CRIMINAL LAW — BAIL REFORM — SUPREME JUDICIAL COURT OF MASSACHUSETTS HOLDS THAT JUDGES MUST ISSUE FINDINGS OF FACT WHEN SETTING UNAFFORDABLE BAIL FOR INDIGENT DEFENDANTS. — *Brangan v. Commonwealth*, 80 N.E.3d 949 (Mass. 2017).

In our criminal legal system, innocent until proven guilty does not likewise mean free until proven guilty. Judges exercise significant discretion over whether defendants charged with crimes will be detained while awaiting trial. If judges decide against pretrial detention, they can impose money bail as a way to ensure defendants have a vested interest in showing up for future hearings.[1] But what happens when defendants awaiting trial are detained and do not (or cannot) post bail? The result is de facto pretrial bail detention[2] — presumably the same outcome judges reject in the first place. Since most courts are overburdened with cases and the duration of bail detention is directly proportional to court caseloads, posting bail can mean the difference for defendants between maintaining stability and snowballing personal consequences.[3] Recently in *Brangan v. Commonwealth*,[4] the Supreme Judicial Court of Massachusetts held that judges must consider a defendant's financial resources when setting bail,[5] detail findings of fact[6] when defendants who cannot afford bail are likely to be held in long-term pretrial detention without adequate procedure,[7] and consider the equities and length of a defendant's pretrial detention if the judge's decision ever comes up for review.[8] Unfortunately, additional procedures do not always make for better liberty protection. While these new procedural due process requirements for bail decisions will give defendants evidence with which to challenge excessive monetary conditions, the requirements likely will not prevent liberty deprivations through bail detention because they do not necessitate a significant change in bail hearing structures.

---

[1] *See* Curtis E.A. Karnow, *Setting Bail for Public Safety*, 13 BERKELEY J. CRIM. L. 1, 3 (2008).

[2] Pretrial detention occurs when a judge decides not to release a defendant pretrial, while bail detention occurs when a defendant remains in jail pretrial because she or he cannot post bail.

[3] *See* Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947, 1972 (2005). Money bail also results in "increased rates of pretrial detention for Black and Latino defendants" because of the "well-established linkages between wealth and race." CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 7 (2016).

[4] 80 N.E.3d 949 (Mass. 2017).

[5] *Id.* at 954.

[6] *Id.*

[7] *Id.* at 954 n.4 (defining "long-term pretrial detention" as "detention for a period of time longer than the defendant might need to collect cash or collateral to post bail").

[8] *Id.* at 966.

On January 17, 2014, Jahmal Brangan was arrested for allegedly robbing a bank.[9] At the time, he was on probation following a prison sentence for child rape and related charges.[10] Considering the alleged probation violation, the Superior Court judge set bail at $20,000 cash or $200,000 surety.[11] A grand jury later indicted Brangan for the offense of armed robbery while masked.[12] At Brangan's arraignment hearing in March 2014, the judge set bail at $50,000 cash or $500,000 surety.[13] Unable to post bail, Brangan remained in custody for one year pending trial.[14] In March 2015, Brangan was convicted, but the judge ordered a new trial.[15] The Commonwealth appealed this order, which resulted in another bail hearing in April 2015 where the judge reinstated the $50,000 cash, $500,000 surety bail.[16] Brangan sought bail reduction to no avail and, during his three-year bail detention, Brangan filed four petitions for relief.[17] All were denied.[18] After the fourth petition, the court permitted Brangan an extraordinary appeal, leading to the instant case.[19]

The Supreme Judicial Court reversed. Writing for the court, Justice Hines[20] began by explaining that state precedent requires court consideration of a defendant's financial resources when setting bail for a criminal proceeding.[21] To this point, the court clarified that "[b]oth the Eighth Amendment . . . and [Article] 26 of the Massachusetts Declaration of Rights prohibit excessive bail."[22] The court reasoned that, based on Supreme Court precedent holding that the "fixing of [a defendant's] bail" must be grounded in "assuring the presence of *that* defendant,"[23] bail calculations must be based on the "individual . . . , including his or her financial circumstances" to be reasonable.[24] In this case, the court

---

9 *Id.* at 955.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *See id.*

15 *Id.*

16 *Id.*

17 *Id.* at 955–56. Each petition was heard by a single justice on the Supreme Judicial Court. *Id.*; *see also* MASS. GEN. LAWS ch. 211, § 3 (2014).

18 *Brangan*, 80 N.E.3d at 956.

19 *Id.* at 956–57.

20 Justice Hines was joined by Chief Justice Gants and Justices Gaziano, Lowy, Budd, and Cypher.

21 *Id.* at 958.

22 *Id.* Excessive bail is defined as bail "'set . . . higher than an amount reasonably calculated to fulfill' the purpose of assuring . . . presence . . . at future proceedings." *Id.* (quoting Stack v. Boyle, 342 U.S. 1, 5 (1951)).

23 *Id.* (quoting *Stack*, 342 U.S. at 5).

24 *Id.*

found nothing in the third bail relief hearing record that demonstrated the judge considered Brangan's indigence when setting bail at $40,000.[25]

While Brangan argued that unaffordable bail was "unconstitutional per se," the court disagreed.[26] Instead, it argued that a "defendant's right to an individualized bail determination that takes his or her financial resources into account" is necessitated by due process and equal protection and that the "imposition of unaffordable bail is subject to certain due process requirements."[27] Although judges are not required to set bail in an amount that the defendant can afford, the court justified prohibiting groundless, high bail for indigent defendants by discussing substantive and procedural due process as those rights relate to pretrial detention.[28] Procedural due process requires that government action infringing an individual's "liberty or property interest" must adhere to "constitutionally sufficient" procedures.[29] Since liberty is a fundamental interest for the purposes of substantive due process, constitutional principles require that statutes affecting liberty be "narrowly tailored to further a legitimate and compelling governmental interest."[30] The *Brangan* court noted that it had previously held in *Aime v. Commonwealth*[31] that, based on these principles, it was unconstitutional to permit judges "unbridled discretion" to determine a defendant's dangerousness within the court procedure required for pretrial detention decisions.[32] In addition, precedent required that pretrial detention be a "carefully limited exception,"[33] and used only when "no conditions of release will reasonably assure the safety" of the community.[34]

---

[25] *Id.* at 959.

[26] *Id.*

[27] *Id.* Due process is the procedure required before fundamental rights enumerated in the Constitution can be rescinded through government action. *See id.* at 961 (citing U.S. CONST. amend. XIV; MASS. CONST. arts. I, X, XII). Equal protection, derived from the Fourteenth Amendment text guaranteeing "any person within [any state's] jurisdiction the equal protection of the laws," is meant to protect against state-sponsored discrimination in the rescission of such rights. U.S. CONST. amend. XIV, § 1.

[28] *Brangan*, 80 N.E.3d at 961–62.

[29] Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (per curiam).

[30] *Brangan*, 80 N.E.3d at 961 (quoting Querubin v. Commonwealth, 795 N.E.2d 534, 539 (Mass. 2003)); *see also, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995). These specifications embody the constitutional sufficiency test called strict scrutiny. *See Adarand Constructors*, 515 U.S. at 235. While the *Brangan* court did not use the term, its use of the terms "compelling," 80 N.E.3d at 961, "narrowly tailored," *id.*, and "fundamental right[s]," *id.*, implicate the concept of strict scrutiny. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

[31] 611 N.E.2d 204 (Mass. 1993).

[32] *Brangan*, 80 N.E.3d at 963 (quoting *Aime*, 611 N.E.2d at 214).

[33] *Id.* (quoting *Aime*, 611 N.E.2d at 211).

[34] *Id.* at 962 (citing MASS. GEN. LAWS ch. 276, § 58A(1), (3)–(4) (2014); Mendonza v. Commonwealth, 673 N.E.2d 22, 25 (Mass. 1996)).

The court then turned to Brangan's case and held that, where a judge sets bail beyond a defendant's ability to pay, bail detention constructively equates to pretrial detention, and thus the decision must be evaluated with the same heightened scrutiny as would be required to impose long-term pretrial detention with due process.[35] The court adopted three rules for judges to follow. First, judges "may not consider a defendant's alleged dangerousness" when setting bail.[36] Second, judges "must provide written or orally recorded findings of fact and a statement of reasons for . . . bail decision[s]" if a defendant appears to be indigent and lacks the financial resources to post bail and that deficiency will likely result in long-term pretrial detention.[37] This "statement must confirm the judge's consideration of the defendant's financial resources, explain how the bail amount was calculated, and state why . . . the defendant's risk of flight is so great that no alternative, less restrictive financial or nonfinancial conditions will suffice" to ensure presence in court.[38] Third, judges "must consider the length of the defendant's pretrial detention and the equities of the case" when bail orders come before them for reconsideration.[39]

Procedural protections exist to protect substantive rights,[40] and in *Brangan*, the court could have fashioned a procedure to protect the liberty of indigent defendants. Instead, the court chose to require that bail hearings use the same procedure required for pretrial detention.[41] Requiring such a record gives indigent defendants leverage with which to challenge high bail. However, the court in *Brangan* simply matched the bail-setting procedure standards for indigent defendants to those required for pretrial detention. In doing so, the court adopted a requirement that will be inadequate as a preventative procedural protection for both bail and pretrial detention and that will necessitate little substantive change to the status quo. Ideally, the court would have instead

---

[35] *Id.* at 963.

[36] *Id.* at 963–64.

[37] *Id.* at 954.

[38] *Id.* at 964–65 (footnote omitted). Judges must still consider, but are not required to report on, factors such as the nature of the offense, the potential penalty, family ties, employment record, reputation, record of convictions, drug dependency, whether the acts alleged involve abuse, and whether the person is on probation, parole, or other release. MASS. GEN. LAWS ch. 276, § 57 (2014).

[39] *Brangan*, 80 N.E.3d at 966.

[40] *See* Washington v. Harper, 494 U.S. 210, 220 (1990) ("It is axiomatic that procedural protections must be examined in terms of the substantive rights at stake. But identifying the contours of the substantive right remains a task distinct from deciding what procedural protections are necessary to protect that right."); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of the government." (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889))).

[41] In order for judges to order pretrial detention for a defendant in Massachusetts, they must issue "written findings of fact and a written statement" explaining why "no conditions [would] reasonably assure the safety of any other person or the community." MASS. GEN. LAWS ch. 276, § 58A(4) (2014).

compelled an approach that would protect against liberty deprivation in the first place by both instructing and incentivizing judges to think twice before setting unaffordable bail.

Requiring a record for bail decisions will ensure defendants have something material with which to challenge excessive monetary conditions. Such records will make it easier for defendants to prepare bail challenges and ensure appellate court scrutiny is appropriately focused.[42] The court's guidance creates specific informational requirements for those records and narrows the hoop judges must jump through to set high bail that constructively parallels pretrial detention. And auditing decisions turning on broad judicial discretion could ameliorate some racial bias in the exercise of discretion associated with bail decisions and require judges to reflect on their decisions by formally reporting in a way that might indirectly improve bail outcomes.[43]

Such findings of fact alone, however, are unlikely to protect indigent defendants from undue liberty deprivations, in part because the procedure neither significantly reduces judges' incentives to hold onto defendants pretrial nor imposes meaningful costs on judges' decisions to do so. *Brangan* essentially left judges with the same "unbridled discretion" that the opinion itself argues has resulted in due process violations.[44] Judicial incentives to impose high bail include alleviating large caseloads, which can be achieved by ensuring defendants are present at trial to resolve cases more quickly or by incentivizing plea bargaining among defendants who get tired of sitting in pretrial limbo;[45] and avoiding public backlash for being "too soft on alleged criminals" or over new crimes committed by defendants.[46] And there are comparatively limited downsides for setting high bail.[47] None of these incentives are addressed by the new protocol.

In addition to permitting the same incentives to impose unaffordable bail to persist, if the court's opinion is accurate, the findings of fact requirement is unlikely to alter the abuse of high bail because it does not include a transaction cost that would limit bail discretion in practice. Procedures can be exceptionally valuable as protections to parties who

---

[42] *See* United States v. Mantecon-Zayas, 949 F.2d 548, 551 (1st Cir. 1991).

[43] *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1230–31 (2009).

[44] 80 N.E.3d at 963.

[45] Manns, *supra* note 3, at 1951, 1967. Money bail proponents usually cite public safety and flight risk as primary concerns. However, money bail provides no deterrent for the indigent defendant with no money of her own to post: money bail is no more compelling than a precatory order that the defendant be law-abiding. *See* Karnow, *supra* note 1, at 2, 12, 22, 25. And the flight risk of indigent defendants is minimal. *See* Jonathan Zweig, Note, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 573 (2010).

[46] Manns, *supra* note 3, at 1967–68.

[47] *See* Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 428 (2016).

lack power in the legal system in part because the transaction costs they impose minimize arbitrary abuses.[48] However, the *Brangan* opinion, as part of an argument that the new practice would "not impose an undue hardship" on bail setting, states that many judges "make findings . . . in support of their bail decisions" already.[49] It appears, then, that the new requirement will not provide any novel protection and will provide relief to indigent defendants only if they have the wherewithal, the resources, and the confidence to challenge a bail decision. This calls into question the overall adequacy of the findings requirement for pretrial detainment decisions as well.

Instead, the court could have provided a procedural protection to shield indigent defendants from liberty deprivations by making it procedurally more difficult to assign exorbitant bail ab initio. Courts in at least four other states have issued opinions or rules with an eye toward limiting money bail.[50] While some courts, like the *Brangan* court, require only written findings, others have gone so far as to order the development of new procedures and injunctive relief for defendants until new measures are in place; at least one court has revoked the use of money bail for indigent misdemeanor defendants altogether.[51]

Judicial solutions that impede institutions from depriving rights are more likely to protect the rights of the indigent than those that provide remedies only after the fact. In order to create conditions for protection, the court can encourage a "default" option in bail setting that incentivizes judges to protect the liberty of indigent defendants.[52] Some bail

---

[48] *See* Manns, *supra* note 3, at 1949 n.9; *cf.* Michael van den Berg, Comment, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 918 (2015) ("[P]rocedures should be structured to try to minimize the abuse of the practice."). Here, transaction costs mean "anything that renders the transfer of rights more costly." *Id.* at 914.

[49] 80 N.E.3d at 964 n.19.

[50] *See, e.g.*, MD. R. CRIM. P. 4-216.1(c)(1) (requiring that all defendants be released "on personal recognizance or unsecured bond" unless a judge can explain the need for pretrial detention on the record); ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1167 (S.D. Tex. 2017) (holding that magistrates "cannot, consistent with the federal Constitution, set . . . bail on a secured basis requiring up-front payment from indigent misdemeanor defendants otherwise eligible for release, thereby converting the inability to pay into an automatic order of detention without due process and in violation of equal protection"), *appeal docketed*, No. 17-20333 (5th Cir. May 10, 2017); Walker v. City of Calhoun, No. 4:15-CV-0170, 2016 WL 361612, at *14 (N.D. Ga. Jan. 28, 2016) (ordering the city to "implement post-arrest procedures that comply with the Constitution" and stipulating that "until [the city] implements lawful post-arrest procedures, [the city] must release any other misdemeanor arrestees in its custody, or who come into its custody"), *vacated*, 682 F. App'x 721 (11th Cir. 2017); State v. Brown, 338 P.3d 1276, 1293 (N.M. 2014) (holding that the district court erred in failing to release a defendant pending trial "on the least restrictive of the bail options and release conditions necessary to reasonably assure . . . appearance and the safety of the community").

[51] *See ODonnell*, 251 F. Supp. 3d at 1167.

[52] *See* van den Berg, *supra* note 48, at 918–19; *see also* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 8 (2008). This proposition conceptualizes the value of bodily liberty as an entitlement whose deprivation in exchange for a benefit to the government (pretrial detainment) constitutes a transaction.

reform advocates suggest that bail outcome inequities would be best addressed by training bail officials "on the basic legal principles of bail,"[53] requiring recorded evidence for bail determinations, and establishing oversight and accountability in the bail determination process.[54] The *Brangan* decision, in fact, successfully embodies the second of these solutions. However, each piece of this three-part framework for fixing high bail must be made an integral part of a new system with the goal of shepherding judges away from exorbitant bail for indigent defendants.

In light of the expected influence of transaction costs on court procedures, one option for courts is to order supervised release of indigent defendants in the form of home detention or electronic monitoring,[55] at least until the legislature creates a mechanism to prevent pretrial liberty deprivation.[56] Another option is to require more detailed findings of fact and an evidentiary record for bail decisions that involves more than just words on a page. Currently, the Massachusetts bail decisionmaking process is not based on individualized evidentiary findings but on seventeen factors that are not necessarily correlated with risk of nonappearance.[57] Since the *Brangan* court's reasoning concedes that defendants have the right to an individualized bail assessment, it could have also imposed an evidentiary requirement on the findings of fact to make the process into a substantive transaction cost that would deter abuse.[58] Such a requirement could take the form of references to cases of other defendants who received bail determinations in the court to show a reasonable justification for bail amounts[59] or it could mandate that judges cite at least one source outside of the record introduced by the prosecutor, such as a record introduced by the defendant of accountability of the defendant in past criminal or civil proceedings, to validate the bail.

Here, "a rearrangement of rights [is] undertaken when the increase in the value of production . . . is greater than the costs which would be involved in bringing it about." R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15–16 (1960).

53 Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 955 (2013).

54 *Id.* at 955–61; *see also* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1172–79 (2012) (discussing various methods judges can use to limit the effects of implicit bias).

55 Manns, *supra* note 3, at 1953.

56 *Cf.* Walker v. City of Calhoun, No. 4:15-CV-0170, 2016 WL 361612, at *11, *14 (N.D. Ga. Jan. 28, 2016) (ordering injunctive relief for indigent defendants and ordering the state to implement bail hearing procedures that do not unduly discriminate against the poor), *vacated*, 682 F. App'x 721 (11th Cir. 2017).

57 ALEXANDER JONES & BENJAMIN FORMAN, MASSINC, EXPLORING THE POTENTIAL FOR PRETRIAL INNOVATION IN MASSACHUSETTS 3 (2015), https://massinc.org/wp-content/uploads/2015/09/bail.brief_.3.pdf [https://perma.cc/55HK-VYFG].

58 *See* Manns, *supra* note 3, at 1949 n.9.

59 *Cf.* Wiseman, *supra* note 47, at 439.

Money bail has exploded as a major issue for criminal justice reform advocates,[60] with its opponents so oriented because indigent defendants in their communities are not able to post, rendering detention due to nonpayment of bail functionally equivalent to court-mandated pretrial detention.[61] *Brangan*'s new bail procedure is an important but moderate step toward institutionalizing liberty protections for poor defendants in Massachusetts. As one of a number of judicial actions ordering some kind of bail reform,[62] the *Brangan* decision contributes to the rising tide of national bail reform efforts. While procedural remedies are only a part of the larger effort to reform the criminal justice system, they deserve to be pushed to their utmost capacity for systemic transformation. To that end, there is precedent for courts to order more creative procedural processes that provide protections as well to minimize infringement of fundamental rights that unreasonably and unfairly burden indigent defendants — and it behooves them to do so if they are able.

---

[60] *See, e.g.*, COLOR OF CHANGE & ACLU: CAMPAIGN FOR SMART JUSTICE, $ELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM (2017), https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf [https://perma.cc/3389-8XF2]; *Bail, Fines, and Fees: A Look at How Bail, Fines, and Fees in the Criminal Justice System Impact Poor Communities in New Orleans*, VERA INST. JUST., https://www.vera.org/research/bail-fines-and-fees [https://perma.cc/3RWZ-MTZ7].

[61] Grassroots organizations like Black Youth Project 100 (BYP), Black Lives Matter (BLM), Dream Defenders, Southerners on New Ground (SONG), and dozens of other local organizations have been fundraising for "bail outs" across the country in protest of bail that constructively results in long-term pretrial detention with "catastrophic impacts on" their constituent communities. NAT'L BAIL OUT, https://nomoremoneybail.org/ [https://perma.cc/AEE8-3FBN].

[62] *See* sources cited *supra* note 50.