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THE CONSTITUTIONALITY OF SETTING BAIL WITHOUT REGARD TO INCOME: SECURING JUSTICE OR SOCIAL INJUSTICE?

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INTRODUCTION

Since its inception, the Supreme Court of the United States has directly addressed the Eighth Amendment's Excessive Bail Clause only three times, thus making it the least developed of the criminal clauses in the *Bill of Rights.*[1] However, this is not the fault of the broader legal community. For decades, legal scholars, judiciary systems, the federal government, and bail reform activists have attempted to recalibrate the bail system in the United States.[2] This is due to the fact that nearly 500,000 defendants in the United States are unnecessarily detained pretrial simply because they cannot afford to post bail.[3] Many of these defendants are accused of non-capital crimes and do not pose a threat to the community.[4] Nonetheless, while there have been many attempts to update the bail system, issues still prevail.

This article seeks to break down the meaning and history of the Excessive Bail Clause in order to conceive a proper solution to the decades-old bail system dilemma—specifically, it will address the effects of setting bail without regard to income and the constitutionality of the act. In Part I, this article will delve into the history of the Eighth Amendment and the significance behind the Excessive Bail Clause, as well as its relationship with the Due Process Clause of the Fifth Amendment. Part II of this Article will highlight the effects of setting bail without regard to income and how doing so violates the Eighth Amendment under certain circumstances. Finally, Part III offers several solutions to mend the bail system, while also providing commentary on current initiatives in place across the United States.

I. EIGHTH AMENDMENT BACKGROUND: INTERPRETING THE EXCESSIVE BAIL CLAUSE

For centuries, legal practice in European and American judicial systems has involved releasing a criminal defendant before their trial after some type of security has been set for their future appearance in court.[5] Similar to the "ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the

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1. Galen v. County of Los Angeles, 468 F.3d 563, 569 (9th Cir. 2006), *opinion amended and superseded*, 477 F.3d 652 (9th Cir. 2007).

2. *See generally* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform,* 76 J. CRIM. L. & CRIMINOLOGY 1, 15 (1985).

3. Shima Baradaran, *The State of Pretrial Detention*, A.B.A. ST. OF CRIM. JUST. 187, 190 (2011).

4. *Id.*

5. Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1140, 1162–63 (1972).

modern practice of requiring a bail . . . serves as additional assurance of the presence of an accused."[6] Often the goal of setting bail is to "accom[m]odate both the defendant's interest in pretrial liberty and society's interest in assuring the defendant's presence at trial."[7] However, whether bail in a criminal case has been set at an excessive amount, particularly when there is no regard to income, is up for debate. To determine what qualifies as "excessive" under the Constitution, it is important to examine the overarching argument: Does the Eighth Amendment of the United States Constitution guarantee a criminal defendant the right to bail?

A. *The History of the Right to Bail*

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[8] As written, the Eighth Amendment does not explicitly grant a right to bail, but observers, and even courts, have stated that by using the phrase "excessive bail shall not be required" a right to bail is simply implied.[9]

In the United States, a right to bail was first seen in the Massachusetts Body of Liberties of 1641, which stated that "[n]o mans person shall be restrained or imprisoned . . . before the law hath sentenced him thereto, If he can put in sufficient securitie, bayle or mainprise, for his appearance . . . ."[10] Thereafter, Pennsylvania adopted a similar provision in 1682 [11], followed by New York in 1683[12], and Delaware in 1702.[13] Right around the time that the Bill of Rights was being drafted, two other significant laws, the Northwest Ordinance and the Judiciary Act of 1789, also recognized a right to bail.[14] The Northwest Ordinance stated that "all persons

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6. Stack v. Boyle, 342 U.S. 1, 5 (1952).

7. Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329–30 (1980).

8. U.S. CONST. amend. VIII.

9. *See* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 969–72 (1965); *see also* Meyer, *supra* note 5.

10. WILLIAM H. WHITMORE, A BIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686, BODY OF LIBERTIES 1641, pmbl. 18 (Boston City Council 1890) (1641), http://www.mass.gov/anf/docs/lib/body-of-liberties-1641.pdf.

11. Verrilli, Jr., *supra* note 7, at 337.

12. *Id.*

13. *Id.*

14. *Id.*

shall be bailable unless for capital offen[s]es, where the proof shall be evident, or the presumption great."[15] Indeed, many scholars believe that the Northwest Ordinance, which was adopted in 1787, is a useful reference and tool in understanding the Framers' original intent when it comes to interpreting the Constitution of the United States.[16] Additionally, the Judiciary Act of 1789 stated:

> [U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offen[s]e, and of the evidence, and the usages of law.[17]

The Judiciary Act of 1789, signed into law by President George Washington, explicitly allowed for a right to bail under certain circumstances. Just one day after, the Bill of Rights, which does not explicitly grant a right to bail, was approved by Congress.[18] So it begs the question, while these provisions would tend to indicate that a right to bail was generally accepted, why did the Framers fail to explicitly grant this right in the Eighth Amendment? The omission does not definitively determine that the Framers intended no constitutional right to bail. An originalist reading of the Eighth Amendment suggests that the Framers understood the word "unusual" to mean "contrary to long usage."[19] Today, thousands of individuals are held in pretrial detention because they are unable to afford bail,[20] and this leads to a "long usage" of the incarceration system. Thus, it could be implied that the use of the word "unusual" in the Eighth Amendment was the mechanism by which the Framers ensured a right to reasonable bail for noncapital crimes. Consider that if bail were not offered, or if it were excessive, the result would lead to an "unusual" or "long usage" of pretrial detention for those who are presumed innocent until

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15. UNITED STATES, AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES, NORTH-WEST OF THE RIVER OHIO ART. II (1787).

16. *See generally* Matthew J. Hegreness, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities,* 120 YALE L.J. 1820, 1873–78 (2011).

17. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (1789).

18. *See* Verrilli, Jr., *supra* note 7, at 335.

19. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1825 (2008).

20. Nick Pinto, *The Bail Trap,* N. Y. TIMES SUNDAY MAG. (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html.

proven guilty.[21] In the Supreme Court case *Carlson v. Landon*,[22] Justice Black's dissent touched upon what he believed to be the Framers' intent regarding a right to bail, summarized as follows: "if the Framers were sufficiently concerned with preservation of pretrial liberty to prevent indirect denial of this liberty, they cannot be assumed to have intended to leave to Congress the power to eviscerate the bail clause by directly denying the right to pretrial liberty."[23] Justice Black also argued that if a right to bail is not intended to be in the Eighth Amendment, then the bail clause "does no more than protect a right to bail which Congress can grant and which Congress can take away. The Amendment is thus reduced below the level of a pious admonition."[24] While the Court in *Carlson* did not decide whether the Eighth Amendment's prohibition of excessive bail implies a constitutional right to bail in a noncapital case, in *Stack v. Boyle*, the Court stated that by prohibiting excessive bail, the Framers' intended to protect the pretrial liberty interests of criminal defendants.[25] "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[26]

It should be noted that while the topic of whether the Eighth Amendment provides a right to bail is contested,[27] individuals on both sides of the argument easily agree that the right is not absolute and certainly does not extend to defendants who pose a risk of flight or to defendants that have been arrested for capital crimes.[28] Commentators have suggested that the reason for the denial of bail to capital defendants is most likely based on the idea that these types of defendants are

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21. *See generally* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

22. Carlson v. Landon, 342 U.S. 524 (1952).

23. Verrilli, Jr., *supra* note 7, at 336; *see Carlson*, 342 U.S. at 556 (Black, J., dissenting).

24. *Carlson*, 342 U.S. at 556 (Black, J., dissenting).

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

26. *Id.*

27. *Compare* Foote, *supra* note 9, *and* Matthew J. Hegreness, *America's Fundamental And Vanishing Right To Bail,* 55 ARIZ. L. REV. 909 (2013) (right to bail), *with* Meyer, *supra* note 5, *and* John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969) (no right to bail).

28. Roman L. Hruska, *Preventive Detention: the Constitution and the Congress,* 3 CREIGHTON L. REV. 36, 68 (1970) (bail could be denied to address public safety concerns "if the standards and guidelines of the Congress are carefully drawn").

predisposed to act dangerously.[29] This belief is evident in all of the bail provisions mentioned above from the 1600s and 1700s, as well as the Eighth Amendment itself. In 1987, the Supreme Court of the United States affirmed this disposition in *United States v. Salerno,* wherein the Court stated that a right to bail is not guaranteed, and a defendant may be denied bail when it comes to capital cases.[30] The Court also noted that "a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses."[31] Moreover, The National Association of Criminal Defense Lawyers filed an amicus brief in *Salerno* in which they argued that the Eighth Amendment does imply a right to bail, unless it is a capital case.[32]

After 1789, states began including a right to bail in their constitution beginning with Kentucky in 1791;[33] by the mid-1970s almost 40 states incorporated a right-to-bail provision in their constitution,[34] and today, all 50 states have a right-to-bail provision, with the caveat that bail can be denied for particular reasons such as flight risk or because the defendants can be dangerous to the community due to the nature of their alleged crime.[35]

In 1966, when Congress discovered that defendants were essentially being denied access to bail because judges across the country were setting bail amounts

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29. Mitchell, *supra* note 27 at 1227–30.

30. United States v. Salerno, 481 U.S. 739, 753 (1987).

31. *Id.*

32. Brief for the Nat'l Ass'n Criminal Def. Lawyers as Amicus Curiae Supporting Respondent at 18, United States v. Salerno, 107 S. Ct. 2095 (1987) (No. 86-87).

33. KY. CONST. of 1791, art. XII, § 16.

34. ALA. CONST. art. I, § 16; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. II, § 22; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 19; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; FLA. CONST. art. I, § 14; IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 9; IND. CONST. art. I, § 17; IOWA CONST. art. I, § 12; KAN. CONST. BILL OF RIGHTS § 9; KY. CONST. BILL OF RIGHTS § 16; LA. CONST. art. I, § 18; ME. CONST. art. I, § 10; MICH. CONST. art. I, § 15; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20; MONT. CONST. art. II, § 21; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 7; N.C. CONST. art. I, § 27; N.J. CONST. art. I, § 11; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 8; OR. CONST. art. I, § 14; PA. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 11; UTAH CONST. art. I, § 8; WASH. CONST. art. I, § 20; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 14.

35. GA. CONST. art. I, § 1, ¶ XVII; HAW. CONST. art. I, § 12; MD. CONST. DECL. OF RTS. art. 25; MASS. CONST. Pt. 1, art. XXVI; N.H. CONST. Pt. 1, art. XXXIII; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; VT. CONST. CH II, § 40; W. VA. CONST. art. III, § 5.

too high, they passed the Bail Reform Act of 1966.[36] The 1966 Act stated that defendants should be denied bail only under circumstances that showed they would not appear for trial.[37] It also broadened the different factors that judges could consider when setting a bail amount including using the "weight of the evidence against the person"[38] and not taking into account the perceived danger to the public if the defendant were to be released.[39] In doing so, the 1966 Act encompassed the idea that defendants accused of non-capital crimes should be released on bail pending their trial.[40] Following the 1966 Act, there was public scrutiny over violent crimes that were being committed by individuals released before their trial.[41] As a result, several states enacted laws that allowed judges to consider the level of danger a defendant posed to the public, regardless of whether the 1966 Act specifically prohibited it.[42] Eventually, Congress enacted an updated version in the 1984 Bail Reform Act because the 1966 Act was considered "too liberal[]."[43] The 1984 Act consisted mostly of the same language from the 1966 Act, except that judges were then allowed to take into account the danger that was posed to public safety by a

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36. Bail Reform Act of 1966, P.L. 89–465, 1966 U.S.C.C.A.N. (80 Stat. 214) 2293, 2295. ("The purpose of [the Act] is to revise existing bail procedures in the courts of the United States including the courts of the District of Columbia in order to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.").

37. *Id.* at 2300 (" [A]ny person charged with a noncapital offense . . . shall, at his appearance before a judicial officer . . . be released on his personal recognizance or upon the execution of an unsecured appearance bond, unless the judicial officer determines, in the exercise of his discretion, upon a showing of good cause, that such a release will not reasonably assure the appearance of the accused as required.").

38. 18 U.S.C. § 3142(g)(2) (2008).

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

40. United States v. Abrahams, 575 F.2d 3, 8 (1st Cir. 1978) (quoting United States v. Smith, 444 F.2d 61, 62 (8th Cir. 1971)).

41. S. Rep. No. 98-225, at 6 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3189 (referencing a study from the District of Columbia reported 13% of felony defendants were rearrested and 25% among other groups of defendants were rearrested).

42. *See* Mary A. Toborg & John P. Bellassai, *Attempts to Predict Pretrial Violence: Research Findings and Legislative Responses, in* THE PREDICTION OF CRIMINAL VIOLENCE 101, 107 (Fernand N. Dutile & Cleon H. Foust eds., 1987).

43. S. Rep. No. 98-225, at 5 ("Increasingly, the [1966 Bail Reform] Act has come under criticism as too liberally allowing release and as providing too little flexibility to judges in making appropriate release decisions regarding defendants who pose serious risks of flight or danger to the community.").

defendant's release.[44] Ultimately, several states enacted legislation to reflect the 1984 Act.[45] Some continued to have provisions that reflect the idea that defendants have a right to bail for non-capital crimes, while others diminished the right to bail.[46] Over the years, "courts expanded the factors used to justify pretrial detention, which now include: (1) the weight of the evidence against the defendant, (2) protection of the court's own processes, and (3) community safety."[47]

It remains uncertain whether the Framers designed the Eighth Amendment to have an underlying constitutional right to bail. However, after the Bill of Rights was ratified, Congress, state legislatures, and courts uniformly acknowledged that a right to bail exists but only under certain circumstances.[48] It is the circumstances by which these branches of government give the right to bail that has left the United States in this long period of uncertainty.

B. *Defining Excessive Bail*

The purpose of bail is to provide defendants freedom from incarceration before they have been deemed guilty, and by the same token, also assure their presence at trial.[49] Justice Douglas once said that "[t]he fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt."[50] Bail must also not be excessive.[51] When determining what amount of bail will not rise to the level of excessiveness, courts have stated that a balance must be struck "between the need for a tie to the jurisdiction and the right to freedom from unnecessary restraint before conviction . . . ."[52] Furthermore, every defendant is entitled to a hearing in order to determine what amount of bail is necessary as it related to the defendant's case.[53] If bail has been set at an amount higher than reasonably calculated to guarantee that

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44. 18 U.S.C. § 3142(g)(4) (2008).

45. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 750 (2011).

46. *Id.* at 750–51.

47. *Id.* at 751.

48. *See* Verrilli, Jr., *supra* note 7.

49. Reynolds v. United States, 80 S. Ct. 30, 32 (1959).

50. Bandy v. United States, 81 S. Ct. 197, 197 (1960).

51. U.S. CONST. amend. VIII.

52. United States *ex rel.* Rubinstein v. Mulcahy, 155 F.2d 1002, 1004 (2d Cir. 1946).

53. Stack v. Boyle, 342 U.S. 1, 6 (1951).

the defendant will appear at trial, then it is excessive[54] and must be examined under the federal Constitution or the state's constitution.[55] Accordingly, bail should not be used as "an instrument of oppression."[56]

Typically, in a criminal case the burden is on the prosecution to show that bail must be set at a higher price due to the likelihood that the defendant may not appear at trial or is a danger to the community.[57] However, the burden shifts to the defendant to show that the amount that bail has been set at is excessive.[58] In doing so, the defendant must take the matter to an appellate court and make a reasonable showing that they are entitled to a reduction by detailing their assets and financial resources, and furnishing other similar records.[59] Nonetheless, courts have repeatedly stated that the test for excessiveness is not whether the bail amount is greater than the defendant is financially capable of providing but whether the amount is enough to secure their appearance at trial.[60] Additionally, federal judges have a duty to not set a financial condition that would result in the pretrial detention of the defendant.[61]

Commentators have argued that statutes regulating bail, including uniform bail schedules, are unconstitutional[62] in light of the ruling in *Stack v. Boyle*, where the Supreme Court of the United States stated that the Eighth Amendment Excessive Bail Clause requires that the amount of bail be set according to the circumstances of each individual defendant and the amount must not be greater than required to ensure their presence.[63] While the Court has released its opinions on the Eighth Amendment's Excessive Bail Clause, it has not outright stated whether it is

54. United States v. Bobrow, 468 F.2d 124, 127 n.16 (D.C. Cir. 1972).

55. Steven Pitcher, *Excessive Bail § 1, in* 18 AM. JUR. PROOF OF FACTS 149 (2d ed. 1979).

56. *Ex parte* Branch, 553 S.W.2d 380, 382 (Tex. Crim. App. 1977).

57. Robert S. Natalini, *Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984,* 134 U. PA. L. REV. 225, 233 (1985).

58. *See* Jack Levin & Lucas Martin, *Bail and Recognizance §99*, *in* 8A AM. JUR. (2d ed. 2019).

59. *Id.* at § 103.

60. *See* United States v. Beaman, 631 F.2d 85, 86 (6th Cir. 1980).

61. 18 U.S.C. § 3142(c)(2) (2008).

62. Anthony G. Amsterdam et al., *Arranging Bail for the Criminal Defendant,* 18 PRAC. LAW. 15, 19 (1972).

63. *Id.*; *see also* Stack v. Boyle, 342 U.S. 1, 4–6 (1951).

applicable or binding on the states[64] other than by suggestions in a footnote.[65] In *Salerno,* the Court stated that when judges are setting a bail amount, they should follow legislation concerning what purpose bail should serve and when it is allowed.[66] In that instance, "the [excessive bail] clause was only a directive to judicial officers to respect the separation of powers by honoring bail legislation."[67] There have been federal courts in the past, however, that have ruled that the Eighth Amendment's Excessive Bail Clause can apply to the states under the Fourteenth Amendment.[68] Increasingly, more courts have begun to agree that incarceration of defendants due to excessive bail amounts is an infringement on due process and equal protection.[69] In the Florida Court of Appeals, the court went so far as to compare bail to receiving no bail at all.[70] In that instance, the court decided a hearing must occur before a bail amount is set to understand the defendant's financial resources.[71]

There is no bright-line test to determine the amount of bail for any particular case. However, courts are strongly urged to use their discretion in good faith and set an amount that is reasonable and does not rise to the level that would be considered "excessive" under the Eighth Amendment, and thus

64. Schlib v. Kuebel, 404 U.S. 357, 365–66 (1971).

65. McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010) ("In addition to the right to keep and bear arms . . . the only rights not fully incorporated are (1) the Third Amendment's protection against quartering of soldiers; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines. We never have decided whether the Third Amendment or the Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause.").

66. United States. v. Salerno, 481 U.S. 739, 752–54 (1987).

67. Scott W. Howe, *The Implications of Incorporating the Eighth Amendment Prohibition on Excessive Bail*, 43 HOFSTRA L. REV. 1039, 1083–84 (2015).

68. Pilkinton v. Circuit Court of Howell Cty.,324 F.2d 45, 46 (8th Cir. 1963); *see also* Wagenmann v. Adams, 829 F.2d 196, 211–13 (1st Cir. 1987).

69. *See* Pugh v. Rainwater, 572 F.2d 1053, 1056–57 (5th Cir. 1978).

70. Camara v. State, 916 So. 2d 946, 947 (Fla. Dist. Ct. App. 2005) (citing Winer v. Spears, 771 So. 2d 621, 622 (Fla. Dist. Ct. App. 2000)); Mesidor v. Neumann, 721 So. 2d 810, 811 (Fla. Dist. Ct. App. 1998).

71. *Mesidor,* 721 So. 2d at 811

unconstitutional.[72] Rather, the goal should be to set an amount that would secure the detainees presence at trial.[73]

II. SETTING BAIL WITHOUT REGARD TO INCOME

An Associate Justice for the Massachusetts Superior Court once said, "When it comes to bail, one size does not fit all."[74] He went on to state that "[o]ne size does not even fit all people who commit the same crime. Bail decisions require individualization."[75] When determining the bail amount, judges are advised to consider where a defendant currently stands in their life,[76] and as such, the amount of bail ought to vary in cases where defendants are indigent.[77] Accordingly, bail must be set at a reasonable amount, which means taking into consideration the defendant's financial status, unless they are charged with a capital crime or are a flight risk.[78] Nonetheless, judges are charged with making bail decisions quickly every day, and as a result they are "disproportionately susceptible to explicit and implicit biases."[79] Moreover, as mentioned above, the test for excessive bail should not be whether one can pay it but whether the amount is reasonable enough to ensure the defendant will be present at trial.[80] Therefore, a court must often consider a variety of factors in addition to a defendant's financial resources when setting a bail amount.[81] Recently, a judge in New York stated that setting bail without regard to a defendant's ability to pay violates the constitutional rights of due process and equal protection.[82] Even though judges are encouraged to consider a defendant's ability to pay bail, in New York and in many other states they are not required to

72. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951).

73. *See generally*, Levin & Martin, *supra* note 58, at § 12.

74. Hon. Peter V. Krupp, *A Call for More Focused Advocacy – Setting Bail After Brangan*, BOS. B.J., at 3 (2018).

75. *Id.*

76. Beddow v. State, 68 So. 2d 503, 503 (Ala. 1953).

77. FED. R. CRIM. P. 46(d); *see also* Levin & Martin, *supra* note 58, at § 33.

78. *See* Pelekai v. White, 861 P.2d 1205, 1209 (Haw. 1993).

79. Krupp, *supra* note 74.

80. Levin & Martin, *supra* note 58.

81. Dyson v. Campbell, 921 So. 2d 692, 693 (Fla. Dist. Ct. App. 2006).

82. *See* People *ex rel.* Desgranges v. Anderson, 59 Misc. 3d 238, 232 (N.Y. Sup. Ct. 2018).

do so by statute.[83] Thus, many courts are left to make on-the-spot decisions that ultimately lead to mass incarceration.[84]

A. *Due Process, Equal Protection, and Excessive Bail*

In *Salerno,* the Court recognized "the individual's strong interest in liberty" as a "fundamental nature" unless "the government's interest is sufficiently weighty."[85] Accordingly, if courts tend to agree that "liberty is the norm, and detention prior to trial . . . is the carefully limited exception,"[86] then one may conclude that "the right to pre-trial release under reasonable conditions is a fundamental right."[87] Under the Due Process Clause of the Fifth Amendment, a defendant has a liberty interest in pretrial release.[88] The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty, or property, without due process of law."[89] Both the Eighth Amendment's Excessive Bail Clause and the Fifth Amendment's Due Process Clause "give this tradition of pretrial freedom constitutional significance."[90] The Court in *Salerno* went on to state that the Fifth Amendment's Due Process Clause protects defendants against "substantive due process" violations and in doing so, "prevents the government from engaging in conduct that shocks the conscience."[91] Under a substantive due process analysis, the government also cannot interfere with rights that are considered "implicit in the concept of ordered liberty"[92] and "so rooted in the traditions and conscience of our

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83. *Id.* at 230.

84. *See* Jason Grant, *Judge Decides Setting Bail Without Regard to Ability to Pay Violates Constitutional Rights,* N.Y.L.J. (Feb. 7, 2018, 4:21 PM), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/02/07/judge-decides-setting-bail-without-regard-to-ability-to-pay-violates-constitutional-rights/.

85. United States v. Salerno*,* 481 U.S. 739, 750 (1987).

86. *Id.* at 755.

87. Ackies v. Purdy, 322 F. Supp. 38, 41 (S.D. Fla. 1970); *see also* State v. Wright, 980 A.2d 17, 22 (N.J. Super. Ct. Law Div. 2009) ("The right to bail is linked to the presumption of innocence.").

88. *See id.*

89. U.S. CONST. amend. V, cl. 4.

90. Jonathan Zweig, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. ON LEGIS. 555, 558 (2010).

91. *Salerno,* 481 U.S. at 746 (citations omitted).

92. *Id.*

people as to be ranked as fundamental."[93] If the government is able to overcome a substantive due process analysis in a certain criminal case, it must also "be implemented in a fair manner," which is often called "procedural due process."[94] Through procedural due process, individuals are guaranteed that if their rights are at risk, then "they are entitled to be heard; and in order that they may enjoy that right they must first be notified."[95] Furthermore, any "opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"[96] Therefore, when a court deciding a bail amount does not afford a noncapital criminal defendant the right to be heard regarding their financial resources and flight risk, their substantive and procedural due process rights are being violated. A court's failure to consider a defendant's financial circumstances while setting a bail amount could lead to bail being excessive[97] and impermissibly result in pretrial imprisonment solely based on their inability to post bail. The Supreme Court of the United States has repeatedly recognized that "imprisoning a defendant solely because of his lack of financial resources"[98] violates that individual's due process rights.[99]

The Fifth Amendment also provides individuals equal protection of the laws.[100] While many courts' and jurisdictions' current bond procedures appear facially neutral, they effectively deny pretrial release to defendants who cannot afford bail while allowing pretrial release to those that can.[101] Subsequently, there are "different consequences on two categories of persons."[102] This type of pretrial imprisonment based "solely because of indigent status is invidious discrimination and not constitutionally permissible."[103] Several federal courts have recognized that bond procedures that fail to evaluate a defendant's ability to pay conclusively result

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93. *Id.* at 751 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

94. *Id.* at 746.

95. Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

96. *Id.* (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

97. *See infra,* Part I.B.

98. Bearden v. Georgia, 461 U.S. 660, 661 (1983); *see also* Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

99. *Bearden*, 461 U.S. at 665.

100. U.S. CONST. amend. V; *see also* Nguyen v. I.N.S., 533 U.S. 53, 57 (2001).

101. *See* Pinto *supra* note 20.

102. M.L.B. v. S.L.J., 519 U.S. 102, 105 (1996) (quoting Williams v. Illinois, 399 U.S. 235, 242 (1970)).

103. Pugh v. Rainwater, 572 F.2d 1053, 1056–57 (5th Cir. 1978).

in indigent individuals being imprisoned while the wealthy are allowed to be free.[104] Indeed, the federal government has also recognized that "a bail scheme that imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to assure appearance at trial . . . infringes on equal protection and due process requirements."[105] Federal judges have noted that the ability for the wealthy to make bail while the indigent get left behind is a "serious flaw in our [judicial] system."[106] In Judge Rakoff's decision in *United States v. Dreier,* he opened by saying:

> How glorious to be an American citizen. In so many countries, the rights of citizens are not worth the paper they are printed on. But here, any citizen—good, bad, indifferent, famous, infamous, or obscure—may call upon the courts to vindicate his constitutional rights and expect that call to be honored.[107]

In his opinion, Judge Rakoff ridiculed the effects of the current bail system. Unless they have been charged with a capital crime or are considered a flight risk, any citizen, not just the wealthy, should be afforded the constitutional right to liberty. The Founding Fathers took the concept of liberty so seriously that they even pledged their lives to it: "[G]ive me liberty or give me death!"[108] Justice Rehnquist also noted that bail amounts should be balanced against "the individual's strong interest in liberty."[109] While liberty is clearly something sacred, it is a fundamental right that is unreasonably difficult to achieve for many indigent individuals who are awaiting their trial date. When courts, intentionally or inadvertently, affect the fundamental right of pretrial release by allowing bail procedures to favor the wealthy over the

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104. *See* Thompson v. Moss Point, No. 1:15-cv-182LG-RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *see also* Jones v. City of Clanton, No. 2:15cv34-MHT, 2015 WL 5387219, at *2–3 (M.D. Ala. Sept. 14, 2015); Cooper v. City of Dothan, No. 1:15-cv-425-WKW, 2015 WL 10013003, at *1–2 (M.D. Ala. June 18, 2015); Pierce v. City of Velda City, No. 4:15-cv-570-HEA, 2015 WL 10013006, at *1, *3–4 (E.D. Mo. June 3, 2015).

105. Brief for the United States Supporting Plaintiff-Appellee & Urging Affirmance on the Issue Addressed Herein at 13, Walker v. City of Calhoun, 682 F. App'x 721 (11th Cir. 2017) (No. 16-10521).

106. United States v. Dreier, 596 F. Supp. 2d 831, 833 (S.D.N.Y. 2009).

107. *Id.* at 831.

108. "*Give Me Liberty Or Give Me Death*," COLONIAL WILLIAMSBURG, http://www.history.org/almanack/life/politics/giveme.cfm (last visited Aug. 10, 2018).

109. United States v. Salerno, 481 U.S. 739, 750 (1987).

poor and indigent, the belief that "any citizen . . . may call upon the courts to vindicate his constitutional rights and expect that call to be honored"[110] is rendered practically meaningless. As can be seen in many instances, virtually conditioning access to the fundamental right of pretrial release upon an individual's ability to pay violates the equal protection clause.

In *Stack v. Boyle*, Justice Jackson stated if a court has a "uniform blanket bail"[111] predicated on the nature of the crime without considering "the difference in circumstances between different defendants[,]"[112] then Fed. R. Civ. P. 46(c) has been violated.[113] Since "uniform blanket bail" procedures do not provide criminal defendants with an opportunity to be heard regarding their financial circumstances, the procedures could be deemed unconstitutional as an infringement on an individual's due process rights.[114] "If mandatory bail schedules are ruled *per se* unconstitutional, the onus will likely shift again toward judicial discretion in assigning reasonable bail."[115] In that sense, hopefully a judge will take into consideration a defendant's financial circumstances and ability to post bail. One commentator has put forth a legal standard that in his view would be an appropriate test for bail excessiveness:

> Where the Government has not shown a compelling interest in pretrial detention by clear and convincing evidence, bail must be set at an amount that should ensure appearance at trial and may not be set in a manner and at an amount that is unreasonable when considering a defendant's financial status. In establishing a monetary amount, it is necessary for judicial officers to consider financial status and not impose an amount or condition which would result in an undue burden upon the defendant.[116]

Thus, the constitutional guarantee against deprivation of liberty without due process of the law is applicable to an excessive bail analysis because an inability to pay results in *de facto* pretrial detention.

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110. *Dreier*, 596 F. Supp. 2d at 831.

111. Stack v. Boyle, 342 U.S. 1, 9 (1951).

112. *Id.*

113. *Id.*

114. *See* James A. Allen, *"Making Bail": Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive" Bail*, 25 J.L. & POL'Y 637, 679 (2017).

115. *Id.*

116. *Id.* at 682.

B. *Recent Federal and State Cases Regarding the Link Between the Fifth, Eighth, and Fourteenth Amendments*

The Supreme Court's decision in *United States v. Salerno* is relevant in understanding the current constitutional climate in both the federal and state judicial systems, as it relates to due process and the Eighth Amendment. The 1980s represented the last bail reform movement in the United States until present time.[117] As a precursor, Justice Thurgood Marshall warned the attentive public in his dissent:

> Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power . . . But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.[118]

Following the enactment of the Bail Reform Act of 1984, the Supreme Court of the United States was faced with its first challenge to the federal government's new legislation.[119] In *Salerno*, the defendants were charged with multiple criminal offenses, among them racketeering and extortion, and were alleged to be high-ranking members of the "La Cosa Nostra" crime family.[120] The government moved for their pretrial detention under 18 U.S.C. § 3142, not because of risk of flight, but because they posed as threats to the safety of the community.[121] The United States District Court for the Southern District of New York granted the government's request for pretrial detention, finding by "clear and convincing evidence" that the defendants posed "present danger[s] to the community."[122] The

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117. TIMOTHY R. SCHNACKE, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM, NAT'L 33 (2014), https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf.

118. United States v. Salerno, 481 U.S. 739, 767 (1987).

119. *See id.* at 753.

120. *Id.* at 743.

121. *Id.*

122. United States v. Salerno, 631 F. Supp. 1364, 1366 (S.D.N.Y. 1986).

defendants appealed based on statutory and constitutional grounds, including a violation of due process, and the United States Court of Appeals for the Second Circuit agreed, but only based on the constitutional argument.[123] The Court found that the Act's grant of pretrial detention based on preventing future offenses was "repugnant to the concept of substantive due process," and the Supreme Court quickly granted certiorari to decide the matter.[124]

The Court's decision in *Salerno* hinged on its understanding of Congress' legislative intent as to whether pretrial detention was "punishment" or "regulation."[125] The Court found that the legislation was regulatory, and thus permissible, because Congress "perceived pretrial detention as a potential solution to a pressing societal problem."[126] Further, the Court held that the Act "carefully limit[ed] the circumstances" for which detention may be sought, and thus was not excessive.[127] The regulatory nature of the Act, combined with its limited application to certain instances of pretrial detention, led the Court to hold that pretrial detention does not violate the Due Process Clause of the Fifth Amendment.[128] In a short, yet impactful opinion, the Court effectively weighed a defendant's fundamental liberty interests against Congress' legislative intent to combat and regulate "pressing societal problem[s]," and chose to side with the government.[129] The Court even went so far as to compare denying a person's freedom prior to the time of trial to detaining persons during times of war.[130] It seems the Court's sensationalist approach to this decision was due to the apparent spike in crime in the United States during the time this case was decided.[131] It is important to examine court decisions in the time period they occur, as sociological influences would certainly shape the context of a Court's decision.

The Court then went on to examine the Bail Reform Act of 1984 under the Eighth Amendment, as though the Due Process Clause and the Excessive Bail

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123. United States v. Salerno, 794 F.2d 64, 71 (2d Cir. 1986).

124. *Id.*; *see Salerno,* 481 U.S. at 753.

125. *Salerno,* 481 U.S. at 747.

126. *Id.*

127. *Id.*

128. *Id.* at 748.

129. *Id.* at 747.

130. *Id.* at 748.

131. Margaret S. Gain, *The Bail Reform Act of 1984 and United States v. Salerno: Too Easy to Believe*, 39 CASE W. RES. L. REV. 1371, 1381 (1989).

Clause are mutually exclusive.[132] The defendants in this case argued that the Act allowed the government to set bail at an infinite amount and was not related to their risk of flight, thus violating the Excessive Bail Clause of the Eighth Amendment.[133] The Court skirted the question of whether the right to bail was inherent. The Court held that "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail."[134] So, because the defendants in *Salerno* were not held due to their risk of flight, but rather their risk to the community, they had no constitutional right to bail under the Act.

By 1988, twenty states had enacted legislation that allowed judges to deny bail based on the Supreme Court's holding in *Salerno*.[135] That is, judges could effectively deny bail to arrestees if they posed a potential threat to the community.[136] Around this time, many critics were concerned that a defendant's fight to prove he is not a danger to the community would be rendered moot with each passing day the defendant was unjustly held in pretrial detention.[137] Following *Salerno*, the Supreme Court left it to state and federal judges, as well as state and federal legislatures, to pave the way for the modern bail system.[138] Not surprisingly, pretrial

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132. *See Salerno,* 481 U.S. at 758–59 (Marshall, J., dissenting) ("The majority approaches respondents' challenge to the Act by dividing the discussion into two sections, one concerned with the substantive guarantees implicit in the Due Process Clause, and the other concerned with the protection afforded by the Excessive Bail Clause of the Eighth Amendment. This is a sterile formalism, which divides a unitary argument into two independent parts and then professes to demonstrate that the parts are individually inadequate.").

133. *Id.* at 752–53.

134. *Id.* at 754–55.

135. Michael W. Youtt, *The Effect of* Salerno v. United States *on the Use of State Preventive Detention Legislation: A New Definition of Due Process*, 22 GA. L. REV. 805, 810–11 (1988).

136. *Id.*

137. *Id.* at 836; *see also* Goldkamp, *supra* note 2.

138. *See* Faheem-El v. Klincar, 841 F.2d 712, 719 (7th Cir. 1988) (holding that a legislature may enact a statute that denies bail consideration to parolees without violating the Excessive Bail Clause); *see also* United States v. Millan, 4 F.3d 1038, 1044 (2d Cir. 1993) (recognizing that a 24-month period of pretrial detention alone did not violate due process). *See generally* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (imposing mandatory pretrial conditions of release, including electronic home monitoring and mandatory curfew); Bryan Dearinger, *The Mandatory Pretrial Release Provision of the Adam Walsh Act Amendments: How "Mandatory" Is It, and Is It Constitutional?*, 85 ST. JOHN'S L. REV.1343 (2014).

detention in federal court cases increased from 59% in 1995, to 76% in 2010.[139] Remarkably, the Supreme Court has not adjudicated an Excessive Bail Clause case since *Salerno* was decided.[140]

Since the 1980s, New York was "one of only four states" that did not permit preventive pretrial detention, a practice that we know was held constitutional under *Salerno*.[141] New York was and remains a champion for civil liberties, and so its decision to not allow preventive detention for almost 25 years came as no surprise.[142] While it is a commendable choice by the New York legislature, it did not eradicate the longstanding consequences of imposing monetary bail.[143] On January 31, 2018, the Supreme Court of the State of New York for Dutchess County found that New York's Criminal Procedure Law, which is used to set bail, unconstitutionally denied the petitioner equal protection and due process under the United States and New York Constitutions.[144] In this matter, petitioner Christopher Kunkeli filed an Article 70 petition for a writ of habeus corpus and declaratory judgment.[145] Kunkeli charged that he was being "unlawfully held as a result of bail, or excessive bail," based on his arraignment for petit larceny.[146]

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139. Thomas H. Cohen, U.S. DEP'T OF JUST. BUREAU ON JUST. STAT., *Pretrial Detention and Misconduct in Federal District Courts, 1995-2010* 2 (Feb. 2013), https://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf.

140. Howe, *supra* note 67, at 1039.

141. CTR. ON THE ADMIN. OF CRIM. L. AT N.Y.U. L. SCH., PREVENTIVE DETENTION IN NEW YORK: FROM MAINSTREAM TO MARGIN AND BACK, CENTER ON THE ADMINISTRATION OF CRIMINAL LAW (Feb. 2017), http://www.law.nyu.edu/sites/default/files/upload_documents/2017-CACL-New-York-State-Bail-Reform-Paper.pdf.

142. *Senate Passes Domestic Violence Legislation*, N.Y. ST. SENATE, https://www.nysenate.gov/newsroom/press-releases/senate-passes-domestic-violence-legislation (last visited Sep 28, 2018). In 2012, Governor Cuomo added two new factors for Courts to consider when determining bail in cases involving family offenses, *i.e.* violations of orders of protection and a defendant's history of firearm possession.

143. *See generally* HUMAN RTS. WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY (2010) https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (describing the problems of New York's bail procedures),

144. People *ex rel.* Desgranges v. Anderson, 59 Misc.3d 238, 242 (N.Y. Sup. Ct. 2018).

145. *Id.* at 239.

146. *Id.*

In making its determination, the court cited New York State Division of Criminal Justice Services statistics on the state's jail population.[147] The court further noted, based on an affirmation submitted by an attorney within the Ulster County Public Defender's Office, that presiding judges "typically" set bail "without regard to the defendant's ability to pay," resulting in "pre-trial incarceration of indigent defendants solely because they are without financial resources to afford bail."[148] The Court found that "[c]learly, $5,000.00 bail to someone earning $10,000.00 per year, like the petitioner, without significant assets, is much more of an impediment to freedom than $5,000.00 bail would be to a defendant earning substantially more and/or with significant assets."[149] Although the Fourteenth Amendment,[150] as well as the New York State Constitution,[151] require that individuals be treated the same, the court held that setting bail based on "how much money someone has, is a violation of the equal protection clauses and due process clauses of the New York State and United States Constitutions."[152]

Just over one month after *People ex rel. Desgranges* was decided, the New York City Bar submitted a report in connection with New York Governor Cuomo's Executive Budget proposal to reform the state's bail statute.[153] Therein, the City Bar supported Governor Cuomo's proposal to eliminate monetary bail for misdemeanor and nonviolent felony charges.[154] Noting nationwide change in the United States bail system, the City Bar stated that, "consistent with the U.S. Supreme Court's instruction" in *Salerno*, reform is needed that "will ensure that 'liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.'"[155]

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147. *Id.* at 240 ("[B]etween sixty percent on average, and in New York City as much as seventy five percent, of inmates in jail have not been convicted of a crime but are awaiting arraignment or trial.").

148. *Id.*

149. *Id.* at 241.

150. U.S. CONST. amend. XIV.

151. *See* N.Y. CONST. art. I, §11.

152. People *ex rel.* Desgranges v. Anderson, 59 Misc.3d 238, 241 (N.Y. Sup. Ct. 2018).

153. *Support for Comprehensive Bail Reform–2019 NYS Executive Budget*, N.Y. C. BAR, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-for-comprehensive-bail-reform-2019-nys-executive-budget (last visited Sept. 16, 2018).

154. FY 2019 N.Y. State Executive Budget, Public Protection and General Government art. VII Legislation, Part C, at 22:15–24, 35:4–13, 39:2–12.

155. *Id.*; *see also* United States v. Salerno, 481 U.S. 739, 755 (1987).

Unfortunately, the New York State budget for 2019 did not include this reform.[156] Hopefully, more courts within the New York State judicial system will begin rendering decisions similar to those in *People ex rel. Desgranges*, thereby signaling to the New York legislature that change is necessary within the structure of the state's bail system as it presently stands.

Similarly, on February 14, 2018, the United States Court of Appeals for the Fifth Circuit also held that the bail system in Harris County, Texas violated "both due process and equal protection."[157] In that case, Maranda O'Donnell and others brought a class action § 1983 suit against Harris County and many of its officials, alleging the County's "system of setting bail for indigent misdemeanor arrestees" violated both the Texas and United States Constitutions.[158] When a defendant in Harris County is arrested on misdemeanor charges, bail is submitted by the prosecutor as per the bond schedule devised by Harris County judges.[159] Hearing officers "are generally responsible for setting bail amounts in the first instance," and "County Judges review the Hearing Officers' determinations."[160] Hearing officers and county judges are forbidden, by law, from "mechanically applying the bail schedule."[161] Instead, state law requires they make individual assessments as to a given arrestee, "based on five enumerated factors, which include the defendant's ability to pay, the charge, and community safety."[162] Harris County does not mandate that hearing officers and county judges follow these factors.[163] The district court found the bail system was extremely flawed. They noted that the "[c]ounty's risk-assessment point system" targeted indigent arrestees.[164] The district court "granted the [plaintiffs'] motion for a preliminary injunction, requiring the

156. Jason Grant, *As Bail Reform Advocates Wait and Hope, Cuomo Tries New Tactic*, N.Y. L. J. (May 1, 2018, 2:43 PM), https://www.law.com/newyorklawjournal/2018/05/01/as-bail-reform-advocates-wait-and-hope-cuomo-tries-new-tactic/?slreturn=20180811144154.

157. ODonnell v. Harris County, 882 F.3d 528, 548 (5th Cir. 2018), *superseded on rehearing*, 892 F,3d 147 (5th Cir. 2018).

158. *Id.* at 535.

159. *Id.*

160. *Id.*

161. *Id.* at 536.

162. *Id.*

163. *Id.*

164. *Id.* For example, not owning a car was given the same point value as having a prior criminal conviction or a prior failure to appear in court.

implementation of new safeguards and the release of numerous detainees subjected to the insufficient procedures."[165]

The Fifth Circuit disagreed with the district court's broad reading of the law in Texas as it applied to an arrestee's liberty interests in pretrial release, but agreed that the County's bail procedures were nonetheless unconstitutional.[166] As to due process, the court found that, "even under our more forgiving framework," Harris County's procedures for imposing bail in misdemeanor cases violated plaintiff's due process rights.[167] The Fifth Circuit agreed with the district court's holding that the county's bail procedures violated the Fourteenth Amendment's equal protection clause. The court relied on prior Supreme Court holdings,[168] which held that, although indigents are technically not a suspect class, when they are detained "*because* of their indigence," laws which detain these arrestee's will receive heightened scrutiny.[169] Here, Harris County's procedures resulted in "absolute deprivation" of indigent arrestee's "most basic liberty interests," and as such failed heightened scrutiny.[170]

Interestingly, Harris County tried to argue that plaintiff's complaint was "an Eighth Amendment case wearing a Fourteenth Amendment costume."[171] However, the court rejected this argument, concluding that "'[t]he incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."[172] The Court cited a Supreme Court case which, as applied to the instant case, essentially stood for the proposition that all excessive bail cases need not be governed by a "single, generic standard" (*i.e.* the Excessive Bail Clause of the Eighth Amendment).[173]

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165. *Id.* at 537.

166. *Id.* at 540.

167. *Id.* at 541–43. The district court found "secured bail orders are imposed almost automatically on indigent arrestees," without any consideration of the arrestee's actual ability to pay.

168. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973); Tate v. Short, 401 U.S. 395, 397–99 (1971); Williams v. Illinois, 399 U.S. 235, 241–42 (1970).

169. *ODonnell,* 882 F.3d at 544.

170. *Id.*

171. *Id.* at 539.

172. *Id.* (citing Pugh v. Rainwater, 572 F.2d 1053,1057 (5th Cir. 1978)).

173. Graham v. Connor, 490 U.S. 386, 393 (1989).

Following its decision, the Fifth Circuit remanded the matter to the district court so that it could revise its injunction.[174] Recently, the Fifth Circuit ruled on Judge Lee Rosenthal's revised order, which required immediate release of certain defendants, as well as bail hearings within 48 hours of being arrested on misdemeanor charges.[175] The Court upheld the 48 hour requirement, but stated that immediate release of those who cannot post bail contravened its prior decision in February 2018, as it was too broad.[176] Harris County is the third largest county in population behind Los Angeles and Cook County.[177] While the Fifth Circuit's initial decision was certainly a win for civil rights defenders, it can be argued that being jailed for 48 hours before a bail determination is made still runs afoul of constitutional integrity. With 63% of its jail population being pretrial defendants, it is imperative that large counties similar to Harris County reform certain pretrial procedures as they relate to bail in order to effect real and meaningful change.[178]

Compare *Holland v. Rosen*, a case decided on July 9, 2018, by the United States Court of Appeals for the Third Circuit which held that there is no federal constitutional right to monetary bail under the Eighth Amendment and the Fourteenth Amendment of the United States Constitution.[179] In 2017, New Jersey amended its Constitution and enacted the New Jersey Criminal Justice Reform Act. New Jersey's former monetary bail system was replaced with "individualized

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174. *ODonnell*, 882 F.3d at 549.

175. ODonnell v. Goodhart, 900 F.3d 220 (5th Cir. 2018) [hereinafter *ODonnell II*]; Cameron Langford, *Federal Judge Orders Texas County to Release Poor Defendants Without Bail*, COURTHOUSE NEWS SERV. (July 2, 2018), https://www.courthousenews.com/federal-judge-orders-texas-county-to-release-poor-defendants-without-bail/; Gabrielle Banks, *Appeal Court Halts Portion of Harris County Bail Fix*, HOUS. CHRON. (Aug. 16, 2018, 7:40 PM), https://www.chron.com/news/houston-texas/houston/article/Appeals-court-halts-portion-of-Harris-County-bail-13161060.php.

176. *ODonnell II*, 900 F.3d at 228; Gabrielle Banks, *Appeal Court Halts Portion of Harris County Bail Fix*, HOUS. CHRON. (Aug. 16, 2018, 7:40 PM), https://www.chron.com/news/houston-texas/houston/article/Appeals-court-halts-portion-of-Harris-County-bail-13161060.php

177. Lomi Kriel, *Harris County drops to No. 2 nationally in population growth, according to Census data*, HOUS. CHRON. (Mar. 23, 2017), https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-drops-to-No-2-nationally-in-11024290.php.

178. THE TEX. CRIM. JUST. COALITION, HARRIS COUNTY, TEXAS. ADULT CRIMINAL JUSTICE DATA SHEET (2016), https://www.texascjc.org/system/files/publications/Adult%20Harris%20County%20Data%20Sheet%202016_0.pdf.

179. Holland v. Rosen, 895 F.3d 272 (3d Cir. 2018).

assessments" of each defendant's flight risk and possible threat to the community.[180] Statistics prior to enactment of the new legislation showed that almost 75% of New Jersey's jail population was attributed to pretrial inmates awaiting trial or sentencing in the state Municipal and Superior Courts.[181] Of that subset, 40% of the population had the option to post bail, but remained in custody because they could not meet the obligation.[182] Further, 12% of the total population remained in custody "because he or she could not pay $2,500 or less."[183] Following statistical analyses and reports, the New Jersey Legislature amended its Constitution which was interestingly similar to conditions set forth by the Bail Reform Act of 1984, as evinced in *Salerno*.[184]

In *Holland*, the defendant was arrested in April 2017 for second degree assault of a person at a bar.[185] Due to the severity of the crime, the prosecutor moved for pretrial detention, based on New Jersey's "Decision-Making Framework."[186] The defendant accepted non-monetary pretrial release, in exchange for the prosecutor to withdraw his motion.[187] In addition, he waived his right to a pretrial detention hearing.[188] He then filed a motion for a preliminary injunction, which the District Court denied.[189] In its decision, the District Court examined the Excessive Bail Clause of the Eighth Amendment and held the defendant's argument for the right to monetary bail would not succeed on its merits.[190] Further, the Court

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180. Nick Wing, *Report Grades Bail Systems Across The U.S., And Only One State Gets An A*, HUFFINGTON POST (Nov. 11, 2017, 12:01 AM), https://www.huffingtonpost.com/entry/state-bail-system-grades_us_59f78f90e4b0aec1467a2708. The Pretrial Justice Institute released a report on all 50 states, which took into account pretrial detention rates, pretrial risk assessment, and reliance on monetary payment before release from detention.

181. MARIE VAN NOSTRAND, IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION, LUMINOSITY IN PARTNERSHIP WITH THE DRUG POL'Y ALLIANCE (Mar. 2013), https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf.

182. *Id.*

183. *Rosen*, 895 F.3d at 279.

184. *Id.* at 280; see United States v. Salerno, 481 U.S. 739 (Respondents were charged with various RICO violations).

185. *Rosen*, 895 F.3d at 283–84.

186. *Id.* at 284.

187. *Id.*

188. *Id*. at 285.

189. *Id.*

190. *Id.*

determined that the statute did not violate due process, as there was evidently no grounds for "finding an option to obtain monetary bail is a fundamental right or is implicit in the concept of ordered liberty."[191]

The Third Circuit, in making its decision, held that the Excessive Bail Clause "applies to the State of New Jersey through the Fourteenth Amendment."[192] The Court avoided the question of whether there is an inherent right to bail. The Court assumed arguendo that, if there was a right to bail, the question then becomes one of whether that right "requires monetary bail to be considered in-line with non-monetary release conditions."[193] The Court delved into the history of bail in the United States and followed the Supreme Court's "broader definition"[194] of what is considered bail.[195]

In *Holland*, the defendant's argument was essentially two-fold. First, he argued that the New Jersey legislation violated the Eighth Amendment because it did not include monetary bail in conjunction with non-monetary bail, *i.e.,* "home detention and electronic monitoring."[196] The Court held that, even assuming there is a "right to bail," the Eighth Amendment did not "contemplate monetary bail."[197] Second, he argued that under the Supreme Court's "broader definition" of bail, the New Jersey legislation violated the Eighth Amendment's Excessive Bail Clause because there was a "less restrictive alternative to the conditions of release," *i.e.*, monetary bail.[198] The Court found that Holland misinterpreted the test in *Salerno*; for bail conditions to be excessive under the Eighth Amendment, they must be "excessive in light of the perceived evil."[199] The Court opined that the defendant's

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191. *Id.*

192. *Id.* at 288.

193. *Id*. at. 288.

194. *Id.* at 290.

195. See Stack v. Boyle, 342 U.S. 1, 4 (1951) (the Court describes the "right to bail" as the "traditional right to freedom before conviction," and the "right to release before trial . . . conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty"); *see also* United States. v. Salerno, 481 U.S. 739, 754 (the Court held the Bail Reform Act of 1984 did not violate the Eighth Amendment, because the "only arguable substantive limitation of the [Excessive] Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil.")

196. *Rosen*, 895 F.3d at 291.

197. *Id.*

198. *Id.*

199. *Id.* (quoting *Salerno*, 481 U.S. at 754 (1987)).

release conditions in *Holland* "are hardly excessive," in light of his "risk of flight and danger to others."[200] It will be important to track and understand the implications and impact that the Court's holding in *Holland* will have on pretrial detainees. Although non-monetary conditions of bail benefits those that are indigent, it does not completely eradicate the risk of stringent non-monetary conditions.[201]

C. *Consequences Resulting from Setting Bail Without Regard to Income*

The cash-bail system in the United States without a doubt favors the wealthy and hurts those who are poor. As of 2013, 60% of inmates across the country were pretrial inmates.[202] A study by the National Association of Counties has shown that the rate of pretrial detention in "misdemeanor cases range from 22% on average in Kentucky counties to 48% in cases with bail amounts less than $1,000.00 in New York City."[203] Many argue that monetary bail is a form of *sub rosa* detention of the poor in our country.[204] This section seeks to explore the effects of imposing secured (*i.e.* an arrestee must pay to be released) bonds on those who cannot afford it. The constitutional inequity in setting bail without regard to income is documented in several years of case law and legal precedent. However, there is a dichotomy between that legal precedent in theory and in practice.

Consider California. California is known as one of the "bluest states in the nation," yet was ripe for bail reform.[205] Historically, states that are ideologically "left-leaning" have long been supportive of bail reform and more broadly, criminal justice system reform. Democrats have been driving support of reform in the criminal

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200. *Id.*

201. *See* CRIM. JUST. POL'Y PROGRAM AT HARV. L. SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM (2016), http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf.

202. TODD D. MINTON, U.S. DEPT. OF JUST., JAIL INMATES AT MIDYEAR 2012– STATISTICAL TABLES, (2013), https://www.bjs.gov/content/pub/pdf/jim12st.pdf.

203. NATALIE R. ORTIZ, NAT'L ASS'N OF COUNTIES, COUNTY JAILS AT A CROSSROADS: AN EXAMINATION OF THE JAIL POPULATION AND PRETRIAL RELEASE 8 (2015), http://www.naco.org/sites/default/files/documents/County%20Jails%20at%20a%20Crossroads%20-%20Full%20Report_updated.pdf; *see also* HUMAN RTS. WATCH *supra* note 143, at 1–2.

204. Cynthia Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, ARTICLES IN L. REV. & OTHER ACAD. J. 301, 935–36 (2013); *see also* HUMAN RTS. WATCH *supra* note 143, at 26.

205. David Feige & Robin Steinberg, *Replacing One Bad Bail System with Another*, THE N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/11/opinion/california-bail-law.html.

justice system related to curing racial discrimination and mass incarceration of minorities.[206] California is home to the largest county in the United States by population[207], and as such, home to the largest jail population.[208] In Los Angeles County, 40% of the inmate population was comprised of pretrial inmates in 2016.[209] In the last quarter of 2016, 67% of inmates were eligible for bail.[210] Of those eligible, nearly 55% had bail which ranged from $50,000.00 to $1,000,000.00.[211] The average bail amount in California is $50,000.00.[212] Consider that the average household income in Los Angeles County is $57,952.00.[213] These numbers are both astronomical and distressing. The idea of having to pay bail that costs an entire year's worth of income is difficult to comprehend. It comes as no surprise, then, that arrestees are left with two options: remain incarcerated or plead guilty to a charge that otherwise may not have been committed. Studies have shown that in six California counties during 2014 and 2015, "71–91 percent of misdemeanor and 77–91 percent of [non-violent] felony defendants who stayed in jail until they received their sentence were released before the earliest possible trial date."[214] The effects of remaining incarcerated, as opposed to asserting a guilty plea, are sometimes just as damaging as allowing the creation of a criminal record.

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206. Shaila Dewan & Carl Hulse, Republicans and Democrats Cannot Agree on Absolutely Anything. Except This., THE NEW YORK TIMES (NOV. 14, 2011) https://www.nytimes.com/2018/11/14/us/prison-reform-bill-republicans-democrats.html.

207. *American Fact Finder,* U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (last visited Sept. 16, 2018). Los Angeles County has a current estimated population of 10,163,507.

208. WORLDATLAS, *The Largest Jails in the United States*, https://www.worldatlas.com/articles/the-largest-jails-in-the-united-states.html (last visited Sept. 16, 2018). Los Angeles County jail population is 19,836.

209. *See* L.A. COUNTY SHERIFF'S DEPT., *Custody Division Year End Review 2016,* 25 (2018), http://www.la-sheriff.org/s2/static_content/info/documents/PMB_YER2016.pdf.

210. *Id.* at 30.

211. *Id.*

212. *It's time to do away with California's cash bail system*, SACRAMENTO BEE (Apr. 7, 2017), https://www.sacbee.com/opinion/editorials/article143174454.html.

213. *See American Fact Finder, supra* note 206.

214. *"Not in it for Justice." How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, HUMAN RTS. WATCH (Apr. 11, 2017), https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly.

In 2015, an 18-year-old boy was held in jail in California for over six weeks following an arrest for being stabbed outside of a restaurant by a stranger.[215] His bail was set at $30,000.00, but his mother, a single woman raising two children, had no "savings or property to sell or use as collateral" to post bail for him.[216] Once his preliminary hearing arrived six weeks later, the judge dismissed his case, stating "there was no evidence [he] committed a crime."[217] He missed an entire semester of school as a result of a crime which he was found to have not committed, all because his mother could not afford to post bail. Analogously, 19-year-old Riana Buffin lost her job as an airport baggage handler after being jailed for only a few days because she couldn't afford $30,000.00 bail in San Francisco County—charges were eventually dropped.[218] Early in 2018, a federal judge released a homeless man who spent almost eight months in jail for stealing $5.00 and a bottle of cologne, because he couldn't afford bail, which was set at $330,000.00.[219] The judge stated that if the defendant "were a rich man, with the same record, he 'would have gone free for no reason other than his wealth' by paying bail."[220] In 2017 a 60-year-old man sat in jail for over a month, accused of welfare fraud, because his bail was set at $7,500.00, which he could not afford.[221] As a result of being incarcerated, the man lost his apartment along with sentimental possessions, his job, and his partner.[222] In stark contrast, a "wealthy real estate heir" in San Francisco who conspired to kill her

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215. Nazish Dholakia, *Witness Falsely Accused and Locked Up In California*, HUMAN RTS. WATCH (Apr. 11, 2017), https://www.hrw.org/news/2017/04/11/witness-falsely-accused-and-locked-california.

216. *Id.*

217. *Id.*

218. Zachary Norris & Mary Lou Fulton, Opinion, *Freedom for Sale in California—If You Can Afford It*, L.A. TIMES (Jan. 26, 2016, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-norris-fulton-bail-lawsuit-20160126-story.html.

219. Bob Egelko, *Homeless Man Couldn't Afford $330,000 Bail, So Judge Orders Him Free For Now*, S.F. GATE (Mar. 14, 2018, 5:32 PM), https://www.sfgate.com/crime/article/Homeless-man-couldn-t-afford-330-000-bail-so-12753950.php.

220. *Id.*

221. Sam Levin, *Wealthy Murder Suspect Freed on Bail As Man Accused of Welfare Fraud Stuck in Jail*, THE GUARDIAN (Apr. 25, 2017), https://www.theguardian.com/us-news/2017/apr/25/california-bail-system-tiffany-li-joseph-warren. Luckily, a *Guardian* reader anonymously donated the man's bail and he was released pending trial; *see San Francisco Public Defender's 2017 Annual Report/2018 Calendar*, S.F. PUBLIC DEFENDERS (2017), http://sfpublicdefender.org/wp-content/uploads/sites/2/2018/01/2017-report-2018-calendar.pdf.

222. *Id.*

husband, remained under house arrest after "posting $4m[illion] in cash and pledging $62m[illion] in property" for bail.[223]

With the cash bail system facing criticism nationwide,[224] and even across party lines,[225] the state of California was able to successfully propose the California Bail Reform Act of 2017, or SB-10, to "safely reduce the number of pretrial detainees."[226] The Act disposes of bail schedules and requires every county to establish pretrial service agencies that conduct pretrial risk assessments.[227] Factors to be considered by the judge include public safety, witness or victim intimidation, and flight risk of the defendant.[228] Pretrial services and judges are instructed to choose the "least restrictive nonmonetary condition . . . or conditions" when releasing the arrested person.[229] The passage of this act shows a meaningful shift away from favoring the wealthy who are "simply purchasing their release."[230] While this is certainly important, some would argue that it merely puts a Band-Aid on a bullet wound. The ACLU of California, which was in staunch support of SB-10 when it was initially proposed, openly shifted its position on the matter, stating the bill cannot "provide sufficient due process nor adequately protect against racial biases and disparities that permeate our justice system."[231] So, in its attempt to combat the inequality between those who can afford to pay bail and those who cannot, the California state legislature was criticized for not taking into account racial

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223. *Id.*

224. Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU (Dec. 11, 2017, 4:30 PM), https://www.aclu.org/blog/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail.

225. Rand Paul & Kamala Harris, Opinion, *To Shrink Jails, Let's Reform Bail*, N.Y TIMES (July 20, 2017), https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html.

226. Assemb. Comm. on Public Safety, S. Bill Comm. Analysis of SB 10, 2017 Leg., 2017-2018 Sess. (Cal. 2017) (July 11, 2017).

227. *Id.*

228. Kyle Harrison, *SB 10: Punishment Before Conviction? Alleviating Economic Injustice in California with Bail Reform.* 49 THE U. PAC. L. REV. 533, 543 (2017).

229. S. B. No. 10, Cal. (2018), ch. 244. §§ 1320.10(b), (c), 1320.13(e)(1), 1320.17, 1320.18(e)(1), 1320.20(e)(1), (f).

230. Timothy Murray, *Why the Bail Bond System Needs Reform,* THE CRIME REP. (Nov. 19, 2013), https://thecrimereport.org/2013/11/19/2013-11-why-the-bail-bond-system-needs-reform/.

231. *ACLU of California Changes Position to Oppose Bail Reform Legislation*, ACLU SOUTHERN CAL. (Aug. 20, 2018), https://www.aclusocal.org/en/press-releases/aclu-california-changes-position-oppose-bail-reform-legislation.

inequality.[232] Most indigent inmates in California are minorities.[233] Studies have shown that bail for black defendants is systematically higher than for white defendants.[234] Because pretrial risk-assessment is relatively new, there have not been many studies that statistically calculate *de facto* racial bias.[235] Yet historically, the reality is that in the United States, the monetary bail system unconstitutionally and implicitly targets minorities. The Act is a large step in changing that reality. Of course, the new system will need to be calibrated to address racial disparities that will inevitably permeate a judge's determination. Systematic racial bias is not erased overnight. But it shifts a pretrial release determination from whether someone has money in their pocket to be free, to whether they present a real and demonstrable risk to the community or whether they have any prior history which would indicate such risk.

New York bail statutes are considered some of the best in the country.[236] Courts are mandated to consider factors such as a defendant's employment status and financial resources, criminal record, and record of non-appearances in court.[237] Yet, courts in the state often do not actually consider these factors. As one reporter put it, "[t]he judge, without asking whether the defendant can afford the payment, offers him two unworkable choices: Post the full amount of bail now or pay a visit to the bail bondsman, an expensive proposition."[238] Of course, if neither of these options are viable, which they usually are not, a defendant can spend days, weeks, or even months at Rikers Island.[239] In 2016, almost 80% of New York City jail

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232. *Id.*

233. *See* L.A. COUNTY SHERIFF'S DEPT., *supra* note 208, at 22. Eighty percent of the Los Angeles County jail population, both male and female, was comprised of Hispanics (50%) and Blacks (30%) in 2016.

234. PRANITA AMATYA ET AL., *BAIL REFORM IN CALIFORNIA*, UCLA LUSKIN SCH. OF PUB. AFFAIRS, DEP'T OF PUB. POL'Y 28 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=835f283a-e9fc-9c56-28bb-073a9bcb1dbf.

235. *Id.* at 29–30.

236. Ian MacDougall, *The Failure of New York's Bail Law*, THE ATLANTIC (Nov. 24, 2017), https://www.theatlantic.com/politics/archive/2017/11/the-failure-of-new-yorks-bail-law/546212/.

237. *See* N.Y. C.P.L. § 510.30 2(a).

238. Murray, *supra* note 230.

239. Michael Schwirtz, *What is Rikers Island?*, N.Y. TIMES (Apr. 5, 2017), https://www.nytimes.com/2017/04/05/nyregion/rikers-island-prison-new-york.html.

inmates were pretrial detainees.[240] Based on bail status, a staggering 72% were detained because they could not post bail.[241]

The story of Kalief Browder demonstrates the harmful effects of setting bail without regard to economic status. On May 10, 2010 Kalief Browder, a then 16-year-old African American boy, was walking home with his friend in the Bronx when police stopped him and accused him of stealing a man's backpack.[242] He was handcuffed following a search, which produced no evidence against him.[243] One of the officers told him, "We're just going to take you to the precinct. Most likely you can go home."[244] He was taken to Bronx County Criminal Court, along with his friend. His friend was released pending trial, but because Browder was on probation, he was held and bail was set at $3,000.00.[245] Neither he nor his family could afford to post bail. As a result, he was held in Rikers Island. On July 28, 2010, Kalief Browder went before the judge at Bronx County Hall of Justice, where he was informed that a grand jury had indicted him on second degree robbery and other charges.[246] Following his plea of not guilty, the Department of Probation filed a "violation of probation" against him, and he was remanded without bail.[247] Having been in jail for almost a full year, the prosecutor kept requesting adjournments for trial.[248]

In 2012, prosecutors offered him a deal—plead guilty and spend three and a half years in jail—but he refused, maintaining his innocence. On February 8, 2012, Kalief attempted to commit suicide by tying a noose made of sheets to a light fixture in his cell and hang himself.[249] He was unsuccessful. On February 18, 2012, he

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240. Ronnie Lowenstein, *Pretrial Detention Rates*, THE CITY OF N.Y. INDEP. BUDGET OFF. (May 16, 2017), http://www.ibo.nyc.ny.us/iboreports/pretrial-detention-rates-may-2017. pdf.

241. *Id.*

242. Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Oct. 6, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* When Kalief Browder was younger, he was accused of stealing a delivery truck and crashing it. He was with friends at the time and maintained he did not drive the truck, but figured he had no defense, so he plead guilty. He was then given "youthful offender status" so he would not have a criminal record.

248. *Id.*

249. *Id.*

stomped on a plastic bucket in his cell, took one of the broken shards, and started slicing his wrist.[250] He was stopped by a corrections officer who just so happened to be passing his cell.[251] Between mid-2011 and early 2013, Kalief was offered—and he denied—13 plea deals.[252] Finally, in May 2013, the prosecutor informed the judge that they did not have enough evidence to meet their burden of proof, and thus, the complaint against Kalief Browder was dismissed.[253]

Kalief Browder endured three years in one of the most dangerous and corrupt prisons in the country. He had told his story following his release to many, in the hopes that it would spark change, both at a community and political level.[254] For a time, it seemed that that is what was happening. In April 2015, Mayor DeBlasio, along with former Chief Judge of the New York Court of Appeals Jonathan Lippman, proposed an initiative to prevent those awaiting trial in the New York criminal courts from languishing in jail.[255] And Kalief himself was, what it seemed at the time, on the up and up. He earned his GED and was attending classes at Bronx Community College.[256] However, in the days leading up to his death, Kalief's attorney Paul Prestia noticed strange Facebook posts by Kalief. Prestia texted him making sure he was alright to which Kalief responded, "Yea I'm alright thanks man."[257] That Saturday, on June 6, 2015, Kalief Browder hung himself in

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250. *Id.*

251. *Id.*

252. J'na Jefferson, *'TIME: The Kalief Browder Story' Part Four Recap: Kalief Browder Shows Resilience Despite a Shady Justice System*, BILLBOARD (Mar. 23, 2017), https://www.billboard.com/articles/columns/hip-hop/7736354/time-the-kalief-browder-story-part-four-recap.

253. Melanie Campbell, *Vulnerable and Inadequately Protected: Solitary Confinement, Individuals with Mental Illness, and the Laws That Fail to Protect*, 45 HOFSTRA L. REV. 263 (2016).

254. Jennifer Gonnerman, *Kalief Browder and a Change at Rikers*, THE NEW YORKER (Apr. 14, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-and-a-change-at-rikers.

255. *Id.*

256. Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html.

257. Ben Mathis-Lilley, *Man Who Spent Three Years in Prison in Rikers Island Jail Without Trial Commits Suicide*, SLATE MAG. (June 8, 2015), http://www.slate.com/blogs/the_slatest/2015/06/08/kalief_browder_suicide_had_been_held_three_years_on_rikers_island_without.html.

his mother's home with an air conditioner cord.[258] Kalief Browder ultimately succumbed to the grave injustices he experienced while in pretrial detention, simply because he could not afford $3,000.00 bail. Kalief Browder's story is a poignant reminder of the psychological effects of remaining incarcerated based on the inability to pay for your freedom.

> In 2017, Governor Cuomo announced his intentions to push for bail reform, stating:
>
> Many sit in [New York] jail[s] for weeks, months, or even years, with their lives disrupted and their work and family situations tossed aside—primarily because they lack the financial means to post bail. That is not justice. Now is the time to transform the State's antiquated bail system, which equates freedom with the ability to pay . . .[259]

Although the bill that followed Governor Cuomo's proposal did not pass through the New York Senate,[260] there still remains a push towards reforming New York's bail system as it stands.[261] Estimates show that those detained in New York City jails because they cannot post bail lose $28 million in lost wages.[262] Apart from economic impact, imposition of bail on those who cannot afford to pay is "inter-generational."[263] Children of detainees are more likely to develop emotional disturbances, drop out of school, and are likely to commit future crimes themselves.[264]

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258. Udi Ofer, *Kalief Browder's Tragic Death and the Criminal Injustice of Our Bail System*, ACLU (Mar. 15, 2017), https://www.aclu.org/blog/smart-justice/kalief-browders-tragic-death-and-criminal-injustice-our-bail-system.

259. ANDREW M. CUOMO, STATE OF THE STATE, 2017 179 (2017), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2017StateoftheStateBook.pdf.

260. *See* Grant, *supra* note 156.

261. *See* MacDougall, *supra* note 236. Brooklyn Public Defenders' are creating a new program, focused on challenging judicial orders of bail that defendants cannot afford.

262. *The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC*, N.Y. CITY COMPTROLLER, BUREAU OF POL'Y AND REV., BUREAU OF BUDGET 5 (Jan. 17, 2018), https://comptroller.nyc.gov/reports/the-public-cost-of-private-bail-a-proposal-to-ban-bail-bonds-in-nyc/.

263. *Id.*

264. Shima Baradaran Baughman, *Costs of Pretrial Detention,* 97 B.U. L. REV. 1, 7 (2017).

There is general bipartisan agreement that the United States needs bail reform.[265] A recent study showed that 57% of Americans are in favor of ending pretrial detention due to a defendant's inability to post bail.[266] There are many stories of defendants sitting in jail on charges (other than capital crimes), simply because they cannot afford to pay bail.[267] This country has a long-standing history of economic inequality that dates back to the late nineteenth century.[268] As such, it is of no surprise that these inequalities would seep into the United States criminal justice system. Some may argue that the defendant should not engage in criminal activity if they do not want to face the consequences of their actions. Such a statement diminishes the very foundation the United States criminal justice system was created: innocent until proven guilty.[269] As shown, many pretrial detainees are not actually convicted of the crimes of which they are accused.[270] Therefore, it is promising to see many states shift away from monetary bail systems, and instead rely

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265. *See* Paul & Harris, *supra* note 225.

266. *Survey on American Money Bail System: Americans Recognize Inequities in Pretrial Justice System and Support Reforms to Current System*, CHARLES KOCH INST. AND THE PRETRIAL JUST. INST. (July 13, 2018, 4:59 PM), https://www.charleskochinstitute.org/blog/pretrial-justice-bail-reform-poll/.

267. Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, THE ATLANTIC (Apr. 12, 2016), https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/. A young man in New Hampshire died in jail five days after he was unable to post $100.00 bail; *see also* Sharon Grigsby, *Another outrage in Sandra Bland injustice: She couldn't find $500 bail*, THE DALLAS MORNING NEWS (Jul. 2015), https://www.dallasnews.com/opinion/opinion/2015/07/27/another-outrage-in-sandra-bland-injustice-she-couldnt-find-500-bail. A 28-year-old woman was found hanging in Texas jail cell three days after her arrest for a failure to signal. She could not afford 10%, or $500.00, of her total bond, which was set at $5,000.00.

268. Michail Moatsos et al., *Income Inequality Since 1820, in* HOW WAS LIFE? GLOBAL WELL-BEING SINCE 1820 (Jan Luiten van Zanden et al. eds., 2014). https://dspace.library.uu.nl/bitstream/handle/1874/305705/15.pdf?sequence=1&isAllowed=y.

269. Coffin v. United States, 156 U.S. 432, 453 (1895). The Supreme Court held that "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."

270. THOMAS H. COHEN & BRIAN A. REAVES, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS: STATE COURT PROCESSING STATISTICS, 1990–2004, SPECIAL REPORT (NCJ 214994) (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf. Twenty percent of defendants detained because they could not post bail were eventually acquitted or their cases dismissed in state courts between 1990–2004.

on non-monetary conditions of release with procedural safeguards in place.[271] Making change at the state level is the best way to signal to the federal branches of government that bail reform should be enumerated at the highest level.

III. SOLUTIONS AND ALTERNATIVES TO THE UNITED STATES BAIL SYSTEM

As demonstrated, several individuals are detained yearly in jail while awaiting their trial simply because they cannot afford their bond amount. "In 1982, for every 100 arrests, 51 people were booked into jail. By 2012, even after crime rates plummeted, that ratio had swelled to 95 out of 100 . . ."[272] Incarcerating low-risk defendants can be costly to taxpayers, and also disrupt the defendants' own personal lives, many of whom have low incomes and face other challenges.[273] This section will seek to suggest solutions that would impose the least restrictive conditions in setting bail, but also ensure that the defendant will ultimately appear. Most importantly, the goal is to reduce unnecessary pretrial detention while still maintaining public safety.

One strategy may be to encourage judges to increasingly release the defendant on his or her own recognizance (ROR) and offer other nonfinancial forms of release. In 1961, the Vera Institute of Justice initiated an experiment, called *The Manhattan Bail Project*, with the objective of increasing the number of persons who could be released before their trial on ROR, if verified information concerning their character would be available to the court at the time of that defendant's bail hearing.[274] Law students were employed to interview defendants before they appeared in court, and if the defendant met the project's criteria, then a recommendation would be passed along to the judge that the defendant be released before trial.[275] The result of the project showed that a large percentage of these defendants who were granted ROR would still appear for court; thus, the project

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271. *See* John Buntin, *The Fight to Fix America's Broken Bail System*, GOVERNING (Oct. 2017), http://www.governing.com/topics/public-justice-safety/gov-bail-reform-texas-new-jersey.html. States including Arizona, New Mexico, and New Jersey have enacted rules and policies that require courts to seriously consider defendants' financial circumstances. Many states are also enacting change at the local city and county levels.

272. *Reducing the Use of Jails*, VERA INST. OF JUST., https://www.vera.org/ending-mass-incarceration/reducing-the-use-of-jails (last visited Sept. 23, 2018).

273. *See generally infra* Part II.C.

274. *See generally* Bernard Botein, *The Manhattan Bail Project: Its Impact on Criminology and the Criminal Law Processes*, 43 TEX. L. REV. 319 (1965).

275. *Id.* at 320.

seems to have worked.[276] Accordingly, implementing a similar project across the nation could ultimately be one type of solution and also save the government money as a result of reduced incarceration. Defendants who are able to obtain ROR could also be subjected to other release conditions ensuring their next court appearance with programs of supervision or treatment of the defendants such as drug and alcohol rehabilitation and/or counseling services; thereby adding to the judge's confidence that the defendant would appear in court. New York City recently implemented a similar type of program that has seen much success.[277]

However, a single project reform would most likely not be enough. Not everyone can fit into a perfect solution. Hence, multiple projects would need to be in place. Judges should be allowed alternatives between detention, ROR, and/or ROR coupled with other conditions. Therefore, after assessing the defendant's financial conditions, flight risk, and safety to the public, a judge could determine which method would be the most suitable for that particular defendant. A ROR coupled with other conditions could include remaining within the court's jurisdiction while awaiting their next court appearance, staying at a fixed address, avoiding certain individuals and/or gangs who may have influenced that defendant being in legal trouble, finding temporary employment, and making periodic check-ins with the court through some type of pretrial probation officer. Similar programs resulted in the release of more defendants before trial with a cost savings of nearly $200,000.00 during their first three years. [278] Unfortunately, public defenders, and certainly prosecutors, are less likely to come forth with the information necessary for judges to make these types of decisions. Public defenders often only have a few minutes to review the case file before presenting their argument in front of a judge,

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276. *Id.* at 327.

277. Cindy Redcross et al., *New York City's Pretrial Supervised Release Programs*, VERA INST. OF JUST., (Apr. 10, 2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-citys-pretrial-supervised-release-program/legacy_downloads/Supervised-Release-Brief-2017.pdf.

278. During 1961–69 the Des Moines Pre-Trial Release Project obtained the release of 3,800 defendants. Only 2.4% failed to appear for trial. In 1970 the Des Moines Model Neighborhood Collections Project was established to obtain the release of the about 400 defendants per year who did not post bond or qualify for that Pre-Trial Release Project, but who might appear for trial if provided with some supervision. Of the defendants who qualified, 97% appeared for trial, which was about the same percentage as those who posted a money bond or had been granted ROR release in that jurisdiction. The project has resulted in a cost savings of nearly $200,000 during its first three years. *See A* U.S. DEP'T. OF JUST. HANDBOOK ON COMMUNITY CORRECTIONS IN DES MOINES (1975), https://www.ncjrs.gov/pdffiles1/Digitization/10781NCJRS.pdf.

and a prosecutor more likely wants a harsher sentence imposed.[279] Therefore, an additional program may need to be in place in order for there to be an evaluation that can be presented to the public defender and/or judge in order for them to have a fuller picture of the defendant's situation. Similar to what the Vera Institute of Justice did in the 1960s, it would be beneficial for individuals hired through a newly created court system, or volunteers, to meet with a defendant prior to their bail hearing and then provide their findings to the judge and/or public defender so that judges could have a range of alternatives to choose from that would best fit that certain defendant. Given the current state of pretrial detention and the overcrowding of jails, this type of improvement in the bail decision-making process could lead to an increase in the release of defendants that are not financially capable of posting bond and that are not a risk to the community.

Furthermore, assessing state pretrial system models that are currently in place is also important in determining which are most efficient. As previously noted, in 2017 the Pretrial Justice Institute performed a comprehensive analysis and grading system of each states' pretrial practices.[280] The State of New Jersey was the only state to receive an "A," and nine states, including Arizona, Connecticut, and Utah, received "B" grades.[281] New Jersey's model veered from reliance on monetary bail to individual assessments of each defendant's risk to the community.[282] Notably, the Court, in making its pretrial assessment, cannot take into account a defendant's juvenile record.[283] This is in stark contrast to how Kalief Browder was evaluated by the judge who set his bail.[284] The Pretrial Justice Institute found that within the first six months of the program's implementation, the "number of people held in New Jersey jails awaiting trial dropped by 15%."[285] Some may question the reliability of

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279. *See generally* Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, AM. BAR ASS'N (2016), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/v31/cjspring2016_BUNIN.pdf (noting that many states do not require counsel present at bail hearings, and initial proceedings generally occur soon after arrests).

280. *See generally* Wing, *supra* note 180.

281. PRETRIAL JUST. INST., THE STATE OF PRETRIAL JUSTICE IN AMERICA (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f9d452f6-ac5a-b8e7-5d68-0969abd2cc82&forceDialog=0.

282. *See generally infra* Part II.B and II.C.

283. *Public Safety Assessment New Jersey Risk Factor Definitions*, N.J. COURTS (Dec. 2018), https://www.njcourts.gov/courts/assets/criminal/psariskfactor.pdf?cacheID=RmwcVxz.

284. *See generally, infra* Part II.C.

285. *See* PRETRIAL JUST. INST., , *supra* note 280, at 4.

using technological algorithms as a deciding factor on whether to release someone from jail pending trial. It can be argued that it may inadvertently release dangerous defendants and keep behind bars low income racial minorities. However, the statistics from New Jersey clearly show that moving away from monetary bail and towards pretrial risk assessments is paving the way towards justice for pretrial inmates.[286]

Another solution, and one to which the authors support, is the Arizona model. In 2016, the Arizona Supreme Court ordered that a task force be assembled in order to truly examine the pretrial release system in the state.[287] In establishing the task force, one of the initiatives the Court mandated is that the task force "[d]evelop suggested best practices for allowing citizens unable to pay the full amount of a sanction at the time of sentencing options for reasonable time payment plans or by the performance of community service."[288] Thereafter, the Task Force on Fair Justice for All compiled a report and made recommendations with regard to fines, penalties, fees, and pretrial release policies within Arizona.[289] Some of the recommendations include reclassifying some misdemeanors as civil charges, creating affordable payment plans based on a defendant's ability to pay, and authorizing judges to impose direct sentences to either community service, education programs, or treatment programs as an alternative to paying monetary bail.[290] For example, the task force recommends that, with authorization by the defendant and their employer, the defendant incur monthly payroll deductions to pay for bail and/or court fines.[291] This is similar to wage garnishment in child support cases or student loan repayment plans based on total earnings. This option

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286. Issie Lapowsky, *One State's Bail Reform Exposes the Promise and Pitfalls of Tech-Driven Justice*, WIRED (Sept. 5, 2017, 7:00 AM), https://www.wired.com/story/bail-reform-tech-justice/. Only eight people were held on bail within the first half of 2017 in New Jersey.

287. *See* PRETRIAL JUST. INST., *supra* note 281 at 5.

288. Establishing the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies and Appointment of Members, ARIZ. ADMIN. ORDER (2016), http://www.azcourts.gov/Portals/22/admorder/Orders16/2016-16.pdf.

289. SUP. CT. OF ARIZ., JUST. FOR ALL: REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON FAIR JUSTICE FOR ALL: COURT-ORDERED FINES, PENALTIES, FEES, AND PRETRIAL RELEASE POLICIES (2016), https://www.azcourts.gov/Portals/74/TFFAIR/Reports/FINAL%20FairJustice%20Aug%2012-final%20formatted%20versionRED%20(002).pdf?ver=2016-08-16-090815-647 (last visited Oct. 8, 2018).

290. *Id.* at 14–19.

291. *Id.* at 17.

should be exercised relative to the defendant's total yearly income and be a certain percentage of that, using certain algorithmic tools.

Additionally, allowing judges to impose community service as an alternative to posting bail is a step forward in bail reform. The ability to "work off" your bail as opposed to having to pay for it outright benefits both the state and the defendant. The defendant avoids being held in pretrial detention because they cannot afford bail, and the state avoids the daily costs that accompany housing a pretrial inmate. Also, allowing defendants who are drug or alcohol addicts to enter treatment centers and using that as a form of "payment" against their bail obligations would benefit the community as a whole. Defendants who are addicts may possibly commit crimes due to their addictions. If these defendants seek treatment, it may lower their risk to the community. They may stop committing crimes which were fueled by drugs and alcohol and maintain their lives before addiction took over.

Finally, the Task Force on Fair Justice for All recommended the elimination the monetary bail system altogether and instead focus on a defendant's risk to the community.[292] This includes using risk assessment algorithms, pretrial service agencies, and research and data presentations to courts to display the effectiveness of risk assessment in action.[293] These initiatives provide multiple different avenues for Arizona to reform the monetary bail system as it presently stands. There are options for those willing to be subjected to monetary bail and for those that oppose it. As previously mentioned, a "one-size-fits-all" methodology may not necessarily work. It will be important to study the immediate and long-term effects of these recommendations/implementations by the Arizona Supreme Court in order to determine what works best.

A good model that deserves serious consideration can be found among New York's newer programs. New York's pretrial detention system has continuously been examined and criticized.[294] Yet, New York in recent years has been slowly shifting towards meaningful alternatives to monetary bail. In 2017, the Independent Commission on New York City Criminal Justice and Incarceration Reform released a report with recommendations on improving New York City's criminal justice system and closing the infamous Rikers Island.[295] Similar to Arizona, the Commission recommended removing certain low-level offenses from the criminal

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292. *Id.* at 31.

293. *Id.* at 36–37.

294. *See generally supra* Part II.B and II.C.

295. INDEP. COMM'N ON N.Y.C. CRIM. JUST. AND INCARCERATION REFORM, A MORE JUST NEW YORK CITY (2017), https://www.ncsc.org/~/media/C056A0513F0C4D34B779E875CBD2472B.ashx.

justice system, including turnstile jumping and low-level marijuana possession.[296] Shifting these offenses to the civil court system would avoid defendants being held pretrial because they cannot afford bail. It would also prevent courts from using prior criminal convictions such as these low-level offenses in making determinations of whether a defendant should be held pretrial. The authors believe that low-level offenses, as well as juvenile records, should not be considered in either setting bail for a defendant or making a pretrial risk assessment determination.[297]

So, in expanding on the ideas initially set forth in 2017, the Commission has recently recommended more substantial ideas and ways to effectuate change.[298] In New York, instead of paying bail, defendants under supervised release are assigned a social worker who checks in with them before trial.[299] We believe the social worker assigned should come from a new unit created either within the state's probation department or as a subset of the state's criminal court system. This system of supervision should only be used in instances where release on recognizance (ROR) is not appropriate. This system, however, should not be used for violent felony defendants, even though the Commission recommends expansion of supervised release to certain violent crimes.[300] The reason this hypothetical unit should be created under the umbrella of the court system is because judges, prosecutors, and defense attorneys are at the core of bail determinations. They are most susceptible to personal bias because they deal with the day-to-day procedures of bail hearings.

By addressing the excessiveness of bail determinations within the court system itself, it will show judges and attorneys the benefit of allowing defendants to be released on supervision. Defendants will be able to continue to work, watch and provide for their children, and maintain their freedom. The taxpayers will not have to incur the daily costs of incarcerating low-level defendants pretrial. The jail populations will decrease. The benefits far outweigh any potential harms.

CONCLUSION

The American judicial system has evolved regarding the notion of what it means for bail to be "excessive." As written and interpreted in early United States

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296. *Id.* at 39.

297. *See id.* at 34, 37, 39, 64.

298. Jeff Lentz, *Lippman Commission Calls for Expanding Supervised Release*, CITY AND ST. N.Y. (July 9, 2018), https://cityandstateny.com/articles/policy/criminal-justice/lippman-commission-calls-expanding-supervised-release.html.

299. *Id.*

300. INDEP. COMM'N ON N.Y.C. CRIM. JUST. AND INCARCERATION REFORM, *supra* note 294, at 48–49.

history, bail was simply meant to ensure a defendant's appearance at trial and maintain his liberty interests prior to.[301] As shown in *Stack v. Boyle*, bail is not a means by which to inflict punishment on a defendant.[302] By 1984, bail reform swept the nation to reflect the times. The crack epidemic and rising crime rates of the 1980s rattled Congress, and now, multiple factors were used to determine whether a defendant was even entitled to pretrial release.[303] The Supreme Court of the United States effectively decided in *Salerno* that there is no constitutional right to bail when a defendant presents a risk to the community.[304] This turned the bail system into what it has become. While not excessive in the eyes of the courts, reliance on preventive pretrial detention is potentially excessive in a lay-person's understanding of the word. Take for example, New York. As previously noted, New York has long been a champion of civil liberties.[305] Yet, they have alarmingly high statistics concerning pretrial detention based on a defendant's inability to post bail.[306] So, in 2018, when the Dutchess County Supreme Court found that New York unconstitutionally violated the equal protection clauses and due process clauses of both the New York State and United States Constitutions, it set new precedent.[307] The court in *People ex rel. Desgranges* understood that money can buy a defendant freedom, and whether or not the defendant can afford to pay should be both a moral and constitutional consideration under the laws of both state and country.

This recent wave of change has shown that those in opposition to the present bail system in the United States are not sitting idly by. Locking up those who cannot afford bail is antithesis to the very holding in *Salerno*, that pretrial detention is a "potential solution to a pressing societal problem."[308] The societal problem is detaining defendants who cannot afford bail. The societal problem is allowing these defendants to lose their jobs, their homes, and their children because they cannot afford bail. The story of Kalief Browder is the result of years of cultivating this failing system. Recent cases within state and lower federal courts are showing the shift in ideology. Courts are striking down state bail statutes as unconstitutional.[309] States are eradicating monetary bail altogether. Research and studies are being performed,

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301. *See supra* Part I.A.

302. *See generally* Stack v. Boyle, 342 U.S. 1 (1951).

303. *See supra* notes 43–47 and accompanying text.

304. *See generally* United States v. Salerno, 481 U.S. 739 (1987).

305. *See* HUMAN RTS. WATCH, *supra* note 143.

306. *Id.*

307. People *ex rel.* Desgranges v. Anderson, 59 Misc.3d 238, 241 (N.Y. Sup. Ct. 2018).

308. *Id.* at 747.

309. *See supra* Part II.B.

data is emerging, and states are reacting.[310] The simple fact is too many inmates across the country are being held pretrial because they cannot afford bail. Alternatives to monetary bail are of the utmost importance in changing the recurring cycle of those that are low income and minorities from staying in the criminal justice system simply because they cannot afford the bail terms that are imposed. It looks like the country is headed in the right direction, and it will be important to sustain this momentum to affect real change.

In a recent case, the Supreme Court of the United States held that the Eighth Amendment's ban on excessive fines applies to the states[311] In that case, an Indiana man's Range Rover, worth $40,000.00, was seized following his arrest and charge for selling heroin.[312] The state sought civil forfeiture of the vehicle, arguing it had been used to transport heroin.[313] He in turn, argued that the car was worth over four times the maximum fine assessable against him for his drug conviction and thus was unconstitutional.[314] Following the Supreme Court's ruling, a variety of issues emerge. Can the same argument used in *Timbs* be applied to the Excessive Bail Clause of the Eighth Amendment? As this article has shown, defendants are regularly offered bail for which they simply cannot afford. Why should low-level offenders be forced to pay excessive bail or face the penalty of pretrial detention? The Supreme Court in *Salerno* found pretrial detention to be regulatory and not a punishment.[315] In her opinion, Justice Ruth Bader Ginsburg ruled in *Timbs* that "[p]rotection against excessive punitive economic sanctions secured by the Clause is, to repeat, both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[316] Justice Ginsburg's opinion in *Timbs* could potentially be used as an argument in further cases concerning the de facto punishment of those who cannot afford bail and who end up in pretrial detention. It could be argued that while pretrial detention under the law is regulatory, bail which places defendants in pretrial detention is in fact a "punitive economic sanction," which is contrary to the concept of "ordered liberty" in the United States.[317] States should look at this case and examine the laws and policies in place that create such a disparity between the goal (secure a defendant's appearance at

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310. *See supra* Parts II.C, III.

311. Timbs v. Indiana, 139 S. Ct. 682 (2019).

312. *Id.* at 686.

313. *Id.*

314. *Id.*

315. United States v. Salerno, 481 U.S. 739, 747 (1987).

316. *Timbs*, 139 S. Ct. at 687 (citing *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)).

317. *Id.*

trial) and the reality (detaining individuals and affecting their liberty) in order to effect real change.