should work to make all of this unnecessary by thinking carefully about how their requests for bail and release conditions square with the offers they're giving, and either refrain from seeking pretrial detention or unattainable bail requirements or move to reconsider pretrial release conditions upon making a time-served offer. Being aware of the problem is the first step toward addressing it, both through policy reforms and through everyday practice, and my hope is that the Article thus far might advance that goal.

Beyond mere awareness and individual practice, however, there's value to considering how to reform the system of pretrial proceedings to avoid the contradiction of bail and time-served offers. General calls for bail reform make up a sizeable literature and are worth considering.[206] Indeed, I've begun contributing to that literature myself.[207] Still, it's worth focusing on distinct failures in bail and pretrial release proceedings and identifying reforms that target these failures. These reforms may be a good first step for jurisdictions that want to begin rethinking their approach to bail and pretrial release—particularly to the extent that they focus on acute problems. Additionally, aspects of pretrial release that are notably absurd are worth highlighting to the extent that they illustrate the system's potential for absurd results. If courts can tolerate the contradiction of holding people on bail because they're dangerous, while also permitting those people's immediate release on time-served offers, what other absurdities might lurk within the depths of bail and pretrial release practices, or elsewhere in the criminal legal system? This question lurks in the background for the remainder of the article's discussion.

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[206] *See* Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879 (2022) (discussing six different models of approaching bail reform).

[207] *See* Michael L. Smith, *Requiring Written Justifications for Bail Determinations*, 56 CONN. L. REV. (forthcoming 2026) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5218810).

IV. Bail Reconsideration Following Time-Served Offers

The remainder of this article suggests reforms designed to address and prevent instances of people being detained pretrial while being offered the opportunity to plead guilty to time served. In short, those given time-served offers should, before accepting, have their pretrial release conditions automatically reconsidered. This is the least that can be done in light of the state's implicit admission that the defendant ought to be released by making the time-served offer.

A. The Proposal: Bail Reconsideration Following Time-Served Offers

My proposal is this: for defendants detained pretrial, a time-served plea offer to a defendant that would result in the defendant being set free upon agreeing to the offer should trigger an immediate review of the defendant's release conditions, including the amount of bail and any outstanding detention orders. The review of the bail must be automatic, and it must take place and be decided before the defendant agrees to the plea deal. The point of this reform is for defendants who might otherwise plead guilty to time served because they want to get out of jail immediately to have a shot at getting out of jail without a conviction. Should they be released, they will be in a better position to decide whether they do indeed wish to plead guilty, or whether the charges are worth fighting.[208]

Before proceeding further, a note on terminology. My references to "time-served" pleas denote instances when defendants are released from custody following a guilty plea. My use of the phrase is therefore broader than some may expect—as they may think of time-served pleas as encompassing only those instances when an individual is released without further conditions or requirements. Because my focus is on conditioning physical detention or release on one's plea status, the time-served offers that would trigger a review also include instances of diversion or informal probation, where defendants are released pending the fulfillment of further conditions or agreeing to certain restrictions on one's freedoms.

In its review of the defendant's bail amount and release conditions, the court cannot consider the defendant's dangerousness or any risk to the community the defendant may pose absent: (1) specific findings related to the defendant and the defendant's case that support a finding of risk; and (2) a ruling that the court would reject a time-served offer under the circumstances. To the extent that a defendant's prior convictions, reputation, or mental health are relevant to the risk the defendant may pose to the victim or the community at large, these considerations cannot factor

[208] *See* Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 240-42 (2018) (comparing the pressures faced by detained defendants with released defendants and arguing that the latter "are in a better position to resist unfavorable plea offers").

into the determination unless they justify a condition that would have been required by the time-served offer, or unless the court would have rejected the time-served offer on these grounds.[209]

The court may determine that bail should remain imposed if it finds that other considerations like flight risk or other failure to return factors apply. Still, the time-served offer should factor into these considerations. The severity of the potential sentence, for example, should count in favor of release, as the time-served offer constitutes releasing the defendant without further jail or prison time and is therefore relatively light when compared with alternate, long-term sentences.[210] Whether a defendant will comply with release conditions and return to court should be evaluated in light of whether the time-served offer involves probation or other conditions that the state assumes the defendant will be able to meet when released from custody. If so, the offer is an admission that the prosecution believes the defendant will comply with those sentence terms—an admission that must be squared with any current or prior assertions that the defendant is unlikely to comply with release terms.

This proposal builds on existing procedural mechanisms for reviewing bail and pretrial release conditions. Some bail schemes facilitate the review of pretrial release conditions for defendants who remain in custody because they are unable to pay bail. Nebraska, for example, provides a right for a review of release conditions for defendants who remain in custody for more than a day after the initial imposition of release conditions.[211] Alaska entitles defendants who remain in custody for 48 hours after initially appearing before a judicial officer the right to "have the conditions [of release] reviewed by the judicial officer who imposed them."[212] Delaware requires the automatic review of release conditions for defendants detained for more than 72 hours.[213] California requires automatic review of bail orders for detained defendants within five days of the original bail order.[214] Connecticut requires courts to review the release conditions of defendants who remain in custody every forty-five days.[215] Mississippi's rules of criminal procedure require senior circuit judges (or a judge

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[209] A time-served offer for a domestic violence charge, for example, would likely be accompanied by a protective order that would remain in place for a determinate period. A court reviewing the defendant's pretrial release conditions may therefore consider danger to the victim as a justification for a similar release condition requiring the defendant to stay away from the victim.

[210] *See, e.g.*, COLO. REV. STAT. § 16-4-103(5)(f) (permitting courts to consider "[t]he likely sentence, considering the nature and the offense presently charged"); MD. R. 4-216.1(f)(2)(A) (requiring courts to consider "the potential sentence upon conviction"); TENN. CODE § 40-11-115(b)(5) (permitting consideration of "[t]he nature of the offense, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance and the safety of the community").

[211] NEB. REV. STAT. § 29-901.03.

[212] ALASKA STAT. § 12.30.006(c).

[213] 11 DEL. CODE § 2110(a).

[214] CAL. PENAL CODE § 1270.2.

[215] CT. GEN. STAT. § 54-53a(a).

designated by the senior circuit judge) to "review the conditions of release for every felony defendant who is eligible for bail and has been in jail for more than ninety (90) days."[216]

State law also permits defendants to move for modification of bail or release conditions. Vermont permits defendants who are detained pending trial, or who are subject to conditions "requiring him or her to return to custody after specified hours," may move for review of their release conditions by a judicial officer other than the one who set the initial release conditions.[217] If that motion is denied, the defendant has the right to appeal to "a single Justice of the Supreme Court who may hear the matter or at his or her discretion refer it to the entire Supreme Court for hearing."[218] Pennsylvania permits the modification of bail and pretrial release conditions upon the motion of either party, or by the judge (after notifying the parties and holding a hearing).[219] While Illinois has abolished monetary bail,[220] it permits the review of "previously set conditions of pretrial release" on motion by either party or by the court's own motion.[221]

Unlike many existing bail review schemes, however, the court's review of the defendant's detention should be mandatory and automatically triggered by the time-served offer. A reform that leaves it to the defendant to request the rehearing or which gives the court discretion to hold the review doesn't go far enough. Defendants may not be aware of their procedural rights—particularly when under the stress of being incarcerated and subject to crowded, hectic pretrial proceedings.[222] Leaving the rehearing up to the court's discretion makes it less likely that courts will revisit bail under circumstances where it is most needed, such as high-volume courtrooms with many defendants who are detained pretrial.[223]

Automatic bail review is warranted because of the state's effective admission, through the time-served offer, that the defendant no longer poses a danger to the

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[216] MISS. R. CRIM. P. R. 8.5.
[217] 13 VT. STAT. § 7556(a).
[218] 13 VT. STAT. § 7556(b).
[219] PA. R. CRIM. PROC. R. 529(d).
[220] 725 ILL. COMP. STAT. § 5/110-1.5.
[221] 725 ILL. COMP. STAT. § 5/110-6(g).
[222] *See* Thea Johnson, *Lying at Plea Bargaining*, 38 GA. ST. U. L. REV. 673, 703-04 (2022) (noting that while defendants are required to enter into plea agreements with knowledge of the charges against them and their rights, defendants "frequently plead guilty early in the case, often at their first appearance, before they have had a chance to review discovery or consult with counsel," and that they are "required to affirm that they understand a panoply of rights that they are giving up without having a single conversation with a lawyer"); Aditi Juneja, Note, *A Holistic Framework to Aid Responsible Plea-Bargaining by Prosecutors*, 11 NYU J. L. & LIB. 600, 623 (2017) (discussing circumstances that limit defendants' "autonomy and ability to adequately evaluate relevant factors in accepting a plea deal").
[223] *See, e.g.*, ODonnell v. Harris County, Texas, 251 F. Supp. 3d 1052, 1104 (S.D. Tex. 2017) (noting "uncontroverted and reliable evidence" that Harris County judges changed "the bond amount and type from that set by the Hearing Officers in fewer than 1 percent of misdemeanor cases").

public if released. The least the court can do, at this point, is revisit the question of whether a defendant should be released or have their bail reduced.[224] Failure to do so constitutes acceptance by both the prosecution and the court of the risk that the defendant will remain in custody solely due to a desire to defend his or her case. At the same time, this reform makes room for the possibility that bail, or detention may be warranted for other reasons. A rehearing regarding bail without consideration of dangerousness is a flexible approach that permits courts to account for the implications of a time-served offer, while continuing to impose conditions on those who might not otherwise appear.

Courts considering bail and pretrial release acknowledge these implications of time-served offers. In *State v. P.J.C.*, the defendant appealed a denial of his motion to reopen his detention hearing, raising—among other grounds—the point that the state had made a "plea offer that included a sentence of time served and probation."[225] The appellate division of the superior court ruled that the trial court had abused its discretion in failing to consider "apparently new information," including "the State's implicit judgment—reflected by its plea offer—that defendant could be safely released into the community as an alternative to being imprisoned in a setting where his risk of exposure to a fatal disease was elevated."[226] The appellate division noted that while the trial court had considered the potential public safety of the defendant's release when setting bail, this concern would "presumably" be considered alongside the defendant's release conditions of home confinement, parental supervision, and electronic monitoring.[227]

Continuing to detain defendants because they're dangerous after they've been offered a chance to walk out of jail in exchange for a guilty plea is absurd. The practice results in the continued detention of defendants solely because they wish to pursue their cases rather than pleading guilty and going free. Despite courts' insistence to the contrary, the practice is punitive, as any future guilty verdict or plea will be more severe than the initial time-served offer.[228] To avoid this absurdity and to take one step that improves bail and pretrial regimes by some measure, courts must revisit the question of bail and pretrial release conditions when time-served offers are made.

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[224] For more discussion on the benefits of a more robust process for repealing bail determinations, see Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401 (2018)

[225] State v. P.J.C., No. A-3271-19T6, 2020 WL 3494381, at *1 (N.J. Sup. Ct. App. Div., June 29, 2020)

[226] *Id*. at *4

[227] *Id*. at *1, *4.

[228] *Cf*. U.S. v. Salerno, 481 U.S. 739, 746-47 (1987) (concluding that pretrial detention does not constitute punishment).

B. Compensation for Those Who Remain in Custody

Supplementing my automatic review proposal, I further recommend that those who remain in custody following their rehearing should be compensated for their time spent in jail. I don't go so far as to provide a precise recommendation for the amount per day, but existing compensation schemes for those wrongfully incarcerated aren't likely to be a helpful starting point as they tend to be minimal.[229]

Compensation should be available for both those who are eventually acquitted and those who end up pleading guilty or being convicted. One might think that those who are convicted are effectively compensated through time-served credit. But this is not the case if they remain in custody after receiving a time-served offer, since any future time-served offer involves a longer sentence than the initial time-served offer—canceling out the compensatory effect of the additional sentencing credit.

To illustrate, say a defendant receives a time-served offer after spending one week in jail. Accepting the offer would compensate the defendant for the time spent detained pretrial by converting that time into credit against the defendant's sentence. But the defendant rejects the offer, hoping to move to suppress the results of a search. One week later, the court hears and denies the defendant's motion to suppress, at which point the defendant is again given a time-served offer, which he takes. On paper, the defendant is being compensated for the additional week spent in custody, as those days are credited against his fourteen-day sentence. But this credit compensation is illusory for those defendants who've already received a time-served offer, as the sentence is fourteen days rather than seven days solely because the defendant rejected the initial plea offer—which would have resulted in his leaving custody with a fully-credited, seven-day sentence.

The upshot? All defendants who are given a time-served offer, yet remain in custody, should be credited for any further time spent detained pretrial. This reform is not as bold or universal as alternate compensation proposals that would compensate all (or almost all) pretrial detainees for time spent in custody.[230] Still, this conditional pretrial compensation scheme may be more palatable to policymakers who might otherwise balk at a universal compensation system.

Compensation may take several forms. Ideally, defendants detained pretrial may be paid directly—a practice that may benefit families or dependents who might

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[229] *See* Jana Lewis, Comment, *Can a Price be Placed on an Individual's Freedom?*, 37 THURGOOD MARSHALL L. REV. 141, 146-48 (2011) (surveying state and federal compensation schemes for those wrongfully incarcerated, noting that some states offer maximum amounts of $20,000 per year (less than $55 per day), and that the federal government offers $50,000 per year for those wrongfully convicted and incarcerated).

[230] *See* Kimberly Kessler Ferzan, *The Trouble With Time Served*, 48 BYU L. REV. 2001, 2065 (2023) (proposing a scheme in which all pretrial detainees are compensated); *see also* Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1952-53 (2005) (arguing that compensation for those detained beyond a de minimis threshold may be mandated under the Fifth Amendment's Takings Clause).

rely on the defendant for support.[231] Direct compensation may also add up to the money needed to pay bail and get out of jail pending trial. These varied functions of direct compensation make it an appealing option. Still, I leave room for the possibility of alternate compensation schemes, such as credits against fines and fees that a defendant might pay should they remain in custody and ultimately be convicted. Fines and fees associated with criminal prosecution and conviction can have devastating impacts on defendants, and in the absence of reforming existing fine and fee schemes, reducing these penalties through pretrial detention compensation may be a step toward reducing these harms.[232]

V. Objections and Alternatives

A. Deterring Time-Served Offers

Time-served offers raise plenty of issues. They are appealing to defendants who, facing the alternative of continued pretrial detention, may accept them despite being innocent or having legitimate procedural grounds to challenge the charges against them.[233] Defendant's presented with a time-served offer are likely to focus on the fact that they will be released from custody, while potentially missing the rights they are waiving, as well as the immediate and collateral consequences of pleading guilty.[234] Time-served pleas also allow overloaded systems to continue to prosecute, process, and punish far more defendants than would be possible were each defendant

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[231] *See id.* at 2067 (suggesting that detainees "be compensated weekly so they can provide for their families and otherwise use the funds").

[232] *See* Lauren Jones, *Ability to Pay: Closing the Access to Justice Gap with Policy Solutions for Unaffordable Fines and Fees*, 51 FORDHAM URB. L.J. 1593, 1600-02 (2024) (describing the impacts of fines and fees on defendants); Lisa Foster, 11 U. MIAMI RACE & SOC. JUST. L. REV. 1, 6-8 (2020) (discussing how fines and fees stack up, and how jurisdictions tend to use them as "revenue-raising device[s]"); Brandon L. Garrett, *Spiraling Criminal Debt*, 34 FED. SENTENCING REP. 92, 93 (describing the rise of debts related to criminal fines and fees and the implications of these debts, including the loss of driving privileges); *see also* Lisa Foster, *Building a Movement: The Lessons of Fines and Fees*, 87 FORDHAM L. REV. 176 (2019) (discussing efforts to reform fine and fee schemes).

[233] Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 AM. CRIM. L. REV. 1167, 1199 (2005) (arguing that it is likely that at least some people who plead guilty are, in fact, innocence, "given the existence of pleas for time served and other plea bargains that may, as a realistic matter, be too good to ignore").

[234] *See* Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, 36 CHAMPION 38, 42 (2012) (warning that defendants who are detained pretrial because they're unable to pay bail and then given time-served offers are unlikely to understand the rights they are waiving); *see also* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. CIV. RT.-CIV. LIB. L. REV. 1, 38-39 (2013) (observing that the burden of complying with Supreme Court rulings requiring that defendants be advised of the collateral consequences of criminal convictions fall on already "overworked and under-resourced public defender[s]").

to have their procedural rights scrupulously protected and each case subject to true adversarial testing.[235]

Yet these critiques hint at the benefits that a time-served offer may have for defendants who wish to get on with their lives—particularly those who are guilty and wish to accept accountability for their actions. Doing away with, or restricting time-served offers may remove a genuinely beneficial option for these defendants. Relatedly, a reform that disincentivizes time-served offers may have a similar impact: leading prosectors and courts to require lengthier jail or prison time when offering plea deals, and exacerbating mass incarceration.

This may be a risk of reforms that require the automatic review of time-served offers and the ongoing compensation of those who remain detained following these offers. Courts and prosecutors may not want to undertake the time and energy needed to hold release condition reviews. Additionally, if these reviews are effective and defendants are released from custody, the reduced pressure to plead guilty may lead fewer defendants to take these pleas—reducing the rate of case resolutions and making time-served pleas less attractive to prosecutors. All of this may result in prosecutors' reluctance to make these offers and choosing instead to offer lengthier jail or prison sentences. Defendants reluctant to agree to these sentences may end up in jail for longer periods as they attempt to challenge their chargers or take their cases to trial. The reform—meant to promote the release of those who are unnecessarily incarcerated—may lead to the unanticipated consequence of longer pretrial detention and sentencing of criminal defendants.

To be sure, this is a concern worth considering. But there are several reasons why it may not be as severe as anticipated. To start, time-served offers aren't just enticing to defendants, they're also appealing to prosecutors. Prosecutors, particularly those in more populous jurisdictions, have heavy caseloads which incentivize them to make favorable plea offers to defendants (including those who may not deserve lenient terms).[236] Prosecutors may also use time-served pleas to salvage weak cases—ensuring a conviction despite a prosecution that would likely fail were it to proceed to trial.[237] Time-served pleas are "deals that are as close to no-

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[235] *See* Brandon Marc Draper, *Revenge of the Sixth: The Constitutional Reckoning of Pandemic Justice*, 105 MARQ. L. REV. 205, 230-31 (2021) (describing how defendants are likely to accept time-served pleas to avoid continued detention, and how this "inhibit[s] the exercise of the accused's Sixth Amendment rights").

[236] Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 267-70, 279-80, 295 (2011); *see also* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 893-904 (2000) (linking historical increases in plea bargaining rates to rising prosecutorial caseloads).

[237] Keith A. Findley, Maria Camila Angulo Amaya, Gibson Hatch, & John P. Smith, *Plea Bargaining in the Shadow of a Retrial: Bargaining Away Innocence*, 2022 WIS. L. REV. 533, 541 (2022); *see also* Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURVEY AM. L. 2055, 228 (2021) ("Plea bargaining enables prosecutors to obtain convictions in cases they would not have filed without it. It sweeps aside resource constraints on the total number of prosecutions and enables

cost to the defendants as possible," and are therefore highly likely to be accepted, allowing prosecutors to obtain convictions even in cases where they "recognize that the chances of conviction are virtually zero."[238] This lack of cost to defendants remains even in instances where defendants are released upon a review of their bail conditions, as pleading guilty still ends the case without further incarceration. These benefits of making time-served offers remain, and may be worth the cost of a further bail review hearing.

Indeed, prosecutors may remain most likely to make time-served offers in cases that are best-suited for these offers. These include cases in which defendants are, in fact, guilty and the proof against them substantial. The upside of proceeding to trial may seem minimal for the defendant, and prosecutors may anticipate that these defendants will still take the time-served offer even if they are released from custody after their bail is reviewed. This strategy may not work as well for defendants against whom the evidence is weak or who have viable procedural challenges—as they may choose to advance these challenges should they be released from custody. Yet these are the defendants to whom prosecutors are most inclined to make time-served offers.[239]

Additionally, making time-served offers is only one stage of the prosecution process that may be affected by the increased burden of bail review reforms. Jenny Roberts argues that a decline in plea bargaining would "impose serious strain on the criminal justice system" and that "[i]f these costs filter down, prosecutors would be forced to decline prosecution in more cases."[240] While there is a possibility that mandatory bail review hearings might deter time-served offers, the inefficiency and increased burden on courts and prosecutors that would result may lead to fewer cases that would trigger this review in the first place. At the most dramatic, prosecutors might file fewer cases—as Roberts suggests would be the case if defendants refused to accept plea offers.[241] Prosecutors' discretion over which (and how many) cases to file plays a notable role in contributing to the crowded dockets that necessitate time-served pleas and other time-saving workarounds.[242] Adding additional procedural hoops for prosecutors who seek to keep the people they charge in custody may lead them to reduce the number of overall cases to accommodate this added burden.

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prosecutors to charge defendants when the likelihood of their conviction is not high enough to justify taking their cases to trial.")

[238] Keith A. Findley, *Reducing Error in the Criminal Justice System*, 48 SETON HALL L. REV. 1265, 1287-88 (2018).

[239] *See* Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURVEY AM. L. 2055, 228 (2021)

[240] Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1099-1100 (2013).

[241] *See id.*

[242] *See* Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, A Response to Adam Gershowitz and Laura Killinger*, 106 NW. U. L. REV. COLLOQUY 143, 148-49 (2011) (emphasizing the role that prosecutors' own exercises of discretion play in contributing to their high caseloads).

But the change need not be so dramatic to improve things (and to address the concern discussed here of a decline in time-served offers). Remember, my proposal of automatic bail review calls for these reviews only in those cases when defendants who receive time-served offers are detained pretrial. Courts and prosecutors who want to lighten the burden of mandatory bail-review hearings can do so by reducing the number of cases that qualify by taking a harder look at the initial bail and release determination and detaining fewer defendants pending trail. Should courts and prosecutors adopt measures that reduce the volume of pretrial detentions that lead to these troublesome time-served quandaries in the first place, the problem may largely be addressed before the solution of mandatory bail reviews is even needed.

B. Reduced Efficiency

Criminal courts have crowded dockets. Courts process millions of misdemeanor arrests each year.[243] Courts in both urban and rural jurisdictions face challenges in processing the volume of defendants before them, given their limited time, personnel, and resources.[244] Overloaded criminal courts result in myriad harms to all involved, including inadequate representation for defendants,[245] delayed proceedings,[246] and arbitrary outcomes.[247] High caseloads lead to longer periods of pretrial incarceration for defendants—exacerbating the burden of pretrial detention for these people.[248]

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[243] Megan T. Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 737 (2018) (estimating that "there are 13.2 million misdemeanor cases filed in the United States each year")

[244] Bailey D. Barnes, *The Perfect Storm: Substance Abuse, Mental Illness, and Rural America*, 20 U.N.H. L. REV. 317, 327 (2022) (describing resource shortfalls for criminal courts in rural jurisdictions).

[245] *See* Jessica Hafkin, *A Lawyer's Ethical Obligation to Refuse New Cases or to Withdraw from Existing Ones When Faced with Excessive Caseloads that Prevent Him from Providing Competent and Diligent Representation to Indigent Defendants*, 20 GEO. L.J. 657, 664-65 (2007) ("Although Katrina exacerbated the problems of under-funding and excessive caseloads in New Orleans, the city's criminal justice system had been suffering from a lack of adequate representation for indigent defendants for a number of years before the disaster.")

[246] Adam Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 264 (2011) ("[E]xcessive prosecutorial caseloads delay trials for months or even years, leading some defendants who would have exercised their trial rights to simply plead guilty and accept a sentence of time served.")

[247] *See* Lauren K. Robel, *Caseload and Judging, Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3, 19-23 (1990) (arguing that expansive caseloads lead courts to take a managerial approach to the cases before them which are largely ungoverned by controlling law, and which often involve decisions made by courts at early stages of cases with limited information).

[248] *See* Judge Herbert B. Dixon, Jr., *The Real Danger of Inadequate Court Funding*, 51 JUDGE'S J. 1, 43 (2012) ("Innocent persons languish in jail due to overcrowded court dockets")

Adding a further bail review proceeding into the mix might complicate and prolong a process that is already punishing.[249] Time-served offers are generally an efficient proceeding. The prosecutor makes the offer, the defendant often accepts, the court approves, and the case is closed. From there, the court can move on to the next case on its crowded calendar. Mandatory bail reviews disrupt this progression, forcing courts to take the time to consider defendants' bail and pretrial release conditions in the midst of whatever other proceedings are scheduled for the day. The reform slows down the case of the defendant who gets the time-served offer, and delays proceedings for all other parties before the court that day.

This reform will inevitably take up some time and effort of those involved in criminal proceedings. Defendants who might otherwise be subjected to a quick plea colloquy with the court followed by their release may find themselves in lengthier hearings over their release conditions. Still, it's worth considering why the proceeding would have taken such a short time absent this reform. The court would have been able to process the defendant's case (along with many others) only through minimal consideration of each case and systematic waivers of procedural rights and safeguards.[250] These bail review hearings are not so much increasing the time needed to resolve criminal cases as they are forcing courts to take the time necessary to consider each defendant's and release circumstances in the place of overreliance on procedural shortcuts.

Relatedly, efficiency may be a poor metric to evaluate the functioning of a system that processes and punishes people accused of crimes. Darryl Brown notes that the standard story of courts and prosecutors pursuing efficiency to deal with rising crime is complicated by discretionary policies of legislation and enforcement that add to overall caseloads.[251] Increased efficiency may therefore be met with an exercise of discretion that increases the number of crimes charged and prosecuted:

> Legislatures, police, and prosecutors (and ultimately, to some degree, public opinion) exercise a lot of discretion in determining caseloads; the number of prosecutions is not simply a direct function of the rates of criminal offending in the world outside the courtroom. The discretion to change the number of crimes by legislating crime definitions, uncovering more with greater policing investments, or addressing some violations

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[249] *See generally* MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979) (detailing how the time and discomfort required to endure misdemeanor criminal proceedings is effectively an aspect of how states punish these offenses).

[250] *See* Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance – Waiving* Padilla *and* Frye, 51 DUQ. L. REV. 647, 648-51 (2013) (discussing and critiquing the practice of entering into plea agreements that waive ineffective assistance of counsel claims on appeal); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 831-32 (2003) (discussing the Supreme Court's approval of waivers of numerous rights in criminal cases and contrasting it with waivers of rights in other contexts).

[251] Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 194-98 (2014).

> with policies other than criminal prosecution--all of this opens the possibility for policymakers to make these decisions in response to changes in the price of adjudication, which changes with gains in efficiency. Policymakers and enforcement officials, then, are in a position something like car drivers in the wake of new models that incorporate fuel efficiency improvements. They have options for how to respond to a more efficient adjudication regime.[252]

In a similar vein, Thea Johnson critiques the "efficiency mindset" that is "engrained among judges, prosecutors, defense attorneys, probation officers, court clerks, and other system actors--lawyers or otherwise--who touch the criminal legal system."[253] Plea bargains are "powerfully efficient" at resolving cases but, as Johnson notes, come with "very real costs," including more people being incarcerated.[254]

Furthermore, as discussed in the previous subsection, courts and prosecutors can adapt to substantial increase in inefficiency by modifying their other practices. Because bail-review hearings will occur only in cases where defendants are detained pretrial, locking fewer of these defendants up in the first place can head off delays later in the proceedings. Courts and prosecutors who hope to keep things going at a quick pace have the means to do so—they just have to take measures that result in fewer prosecutions and instances of pretrial incarceration.

C. Gaming the System

The objections discussed so far address unanticipated consequences that might occur from legal actors reacting to the procedural requirements the proposed reform would add to existing plea bargain and bail proceedings. So far, I've assumed that courts and prosecutors would act in good faith in response to the reform. But it's also worth considering the possibility that these actors might intentionally attempt to circumvent the reform—ensuring that defendants remain in custody while attempting to gain the benefits currently obtained from time-served pleas. The prosecutor, unlike other attorneys, "has the responsibility of a minister of justice and not simply that of an advocate," and the duty to ensure "procedural justice" for defendants.[255] Yet the tendency to get caught up in the adversarial process tempts prosecutors to think like advocates, incentivizing them against questioning the

[252] *Id*. at 199.
[253] Thea Johnson, *The Efficiency Mindset and Mass Incarceration*, 75 OKLA. L. REV. 115, 116 (2022).
[254] *Id*. at 117-18.
[255] MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (Am. Bar Ass'n 1983).

innocence of those they prosecute and "rethink[ing] a conviction" in light of "institutional incentives."[256]

Prosecutors hoping to avoid triggering an automatic bail review may attempt to evade mandatory bail reviews through artful plea offers. They might, for example, offer a this-day-only offer in which the defendant may plead guilty in exchange for time served, plus one day. Should the defendant refuse, the offer expires and the defendant will have to wait until their next interaction with the prosecutor to receive an updated offer (which, more likely than not, will be the additional time served, plus one day). This tactic avoids triggering the automatic bail review hearing, as the extra day keeps it from being a time-served offer. And the offer's temporary nature complicates the potential response that the bail review requirement kicks in one day later.

For better or worse, most of the participants in bail, pretrial release, and plea negotiations are attorneys—a class of individuals trained to spot and exploit procedural gaps and oversights. Even if the reform is adopted through the passage of a law, or the agreement of democratically elected officials, individual prosecutors may still resist—particularly to the extent the reform is portrayed as an example of progressive prosecution.[257] Reforms will likely need to adapt and undergo amendments as participants in the criminal legal system test the boundaries. Measures prohibiting identifiable forms of gamesmanship may head off foreseeable attempts at circumventing the reform, but courts must remain vigilant.[258]

With potential bad faith actors in mind, it's worth noting that the reforms I discuss here are not meant to be a singular or exclusive fix to problems facing bail and pretrial release schemes. Other reforms may enhance the automatic bail reviews triggered by time-served offers in a manner that might mitigate or deter noncompliance. Auditing bail and pretrial release practices (as well as reforms of these practices) is an important component of reform, as it helps policymakers and other stakeholders determine whether the system is performing as functioned and whether a given reform is working as intended.[259] Implementing an auditing scheme

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[256] Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOWARD L.J. 475, 490-91 (2006).

[257] *See* Cynthia Godsoe & Maybell Romero, *Prosecutorial Mutiny*, 60 AM. CRIM. L. REV. 1403, 1405-06 (2023) (describing "prosecutorial mutiny" as individual prosecutors' "internal resistance to progressive changes")

[258] For an example of supplemental reforms designed to avoid gamesmanship, see Zina Makar, *Unnecessary Incarceration*, 98 OR. L. REV. 607, 666 (2020) (proposing compensation for those detained pretrial, but cautioning that the reform should include a prohibition on "dismissal-bargaining" in which prosecutors "negotiat[e] the dismissal of a case conditioned on the accused waiving his right to compensation").

[259] *See* Jonathan Simon, *Prisoners of Myth*, 56 NEW ENGLAND L. REV. 23, 39 (2021) ("[S]erious efforts to audit the racial justice impact of new, algorithm-based pretrial release mechanisms should be considered an essential component of 'bail' reform."); *see also* Olivia M. Hagel, Comment, *My Cash Is My Bond: Recognizing Rights to Cash Bail Forfeiture Exoneration in Washington*, 96 WASH. L. REV. 209, 219-20 (2021) (describing the Washington State Auditor's report on pretrial incarceration in the

to review courts' rulings on bail review hearings, as well as to compare the frequency and outcomes of bail review hearings following the reforms compared with pre-existing statistics may signal which courts are attempting to evade the reform through artful plea tactics or blunt noncompliance.

Acknowledging the importance of ongoing review and monitoring of plea and pretrial release practices may also address another likely objection—the concern that courts won't take bail review hearings seriously and will automatically confirm existing bail and pretrial release conditions after a cursory review. In certain ways, the proposal attempts to account for this—particularly in its prohibition of dangerousness considerations in the bail review hearing. Yet the danger that courts will effectively automate the bail review process in the face of high case volumes remains, and likely can only be effectively addressed through continued monitoring and measures in place that can hold relevant actors accountable for failing to effectively comply with reforms.

D. A Narrower Alternative: Limiting to Explicit Consideration of Dangerousness?

Automatic bail review in all instances of time-served plea offers might seem like an overly broad reform—particularly when my primary objection to time-served offers is specific to those defendants who are detained out of concerns for dangerousness. One might therefore propose an alternative solution that seems like a better fit for the problem: when the prosecution makes a time-served offer, there should be an automatic review of bail and pretrial release for defendants detained pretrial *only if* those defendants are detained out of concern for the risk they pose to the community or victims.

This narrower reform may seem appealing at first. It gets to the heart of the problem—focusing on those cases where defendants are detained because of dangerousness and are then given time-served offers that permit them to go free upon acceptance. This reform is less disruptive and burdensome on courts, as it does not apply to time-served offers made to defendants who are detained for reasons other than dangerousness.[260] If courts can manage to implement this reform, they can address the contradictory behavior of holding people pretrial because they're purportedly dangerous (despite a time-served offer), while saving time and effort that would otherwise be wasted on a rehearing that would re-confirm the initial, non-dangerousness reasons for holding other defendants.

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state of Washington, including Auditor's findings of disproportionate detention of low-income defendants).

[260] *See, e.g.*, MINN. STAT. R. CRIM. PROC. R. 6.02(2)(i)-(j) (requiring consideration of the defendant's "prior history of appearing in court" and "prior flight to avoid prosecution").

On paper, this alternative looks good. But this is true of much criminal law and procedure, including the statutory bail and pretrial release schemes that this and other literature and lawsuits critique. Here, the targeted reform adds qualifications and barriers to the review of pretrial release conditions that courts may use to avoid genuine reconsideration of a defendant's pretrial custody. Where the choice is to forego reconsideration because a case does not qualify, or to do the work of reconsidering a defendant's bail and release conditions, the efficient, first option will appeal to overworked courts struggling to get through a crowded docket. Automatic review requirements prevent courts from bending the rules to classify cases to avoid revisiting them.

Additionally, in some cases—particularly those in busy courtrooms and courts in which individual cases are handled by a different judge at each stage—it may be difficult for the court to determine the basis for the initial pretrial release determination.[261] Initial bail determinations are often made following a brief hearing, and the bases for these determinations are rarely written down or recorded in any detail.[262] With procedures like these, it may be difficult or impossible for reviewing courts to determine with any level of certainty whether dangerousness concerns played a role I the initial determination. Courts operating under this narrower approach may wish to increase their degree of certainty by requesting a transcript or record of the initial bail hearing, but this could delay the review and prolong the defendant's incarceration (assuming such a record even exists).[263]

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[261] This concern is based on my experience in the Fullerton, California courthouse of Orange County Superior Court, in which one court handled arraignments, another court handled pretrial proceedings (indeed, potentially multiple alternate courts for cases in which defendants were represented by public defenders), and another court set cases for trial which would be heard in yet another court. This contrasts with how former students have described misdemeanor court proceedings in Bexar County, Texas, in which one judge tends to handle cases throughout the pretrial process and trial. For examples of references to multi-court handling of criminal cases, see Woods v. State, 569 S.W.2d 90, 903 (Tex. Crim. App. 1978) ("[I]t is not improper for different judges to sit at different hearings in a case, and this holds true, absent an abuse of discretion, even if an objection is made."); Canela v. Allison, No. 19cv1434-GPC (MSB), 2023 WL 4853388, at *11 (S.D. Cal. July 28, 2023) (noting, in its summary of the record, that the defendant had "complained about not getting a transcript from a hearing before a different judge following the preliminary hearing"); State v. Henkel, No. C9-88-1035, 1989 WL 29576, at *1 (Minn. Ct. App. Apr. 4, 1989) (noting, and rejecting, defendant's challenge to a "stop light offense" based on the fact that "[a] judge other than those involved in pretrial proceedings conducted appellant's trial").

[262] Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401, 2428-29 (2018) (describing the brief and automated bail determination process in Harris County, Texas, and noting the difficulties defendants have in seeking reviews of those determinations in later proceedings).

[263] For examples of transcript delays at various stages of criminal proceedings, see State v. Breer, 112 A.3d 1273, 1275 (Vt. 2014) (noting that a hearing on a bail appeal was continued twice "to accommodate scheduling conflicts and delays in obtaining the transcript); People v. Charles, 580 N.Y.S.2d 99, 102 (N.Y. Sup. Ct. App. Div. 1992) (refusing to attribute 12-month delay in obtaining suppression hearing transcript to defendant); State v. Feldhacker, 663 N.W.2d 143, 144 (Neb. 2003) (noting 22-delay that occurred when defendant requested a preliminary hearing transcript). Courts

Furthermore, courts that do make a genuine effort to determine whether a defendant is being detained out of dangerousness or other reasons may face difficult questions to determine whether defendants' cases qualify. Bail factors that don't explicitly mention defendant dangerousness may nevertheless implicitly incorporate this consideration. A defendant whose bail is based on her criminal history,[264] for example, might be detained out of concerns over her dangerousness (she's committed violent or harmful crimes in the past, and she'll do so again), or concerns that she might not reappear in court (her crimes indicate a tendency toward failure to comply with the law, and she'll likely fail to comply with release and reappearance requirements). Determining whether a defendant whose bail was set in light of factors that might involve violence may lead to arbitrariness in bail review—with some courts treating these factors as indicative of prior consideration of dangerousness, and others treating them as independent considerations. Additionally, the difficulty of determining whether a defendant's case qualifies undoes the efficiency gains of replacing automatic bail reviews with targeted bail reviews, as courts must still make a tough call in each case as to whether a case qualifies for review in the first place.

Limiting the review of pretrial release conditions to cases in which defendants are detained out of dangerousness concerns sounds good. But the difficulty of determining which cases qualify, coupled with the procedural obstacles this would create to courts and defendants make it an unappealing alternative.

E. A Broader Alternative: Automatic Release on Recognizance?

Going in the opposite direction of the preceding discussion, one might wonder why I'm proposing that courts review bail and pretrial release conditions rather than arguing for the automatic release of defendants in instances of time-served offers. If pretrial detention is truly as harmful and coercive as scholars suggest,[265] and if time-

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frequently tolerate delays in transcript production. See In re Lugo, 164 Cal. App. 4th 1522, 1540 n.12 (acknowledging a due process right for imprisoned people to receive parole hearing transcripts, but distinguishing it from a 30-day deadline for those transcripts to be provided to the public, and noting precedent finding due process compliance when transcripts were provided after 68 days); Yevsifeev v. Steve, 730 F. Supp. 2d 308, 310 (W.D.N.Y. 2010) (rejecting defendant's claim of a constitutional rights violation for the delayed and erroneous preparation of probable cause hearing and trial transcripts).

[264] A factor listed in many states' bail statutes. *See, e.g.*, KY. REV. STAT. § 431.525(1)(d) (requiring that the amount of bail be "[c]onsiderate of the past criminal acts and the reasonably anticipated conduct of the defendant if released"); LA. STAT. CODE CRIM. PROC. art. 316(3) (requiring courts setting bail to consider "[t]he previous criminal record of the defendant"); OHIO REV. CODE § 2937.011(E)(4) (requiring courts setting bail to consider the defendant's "record of convictions").

[265] *See*, e.g., RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 58 (2019) (detailing the public safety risks of detaining people pretrial); Crystal S. Yang, *Toward an Optimal Bail System*, 92 NYU L. REV. 1399, 1416-29 (2017) (setting forth the costs of pretrial detention).

served offers take advantage of the pressure of pretrial detention to compel guilty pleas,[266] then why not automatically release defendants upon the making of a time-served offer?

Significant, widespread defects and harm in the criminal legal system often prompt calls for dramatic and far-reaching solutions.[267] The shock that one might feel over a wide-ranging reform might derive from the proposed shift from a status quo that tolerates widespread and routine rights violations.[268] Where ingrained practices are oppressive, departure from routine is no reason to oppose change.

With this context, I'm mindful that the temptation to shy away from changes that seem overambitious might be misplaced. Even so, I worry that a broader proposal that triggers release upon making a time-served offer is overly blunt and leaves behind some of the key concerns motivating the reform. Concerns over harsher plea practices and detention due to the time required for my qualified reforms exist (though, as argued above, don't defeat the proposal).[269] A broader reform, however, might amplify these dangers and lead to more harm than good. Legislatures and courts who might implement these needed reforms might balk at this overly broad alternative—making it less practical of an alternative.

More specifically, an automatic-release proposal disregards the role the court plays in the process of plea offers and acceptances. In all plea bargains, the court must ultimately issue the sentence and, in doing so, approve (or reject) the negotiated plea.[270] As the Texas Court of Criminal Appeals explains:

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[266] *See*, *e.g.*, ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 63-65 (2018) (discussing how pretrial detention pressures defendants who cannot pay bail into pleading guilty); Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 859-60 (describing the pressure that defendants face to plead guilty when detained pretrial).

[267] *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 19-49 (2019) (describing the motivations, work, and goals of prison abolitionists); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161-62 (2015) (proposing a "prison abolitionist framework" of "substituting a constellation of other regulatory and social projects for criminal law enforcement"); Marina Bell, *Abolition: A New Paradigm for Reform*, 46 L. & SOC. INQ. 32, 41-44 (2021) (discussing growing concern with calls for reform rather than more dramatic abolition measures).

[268] Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1131 (2013) (characterizing "crashing" the misdemeanor system through refusing plea deals as a measure that "will impose some of the real cost of mass misdemeanor processing" on the criminal system in an effort to accomplish the requirements of "*Gideon* and its progeny").

[269] *See*, *supra*, Section V.A-B.

[270] *See* People v. Cardoza, 161 Cal. App. 3d 40 (1984) ("Judicial approval is an essential condition precedent to any plea bargain worked out by the defense and the prosecution."); Holbrook v. State, 298 S.E.2d 279, 280 (Ga. App. 1982) ("[A]ll plea bargains are subject to the trial court's approval and can never be more than recommendations."); Hoskins v. Maricle, 150 S.W.3d 1, 24 (Ky. 2004) (describing the federal law regarding the court's role in approving or rejecting plea bargains); *see also* Nancy Jean King, *Priceless Process; Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 136 (1999) ("In all jurisdictions, the judiciary retains at least limited authority to review and reject plea agreements, negotiated dismissals, and other stipulations.")

> When a defendant agrees to the terms of a plea bargain agreement he is deemed to have entered into the agreement knowingly and voluntarily unless he shows otherwise. In effect, he becomes a party to a "contract". The "contract" does not become operative until the court announces it will be bound by the plea bargain agreement. Once the court makes such an announcement, the State is bound to carry out its side of the bargain.[271]

To be sure, there are limitations on the role of the court. The plea, for instance, must be compliant with the law (including any mandatory sentencing requirements),[272] and courts lack power to approve non-complaint sentences arrived at through a plea negotiation.[273] Constitutional constraints demand that defendants enter into pleas knowingly and voluntarily,[274] though a great deal of leeway is permitted.[275] While these restraints control the boundaries of what the reviewing court may do, the court's role in reviewing the plea offer remains in place.

Even if a prosecutor makes a time-served offer, it is still up to the court to approve it. This power includes the ability (to some extent) to reject a plea agreement because it is overly lenient.[276] Accordingly, there is no guarantee that a time-served plea will necessarily be the outcome of the case—though that outcome is highly likely.[277] An automatic-release reform assumes that the court plays no role in the process.[278]

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[271] Ex Parte Williams, 637 S.W.2d 943, 947 (Tex. Crim. App. 1982).
[272] *See* Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURVEY AM. L. 205, 223-24 (2021) (describing federal judges' reactions to mandatory minimum sentencing schemes).
[273] *See* People v. Gardner, 317 N.E.2d 316, 317 (Ill. App. 1974) ("The trial court has authority under Supreme Court Rule 402(d) to approve a plea bargain voluntarily entered into between the defendant and the state. However, this presupposes that the agreement is one that the court has power to approve.")
[274] McCarthy v. United States, 394 U.S. 459, 466 (1969) ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.")
[275] *See* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1272-74 (2016) (discussing the leeway that prosecutors have under fairly minimal constitutional safeguards that view the plea bargaining process as analogous to private law contracts and which seek to "maximize the efficiency of the bargaining process").
[276] *See* Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 321-22 (noting that federal law permits consideration of overly lenient sentences, but presenting cases limiting trial courts' discretion to deny motions to dismiss charges on leniency grounds).
[277] Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1518 (2016) ("De facto, criminal verdicts and sentences are simply arrangements between the parties, with the court and the courtroom process playing a minor role."); *see also* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1390 (1970) (noting that "many judges follow [prosecutors' sentencing] recommendations routinely").
[278] *See* In re Alvernaz, 830 P.2d 747, 759 (Cal. 1992) ("[A]lthough it may well be that in our frequently overcrowded courts, judicial rejection of plea bargains is the exception rather than the general rule,

One might complain that my proposal still cuts courts out of the loop to the extent that it restricts them from considering dangerousness when reconsidering defendants' pretrial release conditions. But the proposal is structured to account for the court's power to reject time-served please—permitting courts to set bail and pretrial release conditions based on dangerousness provided there is a basis for such a finding, and as long as the court indicates it would have rejected the time-served offer.[279] This qualification permits courts to acknowledge genuine instances of defendant dangerousness, even if the prosecution is willing to overlook these concerns in pursuit of a plea deal.

Statutory schemes regarding bail and pretrial release often demand individualized bail proceedings.[280] These statutes often contain numerous factors for courts to consider when weighing each case.[281] One of the primary failings of bail and pretrial release systems is their inability to approach this ideal as courts engage in assembly-line style proceedings as they work through heavy criminal dockets.[282] Reforms to bail and pretrial release systems that seek to realize these statutes goals may fall short if they are overly blunt.[283]

For those who think that the problems and reforms that I set forth in this Article are unacceptably narrow, I reiterate that this reform is meant to be only one piece of a broader approach to addressing failures in bail and pretrial release schemes and the criminal legal system more broadly. I don't count out additional reforms alongside those I discuss here—indeed, supplemental reforms such as meaningful auditing of bail and pretrial release procedures may better help achieve my goals of

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we may not simply *presume*, as petitioner urges, that the trial court automatically would have approved a plea bargain negotiated by the prosecutor and the defense.")

[279] *See*, *supra*, Section IV.A.

[280] *See, e.g.*, MD. R. CRIM. R. 4-216.1(b)(2) ("A decision by a judicial officer whether or on what conditions to release a defendant shall be based on a consideration of specific facts and circumstances applicable to the particular defendant, including the ability of the defendant to meet a special condition of release with financial terms or comply with a special condition and the facts and circumstances constituting probable cause for the charges."); TEX. CODE CRIM. PROC. art. 17.028(a) (requiring magistrates to engage in "individualized consideration of all circumstances and factors" required elsewhere in Texas' statutory bail scheme).

[281] *See, e.g.*, 15 ME. REV. STAT. § 1026(4) (listing more than fourteen factors for courts to consider); N.J. R. CT. R. 3:26-8(e) (listing seven considerations for courts to consider when setting a bail amount); PA. R. CRIM. PROC. R. 523 (listing ten criteria for courts setting bail and pretrial release conditions to consider); TEX. CODE CRIM. PROC. art. 17.15 (listing seven rules for courts to consider when setting bail).

[282] *See* ODonnell v. Harris County, 892 F.3d 147, 159 (affirming the district court's finding that Harris County courts imposed bail "almost automatically on indigent arrestees") (overruled on other grounds in Daves v. Dallas County, 22 F.4th 522, 540 (5th Cir. 2022)).

[283] *See* Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L.J. 845, 852 (2019) (proposing a reform that "redefine[s] what constitutes a risk to public safety" by requiring findings of specific threats and "justify[ing] pretrial detention based on this factor only after an individualized, fact-specific hearing has been held on the potential threat of danger").

avoiding detention on baseless grounds of dangerousness.[284] There is room in the literature for proposals that are broadly transformative and others that are more targeted. While this Article may be fairly characterized as leaning more toward the latter category, it may still make the difference for whether some defendants are kept in jail due to the casual acceptance of existing procedural absurdities, or allowing them to go free to defend their case (or even to plead guilty under less coercive conditions). For defendants in these circumstances, this change may well be the difference between a conviction and a dismissal. That seems like reason enough to take it seriously.

VI. Conclusion

Bail and pretrial release conditions often result in incarceration based on defendants' inability to pay rather than whether these conditions are necessary to ensure reappearance or protect the public. Making time-served offers to these defendants and giving them the option to go free in exchange for a guilty plea amplifies this phenomenon. Much remains to be done to improve the vast, oppressive, and error-prone system of pretrial release. But requiring courts to take a second, focused look at bail and release conditions when defendants are given plea offers they might otherwise feel compelled to accept is a step in the right direction. At the very least, acknowledging and reckoning with this absurdity may compel courts and prosecutors to reconsider whether their routines are truly compliant with the law, or whether they lead to incarceration out of a concern for bare efficiency.

[284] *See*, *supra*, Section V.C (discussing the role auditing might play in mitigating attempts at circumventing required bail review reforms).