DEMOCRATIZING BAIL: CAN BAIL NULLIFICATION REHABILITATE THE EIGHTH AMENDMENT?

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DEMOCRATIZING BAIL: CAN BAIL NULLIFICATION REHABILITATE THE EIGHTH AMENDMENT?

The Excessive Bail Clause is one of the least developed clauses pertaining to criminal procedure in the Bill of Rights. In fact, the Supreme Court has not handed down a single opinion interpreting the Clause in more than a quarter of a century. Yet, on any given day, nearly half a million people languish in jails and prisons without having been convicted of any crime. Many of these people have either been denied bail or are unable to meet the bail amount that a judge has set for them. Moreover, bail jurisprudence has failed to account for the many technological and legal developments impacting the use of bail that have arisen in the past three decades.

This Note begins to fill that gap by showing how the operation of so-called community bail funds (CBFs) might inform the meaning of the Excessive Bail Clause. These organizations—and the anticarceral movements they represent—illustrate how the framework that judges have used to set bail since the Supreme Court's decision in United States v. Salerno *is defective. In so doing, CBFs offer a path forward: by replicating jury nullification in the bail context, they illuminate an understanding of the Excessive Bail Clause that reclaims its role as a meaningful protection against governmental abuse of power.*

INTRODUCTION

The United States of America is one of two countries in the world in which money bail plays a prominent role in the administration of criminal justice.[1] In the pretrial setting, America's reliance on money bail means that a defendant who can afford bail will go free, while the same defendant who cannot afford bail will linger in jail.[2] In this way, the institution of money bail may be the most honest in America's criminal justice system. Its honesty is derived from the manner in which it makes explicit what is often only implied: whether an individual will find herself incarcerated at some point in her life is partly a function of wealth.[3] As recognition of this fact has grown, bail's continued vitality has

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1. *See* F. E. DEVINE, COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES 7–13 (1991) (providing an overview of the commercial bail-bonding systems in the Philippines and the United States); Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), https://www.nytimes.com/2008/01/29/us/29bail.html?; Gillian B. White, *Who Really Makes Money off of Bail Bonds*, ATLANTIC (May 12, 2017), https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542/.

2. Kalief Browder is perhaps the most well-known victim of this practice. *See* Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015. However, commentators have long noted its injustice. *See, e.g.*, 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 45 (Phillips Bradley ed., Alfred A. Knopf 1945) (1835) ("[Bail] is hostile to the poor and favorable only to the rich. The poor man has not always security to produce . . . .").

3. ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 11–14 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/

come under intense scrutiny, with critiques coming from all corners of the political, cultural, and legal world.[4]

The impact of this system is not mere conjecture. The vast majority of defendants in the U.S. find themselves sitting in jail cells before being convicted of any crime.[5] Rather, many of these individuals are in jail solely because they did not have the financial means to pay their way out.[6] While the criminal justice system has long been suspected of bias against the poor,[7] nowhere does this bias gain such currency as with money bail. Now, in a country that houses more than 20% of the world's incarcerated population,[8] the wisdom of this practice may finally be attracting the criticism it deserves.

Still, although it once generated a great deal of debate, bail as a legal issue has attracted little scholarly interest until the past few years.[9] In 1987, the Supreme Court in *United States v. Salerno* upheld the constitutionality of the Bail Reform Act of 1984, which granted judges the discretion to detain criminal defendants pretrial if the judge determined the defendant was a flight risk or posed a threat to the safety of the community.[10] This decision has been widely

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es_20180314_looneyincarceration_final.pdf; Khaing Zaw et al., *Race, Wealth and Incarceration: Results from the National Longitudinal Survey of Youth*, 8 RACE & SOC. PROBS. 103, 112 (2016).

4. *See, e.g.*, Matt Arco, *Christie Signs Bail Reform Measure, Lauds Lawmakers for Bipartisanship*, NJ.COM (Aug. 11, 2014), https://www.nj.com/politics/index.ssf/2014/08/christie_signs_bail_reform_measure_lauds_lawmakers_for_bipartisanship.html (describing Republican then-Governor Chris Christie's adoption of bail-reform legislation); Ryan C. Brooks, *Bernie Sanders Goes After the Cash Bail System*, BUZZFEED NEWS (July 25, 2018), https://www.buzzfeednews.com/article/ryancbrooks/bernie-sanders-goes-after-the-cash-bail-system (surveying the trend toward rejection of cash bail in the Democratic Party); Shawn Carter, *Jay Z: For Father's Day, I'm Taking on the Exploitative Bail Industry*, TIME (June 16, 2017), https://time.com/4821547/jay-z-racism-bail-bonds/ (discussing the attempts to call attention to efforts to reform the bail industry); Jason L. Riley, *Bipartisanship on Bail*, WALL ST. J. (Sept. 25, 2018, 6:54 PM), https://www.wsj.com/articles/bipartisanship-on-bail-1537916063 (describing cooperation between Republicans and Democrats in state legislatures to reform bail practices).

5. *See* MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009, at 11 (2011), https://www.bjs.gov/content/pub/pdf/fjs09.pdf.

6. CATHERINE S. KIMBRELL & DAVID B. WILSON, DEP'T OF CRIMINOLOGY, LAW & SOC'Y, GEORGE MASON UNIV., MONEY BOND PROCESS EXPERIENCES AND PERCEPTIONS 10 (2016), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4ce69b9e-36d1-328f-30e3-416ee82abbdf.

7. *See generally* CHARLES DICKENS, BLEAK HOUSE (Norman Page ed., Penguin Classics 1971) (1853) (describing a corrupt and unjust legal system that disadvantages the poor).

8. *See* ROY WALMSLEY, INST. FOR CRIMINAL POLICY RESEARCH, WORLD PRISON POPULATION LIST 2 (11th ed. 2015), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf.

9. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 725–26 (2011) (describing reduced scholarly attention to bail and pretrial-detention issues in recent decades); Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 995–96 (1965); Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 148 (2009).

10. United States v. Salerno, 481 U.S. 739, 754–55 (1987).

interpreted as closing off most attacks on money bail—both facially and as applied—on the basis of the Eighth Amendment's Excessive Bail Clause.[11] As a result, the academic writing and litigation addressing bail generally centers on its relation to due process or equal protection.[12]

Yet, in this Note, I will argue that the rise of another player in the money bail scene may illustrate why relegating the Excessive Bail Clause to the dustbin of history is misguided. In response to the widespread failure of state legislatures to adequately address the problem of money bail—with a couple of notable exceptions—many individuals and organizations across the country have established community bail funds (CBFs).[13] These CBFs may differ in organizational or ideological focus but almost unanimously follow a simple model: donations from community members are used to post bail for individuals accused of low-level offenses who cannot afford to post bail themselves.[14] The offenses targeted are generally low-level because the corresponding bail amounts are more affordable.[15] The individuals chosen to have their bail paid are selected based on need and ties to the community.[16] The CBFs then often work to ensure the individual makes each court date, at which point the money is returned to the CBF to be recycled.[17]

A few scholars have discussed the legal importance of these CBFs, including the way in which their existence acts as a check on judicial discretion.[18] Some have even gone so far as to describe CBFs as a type of "bail nullification," similar to jury nullification in the trial context.[19] Professor Jocelyn Simonson, for example, notes that these CBFs may serve not only as a check but also as a

11. *See* 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, 1372 (1988); Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 2 (2005); Wiseman, *supra* note 9, at 123.

12. *See, e.g.*, Intervenor Complaint at 15, Hester v. Gentry, No. 5:17-cv-00270-MHH (N.D. Ala. Aug. 1, 2017); Melissa Hamilton, Back to the Future: *The Influence of Criminal History on Risk Assessments*, 20 BERKLEY J. CRIM. L. 75, 107 (2015) (arguing that the use of socioeconomic and demographic variables to inform a defendant's sentence may violate the Equal Protection and Due Process Clauses); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 803–06 (2014).

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

14. *See, e.g.*, *How the Fund Works*, BROOKLYN COMMUNITY BAIL FUND, https://brooklynbailfund.org/how-it-works/(last visited Oct. 6, 2019).

15. *See id.* (noting that, pursuant to the New York Charitable Bail Act, the fund pays bail amounts lower than $2,000); *Make a Referral*, NASHVILLE COMMUNITY BAIL FUND, https://nashvillebailfund.org/contact/ (last visited Oct. 6, 2019) (listing a bail amount of $2,000 or less as a requirement for receiving assistance from the fund).

16. *See How the Fund Works*, *supra* note 14.

17. *Id.*

18. *See, e.g.*, Logan Abernathy, *Bailing Out: The Constitutional and Policy Benefits of Community and Nonprofit Bail Funds*, 42 L. & PSYCHOL. REV. 85, 90–94 (2018); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 608 (2017); Rachel Smith, *Condemned to Repeat History? Why the Last Movement for Bail Reform Failed, and How This One Can Succeed*, 25 GEO. J. ON POVERTY L. & POL'Y 451, 460–61 (2018).

19. Simonson, *supra* note 18, at 588.

constitutional actor, altering the understanding and interpretation of certain constitutional clauses, including the Excessive Bail Clause.[20]

However, the way in which this constitutional change might take place has been undertheorized thus far. This Note will fill that gap by supplying possible avenues by which CBFs can illuminate a better understanding of the Excessive Bail Clause. First, by manifesting the burdens that money bail places on a community, CBFs demonstrate that the *Salerno* Court created a false dichotomy between community safety and individual liberty. Thus, the balancing test that *Salerno* prescribed for setting bail fails to adequately protect the interests of the community in which the alleged crime took place. Second, CBFs reveal the important role that dignity must play in bail jurisprudence, similar to the way that concept has entered other constitutional doctrines in the past few decades. Finally, CBFs highlight the inherent unreliability and risk that accompanies judicial discretion to make assessments about future dangerousness, as sanctioned in *Salerno*.

Additionally, this Note offers a nonexhaustive overview of the ways in which popular movements, such as CBFs, can inform constitutional interpretation.[21] It will also lightly describe the concept that encompasses this phenomenon—coined "demosprudence"[22]—as a backdrop to understanding how CBFs, as nontraditional actors in the judicial system, can make constitutional law.

This Note proceeds as follows: Part I provides a history of bail up to and beyond the ratification of the Excessive Bail Clause with the Bill of Rights. Part II addresses the ongoing bail crisis, its moral and economic impacts, and the various responses to that crisis. Foremost among those responses, for purposes of this Note, is the rise of CBFs. As Part II discusses, these populism-fueled answers will never be enough to "fix" the institution of money bail. However, they are central to a renewed constitutional conversation about bail. In Part III, I offer a framework through which this conversation can take place. Specifically, I draw upon the important work of Jocelyn Simonson, who first coined the term "bail nullification" to describe how CBFs negate a judge's bail determination. In the process, CBFs contest existing political and constitutional understandings of money bail. This Part also relies heavily on Professors Lani Guinier and Gerald Torres's work defining and popularizing the concept of "demosprudence." Finally, in Part IV, I argue that CBFs challenge the accepted meaning of the Excessive Bail Clause, which the Supreme Court has effectively neutered. In the process, I suggest several different ways in which this community participation in the bail system can shift Excessive Bail Clause jurisprudence in a way that is more meaningful and democratic.

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20. *See id.* at 627–28.

21. *See, e.g.*, Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2745 (2014).

22. *Id.* at 2749.

I. HISTORY OF BAIL AND THE EXCESSIVE BAIL CLAUSE

The Eighth Amendment to the Constitution provides, among other things, that "[e]xcessive bail shall not be required."[23] As with the rest of the Eighth Amendment, the Excessive Bail Clause garnered little recorded debate in the First Congress.[24] Indeed, the only remark directed at the Clause that history has preserved was by Samuel Livermore in the House of Representatives, who asked, "What is meant by the terms excessive bail? Who are to be the judges?"[25] For all we know, no response or clarification was offered, and the Amendment was approved without further elaboration.[26]

Beyond this spare commentary, few other useful sources of evidence exist of the Framers' intent for the Excessive Bail Clause. That said, it is widely accepted that the Clause drew inspiration from Clause Ten of the English Bill of Rights of 1689.[27] The two clauses are nearly identical. In fact, the only difference between them is that where the English clause provides that excessive bail "ought not" be required, the Excessive Bail Clause more obligatorily states that it "shall not" be required.[28] Still, because of the dearth of historical material, it has long been difficult to interpret the Excessive Bail Clause by reference to its origins and purpose.[29]

The Court, though, has found a few opportunities to expound upon the Clause's meaning. In *Stack v. Boyle*, the first major case to discuss the Excessive Bail Clause, twelve petitioners were arrested on charges of conspiring to violate the Smith Act, a Cold War-era law directed at Communist sympathizers.[30] For each defendant, the trial judge set bail between $2,500 and $100,000, but eventually those were modified to a uniform amount of $50,000 per defendant.[31] Petitioners moved to reduce the amount, arguing that the amount violated the Excessive Bail Clause in light of their financial resources and existing obligations.[32] After a hearing, the district court denied the petitioners' motions, and the Ninth Circuit affirmed.[33]

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23. U.S. CONST. amend. VIII.

24. Wiseman, *supra* note 9, at 128.

25. 1 ANNALS OF CONG. 754 (Joseph Gales & William Seaton eds., 1834), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 377 (Philip B. Kurland & Ralph Lerner eds., 1987).

26. *Id.*

27. *See* Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) ("Across the Atlantic, this familiar language was adopted almost verbatim . . . in the Eighth Amendment . . . ."); Wiseman, *supra* note 9, at 124.

28. U.S. CONST. amend. VIII; *English Bill of Rights 1689*, AVALON PROJECT, https://avalon.law.yale.edu/17th_century/england.asp (last visited Nov. 2, 2019).

29. Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 264 n.4 (1989) (noting these twin guides as central to Eighth Amendment interpretation).

30. Stack v. Boyle, 342 U.S. 1, 3 (1951).

31. *Id.*

32. *Id.*

33. *Id.* at 3–4.

Reversing the Ninth Circuit, the Supreme Court explicitly linked the excessiveness of bail to its use as collateral: "Bail set at a figure higher than an amount reasonably calculated to fulfill [the] purpose [of returning a defendant to court] is 'excessive' under the Eighth Amendment."[34] In justifying its decision, the Court noted the narrowly tailored role that pretrial detention was to play in the American criminal justice system, given its potential conflict with the presumption of innocence.[35] That presumption, the Court warned, ordinarily means the accused is entitled to freedom before conviction, allowing "the unhampered preparation of a defense[] and serv[ing] to prevent the infliction of punishment prior to conviction."[36] By limiting the use of bail to guaranteeing a defendant's presence at trial,[37] the Court breathed life into a clause rarely acknowledged in the nation's first century and a half.

Over forty years later, bail again came before the Court in *United States v. Salerno*.[38] The petitioners in *Salerno* were arrested on racketeering, fraud, and gambling charges.[39] In seeking to deny Salerno and his codefendants bail altogether, the government provided evidence that the defendants were members of the Mafia and, therefore, represented a threat to public safety.[40] The prosecutors relied on the recently passed Bail Reform Act of 1984, which allowed pretrial detention whenever the "[g]overnment demonstrates by clear and convincing evidence . . . that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'"[41] Accordingly, the district court granted the motion and denied the petitioners bail.[42]

On appeal, the petitioners argued that this provision of the Bail Reform Act violated the Excessive Bail Clause, citing the *Stack* Court's admonition that pretrial detention should be limited to guaranteeing the accused's presence at trial.[43] In rejecting both this claim and the due process claim, Chief Justice Rehnquist wrote for the Court that the Eighth Amendment says little about whether bail should be available at all, as opposed to simply limiting its imposition.[44] Discussing the meaning of "excessive," the Court recognized a legitimate government interest in considering both flight risk *and* dangerousness in setting

34. *Id.* at 5.
35. *See id.* at 4.
36. *Id.*
37. *Id.* at 5.
38. United States v. Salerno, 481 U.S. 739 (1987).
39. *Id.* at 743.
40. *Id.*
41. *Id.* at 741 (quoting 18 U.S.C. § 3142(c)(1)(B) (second omission in original)).
42. *Id.* at 743–44.
43. *Id.* at 752–53.
44. *Id.* at 752 ("This Clause, of course, says nothing about whether bail shall be available at all.").

bail.[45] Thus, determining whether any given bail amount was excessive required comparing the amount against the interests the government sought to protect.[46]

The bail jurisprudence that *Stack* and *Salerno* established consequently left little in the way of substantive limitations.[47] "Excessive" means relative to a specific arrestee and in particular to the danger or risk of flight she poses.[48] So far as the Court's scarce bail decisions are concerned, the only community interests that should be taken into account are those related to ensuring a defendant's presence at trial and being protected from crimes committed by arrestees.[49] Other interests, such as the harm to a community's dignity from pretrial detention or the economic and social damage that widespread pretrial detention may wreak on the community, do not currently play a role in excessiveness analysis.[50] In addition, critiques about judges' abilities to make dangerousness or flight-risk determinations on behalf of a community hold little water in Eighth Amendment challenges.[51] This interpretation, as one scholar has described it, fails to recognize the Excessive Bail Clause "as a meaningful source of law."[52]

Even so, the Supreme Court has not dispensed with the Clause altogether. In *McDonald v. City of Chicago*, the Supreme Court, in dicta, categorized the Clause as one of several Bill of Rights protections that had been incorporated against the states.[53] The inclusion was peculiar, given that the Court had never directly addressed the Clause's incorporation.[54] Additionally, incorporation ordinarily suggests that the Court views a particular right as a significant limitation on government power, one that is "selective" among the Bill of Rights.[55] With that in mind, the Clause's current deficiency in protecting those accused of crimes is striking.

45. *See id.* at 754–55.

46. *Id.* at 754.

47. *See id.* at 754 ("The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil.").

48. *See id.*

49. *See id.* at 754–55.

50. *See id.*

51. *See id.*

52. Wiseman, *supra* note 9, at 148.

53. McDonald v. City of Chicago, 561 U.S. 742, 764 & n.12 (2010).

54. Scott W. Howe, *The Implications of Incorporating the Eighth Amendment Prohibition on Excessive Bail*, 43 HOFSTRA L. REV. 1039, 1042–43 (2015).

55. *See McDonald*, 561 U.S. at 763.

II. THE BAIL CRISIS AND THE RISE OF COMMUNITY BAIL FUNDS

In the past three decades, use of money bail has ballooned. Between 1990 and 2009, use of money bail as a condition of pretrial release for felony defendants in the largest counties increased from 37% to 61%.[56] Currently, no accurate estimate exists of the number of people nationwide who are in jail solely because they cannot afford bail.[57] However, by the end of 2016, over 458,600 people were being held in jail despite not being convicted of any crime, including over 65% of all people in jail in the United States.[58] That number includes individuals who are held for reasons other than their ability to make bail, such as those accused of crimes that make them ineligible for bail or individuals awaiting transfer to a mental health institution.[59] Furthermore, recent studies suggest that a significant number of these individuals are in jail simply for lacking the financial means to post bail.[60] For instance, a Vera Institute report on the makeup of jail populations across the country found that nine out of ten felony defendants being held pretrial could not afford bail.[61] Similar studies show that a majority of pretrial detainees were in jail because they could not afford bail.[62] Moreover, between 1999 and 2014, 99% of the total growth in the national jail population came from "the detention of people who are legally innocent."[63]

Even so, the consequences of this regime extend far beyond the liberty lost by detaining individuals without convictions. Once denied bail, defendants are at a distinct disadvantage in arguing their cases.[64] A defendant is significantly more likely to plead guilty if she is denied or unable to afford bail.[65] This result

56. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 1 (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

57. *See, e.g.*, ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES IN 2016, at 9 (2018), https://www.bjs.gov/content/pub/pdf/ji16.pdf.

58. *See id.*

59. *See id.*; *see also* Meek Mill, Opinion, *Meek Mill: Prisoners Need a New Set of Rights*, N. Y. TIMES (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/opinion/meek-mill-criminal-justice-reform.html (describing a defendant who was denied bail for popping a wheelie on a motorcycle in violation of a probation order).

60. *See, e.g.*, RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 32 (2015), http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf (finding that more than half of inmates held in New York City jails in 2013 were there because of an inability to afford low bail).

61. *See id.*

62. N.Y.C. CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2013, at 30 (2014), https://www.nycja.org/library.php; *see also* Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L., ECON., & ORG. 511, 511–12 (2018).

63. Peter Wagner, *Jails Matter. But Who Is Listening?*, PRISON POL'Y INITIATIVE (Aug. 14, 2015), https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/.

64. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713–14 (2017).

65. *See id.* at 771.

is a function of several different factors and incentives that encourage defendants to plead guilty.[66] For instance, pretrial detention—which in many jurisdictions averages well over a month[67]—may mean the loss of employment, which, in turn, makes it even more difficult for a defendant to cobble together the money necessary to make bail.[68] Moreover, defendants who do not have another adult ready to take their children may find those children in foster care or otherwise removed from the household.[69] In addition, incarceration of any sort has been shown to have significant deleterious effects on incarcerated individuals' physical and mental health, as well as on that of their families.[70] These natural consequences of pretrial detention—and many more[71]—create a panoply of incentives for the accused to plead guilty, whether or not she actually committed the crime charged.[72]

Yet even a defendant who refuses to plead guilty will see her chances of conviction jump from 59% to 85% if she is unable to post bail.[73] This phenomenon may be the result of a variety of factors, not the least of which is the prejudicial effect that can accompany a defendant who must present herself to jurors wearing a jail uniform and shackles.[74] Further, defendants are less able to communicate effectively with their attorneys and plan a successful case strategy while detained in jail.[75] As a result, the ability to pay bail—and to have a qualified attorney at the bail hearing—makes a drastic difference in a defendant's later criminal proceedings and, consequently, her life thereafter.[76]

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66. *See id.*

67. *See* PREETI CHAUHAN ET AL., JOHN JAY COLL. OF CRIMINAL JUSTICE, TRENDS IN CUSTODY: NEW YORK CITY DEPARTMENT OF CORRECTION, 2000–2015, at 25 (2017), http://datacollaborativeforjustice.org/wp-content/uploads/2017/04/DOC_Custody_Trends.pdf.

68. *See* ALEXANDER M. HOLSINGER, CRIME & JUSTICE INST., EXPLORING THE RELATIONSHIP BETWEEN TIME IN PRETRIAL DETENTION AND FOUR OUTCOMES 3 (2016) https://www.crj.org/assets/2017/07/12_Exploring_Pretrial_Detention.pdf.

69. Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 247 (2009).

70. *See* MAEGHAN GILMORE & MARY-KATHLEEN GUERRA, CTY. SERVS. DEP'T., CRISIS CARE SERVICES FOR COUNTIES: PREVENTING INDIVIDUALS WITH MENTAL ILLNESSES FROM ENTERING LOCAL CORRECTIONS SYSTEMS 1 (2010) (discussing how detention negatively affects juveniles with mental health disorders).

71. Pinto, *supra* note 13.

72. *See* Heaton et al., *supra* note 64, at 723.

73. MARY T. PHILLIPS, BAIL, DETENTION, & FELONY CASE OUTCOMES 5 (2008), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjUw9S0suL-lAhVrg-AKHU7UDAsQFjAAegQIABAC&url=https%3A%2F%2Fwww.nycja.org%2Flwdcms%2Fdoc-view.php%3Fmodule%3Dreports%26module_id%3D597%26doc_name%3Ddoc&usg=AOv-Vaw35XpKghyNbMktSK3TWwoOP.

74. Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 25 (2016), https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf.

75. Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1301 (2012).

76. *See* Heaton et al., *supra* note 64, at 714–15.

With mass incarceration gaining momentum as an issue of national importance, a number of organizations have zeroed in on money bail and its outsized impact on the bloated criminal justice system.[77] CBFs are among these organizations.[78] Much of the motivating ideas and supporting data for CBFs can be traced to a 1960s Vera Institute initiative known as the Manhattan Bail Project.[79] For several years, Institute researchers collected information on thousands of defendants throughout Manhattan regarding their employment history, community ties, and prior criminal record.[80] Based on these data, the researchers made recommendations to judges to release certain defendants on their own personal recognizance, meaning no bail was issued.[81] The results were eye-popping: fewer than 2% of defendants who were granted release without bail based on Vera's recommendations failed to return for trials for reasons they could control.[82]

Unfortunately, contemporary studies on the use of bail suggest that the lessons learned from the Manhattan Bail Project have not stuck.[83] Still, the experiment helped pave the way for the modern bail reform movement and, in particular, the CBFs at the frontlines of that movement.[84] In 2007, the Bronx Freedom Fund—an offshoot of the Bronx Defenders—began using grant money to post bail for indigent defendants.[85] The Fund gained a following and expanded its operation with individual donations, eventually posting bail for hundreds of defendants accused of relatively low-level offenses.[86]

The CBF model was simple. As soon as possible after an arrest has been made, the Fund would use its money to post the defendant's bail.[87] As a result, the defendant could return home, avoiding the risk of losing her job, housing, children, and more. Over time, CBFs developed reentry support, such as employing social workers and immigration attorneys.[88] When the defendant's court

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77. *See, e.g.*, *Challenging the Money Bail System*, C.R. CORPS, https://www.civilrightscorps.org/work/wealth-based-detention (last visited Oct. 7, 2019); 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.

78. *See* Alysia Santo, *Bail Reformers Aren't Waiting for Bail Reform*, MARSHALL PROJECT (Aug. 23, 2016, 10:00 PM), https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform.

79. SCOTT KOHLER, VERA INSTITUTE OF JUSTICE: MANHATTAN BAIL PROJECT (1962), https://cspcs.sanford.duke.edu/sites/default/files/descriptive/manhattan_bail_project.pdf.

80. *Id.*

81. *Id.*

82. *Id.*

83. *See* MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, A DECADE OF BAIL RESEARCH IN NEW YORK CITY 1–2 (2012), https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf.

84. *See* Simonson, *supra* note 18, at 600.

85. Pinto, *supra* note 13; *see also Our Work*, BRONX FREEDOM FUND http://www.thebronxfreedomfund.org/our-work (last visited Oct. 7, 2019).

86. Pinto, *supra* note 13; *see also Get Involved*, BRONX FREEDOM FUND http://www.thebronxfreedomfund.org/get-involved (last visited Oct. 7, 2019).

87. *See* Simonson, *supra* note 18, at 603.

88. *Id.* at 603 & n.100.

date arrived, the Fund would call the defendant to remind her of the date to ensure no logistical issues would impede the defendant's presence.[89] When the defendant appeared for all of her court dates—as 96% of Bronx Freedom Fund defendants did—the bail money would be returned to the fund to be recycled.[90]

Ten years later, dozens of CBFs have propped up across the country, all using essentially the same model pioneered by the Bronx Freedom Fund.[91] While most funds target those accused of crimes generally, some also target specific offenses or populations. For instance, the Immigrant Family Defense Fund in California pays bail for individuals in immigration detention who risk deportation.[92] Similarly, the LGBTQ Freedom Fund in Florida posts bail for LGBTQ people—who are three times more likely to face incarceration than non-LGBTQ people—held in pretrial detention.[93]

Some CBFs also engage in the debate over money bail through grassroots organizing, legislative lobbying, and litigation.[94] The Chicago Community Bond Fund, for example, refers clients to class action suits challenging bail practices and to advocates for legislation that would expand representation at bail hearings across Illinois.[95] Many other funds also work with like-minded criminal justice reform organizations on issues ranging from sentencing to drug decriminalization.

In short, with their skyrocketing growth, CBFs have developed into major players on the criminal justice scene. In doing so, these organizations—the vast majority of which draw inspiration from a core belief that the use of bail in the administration of criminal justice is not serving its proper function—bring a particular voice (or, more accurately, a set of voices) to the debate over criminal justice reform in America. CBFs thus distinguish themselves from discrete crowdfunding bailout campaigns, which typically decline to speak to a broader cause or issue.[96]

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89. *Id.* at 603.

90. *Id.*; Pinto, *supra* note 13.

91. *See National Bail Fund Network*, COMMUNITY JUST. EXCHANGE, https://www.communityjusticeexchange.org/national-bail-fund-network/ (last visited Oct. 7, 2019).

92. IMMIGRANT FAMILY DEFENSE FUND, https://immigrantfamilies.org/ (last visited Oct. 7, 2019).

93. FREEDOM FUND, https://www.lgbtqfund.org/ (last visited Oct. 7, 2019).

94. *See e.g.*, *End Money Bond*, CHI. COMMUNITY BOND FUND, https://chicagobond.org/advocacy/ (last visited Oct. 7, 2019).

95. *Id.*

96. *See* Simonson, *supra* note 18, at 600.

III. BAIL NULLIFICATION AND DEMOSPRUDENCE

Simonson has described the ability of CBFs to contest and undo judicial bail determinations on behalf of a community as "bail nullification," echoing Professor Paul Butler's idea of "jury nullification."[97] The latter concept refers to the act of jury members voting for acquittal in a given criminal case, without regard to any of the evidence before the jury, on the basis that the law or punishment is unjustified.[98] By voting for acquittal, the jury—or even an individual juror—effectively nullifies the law under which the offense is being prosecuted.[99] This act thus sends a message to those who shape the criminal justice system—police, prosecutors, judges, and legislators—that that system is no longer acceptable as a way to deal with certain behavior.[100]

In a similar manner, CBFs—by inserting themselves into the criminal justice system and posting bail for an indigent defendant—can be considered to have nullified the judge's bail determination.[101] As Simonson has argued, when CBFs do this in a "public, bottom-up" manner over numerous cases with the ultimate goal of "disrupting the money bail system," they take apart traditional conceptions of bail and its place in the administration of justice.[102] More specifically, CBFs can challenge the role and definition of "community" as it is understood in connection with bail.[103]

This destabilization has both political and constitutional implications.[104] In this Note, I explore only the constitutional implications and, in particular, the potential for CBFs to alter Excessive Bail Clause jurisprudence. This constitutional engagement occurs by means of a concept known as "demosprudence," coined by Guinier and Torres.[105] Discussing the impact that CBFs can have on Excessive Bail Clause jurisprudence thus requires a brief primer on what demosprudence is and how it works.

In their article describing demosprudence, Professors Guinier and Torres characterize it as "the study of the dynamic equilibrium of power between lawmaking and social movements."[106] Demosprudence complements, but is separate from, jurisprudence, which is the study of judges shaping law in formal

97. *Id.* at 596; Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 681 (1995) (describing race-based jury nullification as a response to larger racial injustices in the criminal justice system).

98. Butler, *supra* note 97, at 679.

99. *Id.*

100. *See id.*

101. Simonson, *supra* note 18, at 606.

102. *Id.* at 612.

103. *Id.*

104. *Id.* at 621.

105. Guinier & Torres, *supra* note 21, at 2749–50.

106. *Id.* at 2749.

settings such as courtrooms.[107] Rather, "demosprudence focuses on the ways that ongoing collective action by ordinary people can permanently alter the practice of democracy."[108] Where judges are the actors in jurisprudence, popular movements are the actors in demosprudence.[109] Demosprudence is not an "adversary" to jurisprudence any more than popular movements are an adversary to judges in lawmaking.[110] Rather, demosprudence describes the set of processes that inform lawmaking through citizen mobilization.[111]

Central to this concept is the study of "collective expressions of resistance."[112] These expressions zero in on discrete institutions and force critical assessments of their democratic (or anti-democratic) nature.[113] Guinier and Torres cite examples from the Civil Rights Movement—such as the Montgomery Bus Boycott—that set the stage for later litigation informed by a renewed understanding of what democracy requires constitutionally.[114] Importantly, demosprudence recognizes and emphasizes the ability of traditionally marginalized groups—who often are not represented in impact litigation—to inform the law.[115] It does this by seeking out the "democracy-enhancing" effect of these movements on legal and political institutions, including courts in the process of making constitutional law.[116]

Understanding demosprudence through the lens of these "collective expressions of resistance" illuminates how CBFs have become active participants in this process.[117] As Simonson observes, adjudication of a criminal case ordinarily includes no public input at all.[118] Few criminal cases ever reach a jury,[119] and the vast majority are resolved through a series of often-rushed court appearances that result in either a guilty plea or dismissal.[120] So when CBFs post bail for an indigent defendant, they inject a dose of community input into the process that otherwise would be lacking. When CBFs do this repeatedly over an extended period of time, they express an understanding of the law and the

107. *Id.*

108. *Id.* at 2750.

109. *See id.*

110. *Id.* at 2755.

111. *Id.* at 2752.

112. *Id.* at 2755.

113. *Id.*

114. *Id.* at 2756–57.

115. *Id.* at 2745–46.

116. *Id.* at 2745 n.12.

117. *Id.* at 2755.

118. Simonson, *supra* note 18, at 621.

119. LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING 1 (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf (noting that about 95% of criminal cases in federal district court were disposed of by a guilty plea); *see also* Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials.").

120. Simonson, *supra* note 18, at 621–22.

role of bail that is, by definition, excluded when the only actors in the process are the defendant, the prosecutor, and the judge.[121]

By becoming a legitimate decision maker in the institution of bail, CBFs "rub up against" orthodoxy surrounding money bail and its proper role in criminal adjudication.[122] As a result, this tension in understanding criminal procedure raises novel questions regarding the constitutional principles that undergird money bail, such as how the interests of the community should factor into bail determinations. Eventually, these questions—heralding a new conception of bail—reach courtrooms, at which point they must be analyzed with an eye toward principles and assumptions that have not previously been considered in interpreting the Constitution's prescribed role for bail.[123] This is an indirect process but a necessary and fundamental one nonetheless.

IV. COMMUNITY BAIL FUNDS AND THE EXCESSIVE BAIL CLAUSE

The *Salerno* Court made clear that "[t]he 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."[124] In the context of the entire opinion, the Court's discussion of the Clause took up only a few paragraphs of analysis, with the bulk of the majority's attention spent dismissing the petitioners' due process claim.[125] Still, the Court distanced itself from the more expansive reading of the Clause advocated previously in *Stack*.[126]

CBFs, when engaged in demosprudential lawmaking, offer important insights into how *Salerno* wrongly approved the constitutionality of the Bail Reform Act. CBFs do this in three important ways. First, by manifesting the burdens that money bail places on a community, CBFs uncover the faulty assumptions that undergird the Supreme Court's "excessiveness" analysis under the Eighth Amendment. Second, CBFs reveal the important role that dignity must play in bail jurisprudence, just as that concept has reached other constitutional doctrines in the past few decades. Finally, CBFs highlight the inherent unreliability and risk that accompany the judicial discretion to make assessments about future dangerousness, as sanctioned by the *Salerno* Court.

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121. *See id.* at 622.

122. *Id.* at 626.

123. *Id.*

124. United States v. Salerno, 481 U.S. 739, 754 (1987).

125. *Id.* at 752–55.

126. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (finding that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

A. Shifting the Meaning of Community Safety

In the process of posting bail for an indigent defendant, a CBF "recasts" the community's proper place in bail determinations.[127] The *Salerno* formula for determining whether a given bail amount is "excessive" under the Eighth Amendment requires balancing two interests against each other: the defendant's interest in maintaining her liberty and the community's interest in its own safety.[128] This formula rests on an assumption that the community's safety—and, therefore, its well-being more generally—is incompatible with the defendant's interest in liberty.[129] While *Salerno* did establish a presumption of pretrial release to protect the liberty of defendants who judges determine are only minimally dangerous, the assumption remains that pretrial release is inherently antagonistic to the interest of the community.[130]

CBFs engaged in demosprudence reject this assumption on the grounds that the community has a legitimate interest in the defendant's liberty as well. As the Bail Project explains, "Cash bail criminalizes poverty, devastating low-income communities and disproportionately affecting women and people of color."[131] In fact, a defendant's liberty may even itself be in the interest of community safety. Studies have shown that detention of any kind has criminogenic effects.[132] Pretrial detention, in particular, increases the likelihood that the detainee will engage in future criminal activity.[133] Thus, detaining defendants pretrial may actually have the perverse effect of putting the community into which the defendant is likely to go once released at an even greater risk of crime.

But maintaining a defendant's interest in liberty is in the community's interest in other ways. Families of incarcerated people risk facing steep and sudden losses of income and wealth.[134] Children lose stabilizing adult figures, including parents, teachers, religious leaders, and coaches.[135] Communities suffer economically when business owners and consumers are swept away. In taxes alone, America's communities are left with an annual $14 billion price tag to

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127. Simonson, *supra* note 18, at 619.

128. *Salerno*, 481 U.S. at 750–52 (describing community safety and a defendant's liberty interest as two sides of a scale).

129. *See generally id.* at 742.

130. *See id.* at 755.

131. *Why Bail?*, BAIL PROJECT, https://bailproject.org/why-bail/ (last visited Oct. 7, 2019).

132. Heaton et al., *supra* note 64, at 718 (finding that "by eighteen months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges" and that this is consistent with other research).

133. *Id.* at 766.

134. *Id.* at 713 ("A person detained for *even a few days* may lose her job, housing, or custody of her children." (emphasis added) (citing N.Y.C. CRIMINAL JUSTICE AGENCY, *supra* note 62, at 22, 30 & exhibit 18)); *see also* SUBRAMANIAN ET AL., *supra* note 60, at 12–13.

135. *Id.* at 17–18.

house pretrial detainees, most of them charged only with nonviolent crimes.[136] While detention serves a valuable and sometimes necessary role in separating potentially dangerous people from communities, it brings with it costs that destabilize, split up, and undermine the productivity of those same communities.

In this light, the "perceived evil" against which *Salerno* authorized money bail as a protection becomes much more difficult to identify.[137] A judge who sets bail beyond what the defendant can afford risks placing the community in peril, even as she attempts to protect it. Disrupting the balancing test in this way requires a critical assessment about what "excessive" means constitutionally. Through repeated acts of posting bail for indigent defendants, CBFs communicate an important message to courts: the excessiveness analysis sanctioned since *Salerno* is wrong and requires reconfiguring. In its place, courts must take into consideration not just the potential danger that a defendant poses to the community but also the harm that detaining the defendant without a conviction poses. The formula that CBFs advocate is more complex than a binary "community versus defendant" analysis, but it is also more representative of the real objective of the criminal justice system: to improve society's well-being by reducing antisocial behavior.[138]

Perhaps, though, the implication of this new analysis is not that the Constitution *requires* a consideration of the variety of community interests in its members' liberty but that Congress should take those interests into consideration by passing an updated bail statute. In other words, CBFs are not constitutional actors but merely part of the legislative process as interest-group advocates. But this argument misunderstands what the Excessive Bail Clause requires. *Salerno* made clear that any given bail amount must be linked to a compelling government interest.[139] What CBFs demonstrate is that the pre-approved calculation that sets defendants and the community on opposite ends of the scale misjudges the interests of the community. CBFs alter entirely what the compelling government interest is, thereby forcing a reconsideration of how to balance that interest against the proposed bail amount.

Moreover, CBFs suggest that the excessiveness analysis under the Eighth Amendment cannot be isolated to individual cases. Under the current analysis regarding indigent defendants, the question centers around whether a certain bail amount—say, $1,000—is unreasonable for a particular defendant, in light

136. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 2 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66fadcd.

137. United States v. Salerno, 481 U.S. 739, 754 (1987).

138. JAMES G. EXUM, JR. ET AL., AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2(c) (Am. Bar Ass'n, 3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

139. *Salerno*, 481 U.S. at 748.

of that defendant's potential threat to the community.[140] CBFs, however, posit that the question required by the Eighth Amendment is whether setting a $1,000 bail for an indigent defendant ever serves a compelling government interest, considering the wealth of factors—other than the possibility of that defendant committing a crime while awaiting trial and the potential for pretrial detention to impose significant costs on the community.[141]

Finally, CBFs dispute whether the reliance on "community ties," or lack thereof, is an appropriate means of justifying pretrial detention. When a CBF posts bail for an indigent defendant with whom it has no specific relationship, the CBF sends a message to the judge that whether the defendant has ties to the community is irrelevant to determining whether she ought to maintain her liberty. Diminishing the importance of community ties in measuring the "perceived evil" that bail seeks to avoid thus rejiggers the entire excessiveness analysis.

In the final estimate, CBFs demonstrate that the many assumptions that buttress the *Salerno* excessiveness analysis are either weak or incorrect altogether. The Eighth Amendment requires judges to consider more than simply the defendant's potential for committing a crime while awaiting trial. Bail is not merely excessive as to an individual defendant but to the community as well, which suffers many of the costs that pretrial detention creates. In this light, CBFs suggest that *Salerno* begs for reconsideration, if not outright rejection.

B. Dignitary Interests and the Excessive Bail Clause

In *Trop v. Dulles*, Justice Stevens, writing for the majority, stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[142] Of course, *Trop* concerned a challenge to the Cruel and Unusual Punishment Clause rather than the Excessive Bail Clause.[143] However, the Court's reasoning in deciding that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" applies with equal force to both clauses.[144] As a result, courts must consider the dignitary interests of potential pretrial detainees when assessing the constitutional implications of the Excessive Bail Clause. In turn, CBFs can reveal what those dignitary interests are and how they should be considered when interpreting the Clause.

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140. *See id.* at 750; Simonson, *supra* note 18, at 629; *see also* Galen v. County of Los Angeles, 477 F.3d 652, 660 (9th Cir. 2007) ("*Salerno* confirms that the Excessive Bail Clause prevents the imposition of bail conditions that are excessive in light of the valid interests the state seeks to protect by offering bail." (citing *Salerno*, 481 U.S. at 754)).

141. Simonson, *supra* note 18, at 629.

142. Trop v. Dulles, 356 U.S. 86, 100 (1958).

143. *Id.* at 99–100.

144. *Id.* at 101.

Scholars continue to debate whether and to what degree human dignity plays a role in constitutional interpretation.[145] This Note will not survey the variety of perspectives on this issue, though it will discuss how some commentators have suggested dignity might underpin constitutional jurisprudence, in particular with regards to the Eighth Amendment. In addition, I will describe what form CBFs suggest this dignity might take, drawing on philosophical descriptions of human dignity and the Court's own limited analysis of dignity in other Eighth Amendment contexts.

The notion of human dignity repeatedly presents itself in the Supreme Court's Eighth Amendment jurisprudence.[146] In at least eight other cases concerning challenges based on the Cruel and Unusual Punishment Clause, the Court has relied on *Trop*'s language describing how dignity lies at the heart of the Amendment.[147] But the Court's treatment of human dignity in these cases is by no means consistent.[148] For instance, in death-penalty cases, the Court has struggled to articulate a clear role for dignity in determining whether the death penalty is unconstitutional as to particular offenses or classes of offenders.[149] While the Court relied on human dignity in declaring capital punishment unconstitutional as to juvenile offenders and intellectually disabled offenders, it rarely does so in other death-penalty cases.[150] As a result, it is difficult to discern from this line of cases the precise contours of the dignitary interests at the heart of the Eighth Amendment. Yet the Court has made clear that "evolving standards of decency" must guide the Court's reasoning in this area, and many have reiterated the dignitary interests that motivate those standards.[151]

Similarly, in *Hope v. Pelzer*, the Court held that tying a prisoner to a hitching post—intentionally placing him in a position that was "painful," "degrading," and "dangerous"—was "antithetical to human dignity."[152] Justice Stevens, again writing for the majority, emphasized the humiliation the prisoner experienced and how exposure to such humiliating circumstances betrayed the prisoner's right to have his dignity recognized.[153] *Hope* is unique because the Court relied on this violation of dignitary interests to strip the defendant corrections officers of qualified immunity. In only one other case has the Court denied a defendant

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145. *See generally, e.g.*, Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381 (2011); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2005); Benjamin F. Krolikowski, Brown v. Plata: *The Struggle to Harmonize Human Dignity with the Constitution*, 33 PACE L. REV. 1255 (2013).

146. Goodman, *supra* note 145, at 743.

147. *Id.* at 773.

148. *Id.* at 757.

149. *See id.* at 775–77.

150. Goodman, *supra* note 145, at 775–76.

151. *Id.* at 773 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

152. Hope v. Pelzer, 536 U.S. 730, 745 (2002).

153. *Id.* at 738, 745.

state actor qualified immunity to suit.[154] This would suggest that the Court weighed Hope's dignitary violation heavily. Yet *Hope*'s recent disappearance from the Court's jurisprudence leaves the role that dignity plays in immunity law murky.[155]

In other words, the concept of dignity unquestionably played a role in deciding these cases and thus has a meaningful—if ill-defined—role to play in any case that challenges state activity on the grounds of that Amendment.[156] Still, given that dignity has only arisen regarding the Cruel and Unusual Punishment Clause, the implications that dignity has for the Excessive Bail Clause have not been explored extensively. Indeed, it might be argued that dignity as a constitutional value only undergirds the Cruel and Unusual Punishment Clause, rather than any other part of the Eighth Amendment. Yet the Court's jurisprudence does not lead to this conclusion. First, the Court's failure to acknowledge dignitary interests in the bail context means little, given that the Court has decided so few cases involving the Excessive Bail Clause. Moreover, the Court has never limited the dignity principle to the Cruel and Unusual Punishment Clause specifically; indeed, the Court often refers to the Eighth Amendment generally.[157] The *Trop* Court also noted that the concept of dignity comes from the Magna Carta, which was a precursor to the English Bill of Rights that birthed the notion of excessive bail as a constitutional value.[158]

Perhaps more importantly, the threat of pretrial detention undoubtedly brings into question human dignity. Much of American criminal law is founded upon the theory of retributive justice, which provides generally that it is morally good to impose on a criminal a punishment that is proportional to the crime.[159] Retributivism owes its contemporary force to a number of intellectual proponents, particularly G.W.F. Hegel. Writing in the early nineteenth century, Hegel postulated that punishment is central to criminal law because it respects and reinforces "the formal rationality of the individual's . . . volition."[160] In this sense, punishment is not merely useful to society in that it deters crime, a fundamentally utilitarian argument. Rather, punishment is necessary to recognize

154. Groh v. Ramirez, 540 U.S. 551, 563–64 (2004) (holding that "no reasonable officer" could believe that a search warrant that failed to describe with particularity the persons or things to be seized would be legally valid).

155. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1247–49 (2015).

156. *Id.*

157. *Trop*, 356 U.S. at 100 ("The basic concept underlying *the Eighth Amendment* is nothing less than the dignity of man." (emphasis added)).

158. *Id.*

159. JOSHUA DRESSLER & STEPHEN GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 41–51 (7th ed. 2015).

160. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 100, at 126 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (emphasis omitted).

the dignity of the individual as a rational and independent actor.[161] Central to this recognition, moreover, is the idea that the individual offender has a right to be punished.[162]

The contrapositive of this idea is that, if an individual is treated as merely a thing to be controlled for the sake of preventing future crime, she is denied this recognition.[163] In Hegel's words, she is only a "harmful animal."[164] When pretrial detention is relied upon to guard against an offender's potential future dangerousness, serious questions arise as to whether the offender is being treated as a rational being. In such cases, the detention has nothing to do with punishment—nor, legally, could it, as the *Salerno* Court explicitly stated.[165] Yet a system that permits detention purely on the basis of potential dangerousness fails to recognize the important element of human dignity. Thus, if dignity is a meaningful value espoused in the Constitution, it must surely come into play when interpreting the Excessive Bail Clause and under what circumstances the Clause permits pretrial detention.

When CBFs nullify a court's determination by posting an accused's bail, they bring into sharp focus the court's cavalier relationship with the accused's dignity. The accused benefits from the CBF's intervention not because of any particular connection that she has to the CBF or its operators but because she is an individual who, in the eyes of the community, has been wronged. By stepping in to post bail, the CBF communicates that the individual ought to be allowed to decide for herself whether she will engage in behavior that merits punishment. To respect the accused's dignity is to respect her autonomy. As CBFs demonstrate, this principle is inconsistent with a criminal justice system that legitimizes pretrial detention as a means of preventing crime by individuals accused of crimes. Taking this idea seriously, therefore, may require that the Excessive Bail Clause, designed to safeguard human dignity consistent with the Eighth Amendment more broadly, does not leave room for dangerousness as a sole justification for denying bail.

C. The Danger of Judicial Discretion

Justice Marshall concluded his dissent in *Salerno* with a prescient admonition that the majority's decision would "go forth without authority, and come back without respect."[166] Among the legitimate concerns with the *Salerno*

161. *Id.*

162. *See id.*

163. *See* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 29–30 (2003) ("If we not only fail to punish him, but simultaneously deprive him of liberty, then, to use Hegel's words, we are treating him simply as a harmful animal.").

164. HEGEL, *supra* note 160.

165. United States v. Salerno, 481 U.S. 739, 746 (1987).

166. *Id.* at 767 (Marshall, J., dissenting).

Court's decision to sanction assessments of dangerousness in bail determinations is that the Bail Reform Act affords judges wide latitude in making these assessments.[167] In assessing the defendant's dangerousness (as well as her flight risk), the BRA permits judges to look to "the history and characteristics of the [defendant]."[168] This assessment may include "the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings."[169] By linking "excessiveness" to a judge's perception of the accused's dangerousness, with the numerous open-ended criteria the judge is allowed to consider, the BRA threatens to render meaningless the Excessive Bail Clause altogether.

Some scholars have argued that the Excessive Bail Clause is fundamentally grounded on antidiscrimination principles.[170] Under this view, the BRA is facially unconstitutional because it allows judges to deny bail solely on the basis of personal characteristics.[171] This, in turn, means that individuals who reside outside the "mainstream of society" are targeted with special vigor, despite being precisely the individuals the Framers intended the Clause to protect.[172] This concern increases when one considers the well-established risk that implicit bias may plague judges' bail determinations or even that a judge may use the wealth of factors at her disposal as pretext to deny bail to a defendant for illegitimate reasons.[173]

Whatever the merits of this view, we need not accept it to see how CBFs reveal the constitutional problems with granting judges this level of discretion. Excessiveness fails to be a meaningful substantive limitation when its requirements can be met simply by pointing to some combination of factors, all of which inject a certain degree of subjectivity. Given the discretionary nature of bail setting, it should not be surprising that "formal controls at best have only limited capacity to control" judicial decision-making in this area.[174] Yet, CBFs illuminate that this concern is more than theoretical. By repeatedly and consistently rejecting bail determinations, CBFs undermine the confidence that the BRA places in judges and the discretion it affords them. In doing so, they con-

167. *See generally* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990 (1993).

168. 18 U.S.C. § 3142(g)(3) (2012).

169. *Id.* § 3142(g)(3)(A).

170. *See, e.g.*, Wiseman, *supra* note 9, at 156–57.

171. *Id.* at 156.

172. *Id.* at 155.

173. *Id. See generally* Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J.F. 406 (2017).

174. WALKER, *supra* note 167, at 79.

tribute to the argument that the Excessive Bail Clause must entail more meaningful limitations than what the BRA would allow by its expansive reliance on free-wheeling factors.

This discretion is particularly troublesome when one considers the short length of time judges often have to set bail. Bail hearings—nominally adversarial affairs—often take no more than a few seconds.[175] Even under ideal circumstances in which the defendant has a dedicated and zealous lawyer—a well-documented rarity for criminal defendants, who are much poorer than the rest of the population on average[176]—a bail hearing (or, depending on the jurisdiction, the segment of the preliminary hearing in which bail is determined) will rarely last longer than a few minutes. Moreover, defendants have not ordinarily had time to assemble the evidence necessary to put on a convincing case for pretrial release, especially when faced with a judge who is inclined toward detention.

On this note, CBFs shine a spotlight on a reality of judicial discretion to set bail that is not widely discussed: incentives. Various commentators have described a "principal–agent" problem that plagues the bail system.[177] While the public, or the "principal," has one set of incentives in mind when it passes bail statutes, judges, or the "agents," very often have a different one. Especially at the state level, where many judges are elected, judges are wary of bearing responsibility for crimes committed by individuals released pretrial.[178] Those judges must also contend with the possibility that they will be seen as responsible if an accused is acquitted or otherwise avoids punishment.[179] On the flip side, judges are rarely praised or rewarded for properly releasing defendants.[180] At best, they may benefit from appearing to be reform-minded, and while this designation may become more valuable as the public turns its attention to the problem of mass incarceration, it is unlikely to outweigh the risks associated with the discrete decision to release an individual who goes on to commit a crime.

175. ODonnell v. Harris County, 892 F.3d 147, 153–54 (2018) ("The hearings often last seconds, and rarely more than a few minutes. Arrestees are instructed not to speak, and are not offered any opportunity to submit evidence of relative ability to post bond at the scheduled amount."); *see also* Locke E. Bowman, *The Emperor Has No Clothes: A Journalist Sees the Criminal Justice System*, 95 J. CRIM. L. & CRIMINOLOGY 1411, 1416 (2015) (reviewing STEVE BOGIRA, COURTROOM 302 (2005)) ("In reality, Bogira reports, bail is set in a rapid-fire, perfunctory hearing that lasts all of thirty seconds." (citing BOGIRA, *supra*, at 21)

176. Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://www.prisonpolicy.org/reports/income.html ("We found that, in 2014 dollars, incarcerated people had a median annual income of $19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages." (emphasis omitted)).

177. *See, e.g.*, Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 417 (2016).

178. *Id.*

179. *Id.*

180. *Id.*

Judges, too, are subjected to pressure from a powerful bail lobby.[181] Indeed, the bail-bonding industry is a massive entity that depends entirely on judges choosing to detain defendants who are unable to make bail with their own financial resources. Even when lobbying groups do not donate to specific judges in their races, the groups are able to—and frequently do—organize opposition to judges perceived as too hesitant to use their bail-setting powers. Those lobbies can pressure judges to keep bond requirements high, thus making bail nearly impossible for even more defendants with limited financial means.[182]

As third-party actors placing a thumb on the other end of the scale, CBFs do more than merely counter the political influence of this lobby. They also reveal the constitutional infirmities that inhere in a system that permits this type of political influence in the first place. Excessiveness cannot be a meaningful limitation when it can so easily be manipulated by unaccountable, non-constitutional actors such as the bail-bond industry. That industry, contrasted with CBFs, does not engage in constitutional lawmaking by virtue of any organized demosprudential movement: it exists to turn a profit.

A final discretionary concern is that judges are not charged with analyzing a defendant's dangerousness and flight risk independently of each other.[183] Rather, the BRA only requires that pretrial-release conditions "reasonably assure the appearance of the person as required and the safety of any other person and the community."[184] Yet, flight risk and dangerousness are entirely separate dangers; different risk factors are associated with each. Combining the two effectively grants judges a great deal of discretion by limiting the need for a rigorous assessment of each potential concern.[185] It also raises the possibility that both kinds of risk will be overestimated or calculated incorrectly.[186] Both of these concerns are particularly potent given the well-documented risk that bias may infect the judicial decision-making process.

Again, these are more than policy deficiencies. Nearly unfettered discretion becomes a constitutional problem the minute it reduces the Excessive Bail Clause to an empty platitude. CBFs do the necessary work of exposing the very real implications of this discretion by consistently rejecting judicial decisions that fail to serve the purpose of bail as defined by the BRA. Over time, these rejections raise new questions about whether bail that is financially out of reach or denied outright is intrinsically excessive and thus whether the discretion to set bail in such a manner violates the Excessive Bail Clause. In doing so, CBFs act less like dedicated interest groups and more like legitimate constitutional

181. *See* White, *supra* note 1.

182. *See id.*; Wiseman, *supra* note 177, at 475.

183. Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 842.

184. 18 U.S.C. § 3142 (2012).

185. *See* Gouldin, *supra* note 183, at 885.

186. *Id.*

actors exploring the bounds of what "excessiveness" really means—in short, demosprudence.

CONCLUSION

In recent years, bail reform has taken on heightened visibility in mainstream political and legal debate. Indeed, many of those operating in this new arena of criminal justice activism have deemed it the "third wave of bail reform."[187] Jurisdictions across the country have begun seeking ways to amend bail statutes that rely too heavily on imprecise assessments and frequently result in a "two-tiered pretrial justice system."[188] Moreover, a number of organizations have filed suits challenging bail practices as unconstitutional with mixed results. Yet, this litigation has focused almost exclusively on equal protection and due process challenges, and with good reason: bail has scarcely been analyzed with an eye toward those constitutional principles. The Excessive Bail Clause of the Eighth Amendment, however, has been viewed as a dead letter since *Salerno*, a practically meaningless afterthought of the Bill of Rights. This Note argues that such a view is misguided, and the important work being done by CBFs exposes the constitutional costs that accompany that view. In the process, these organizations do more than rescue a few hundred people a year—a blip on the radar—from pretrial detention. They also shine a light on a new and serious avenue of constitutional litigation that may shape the future of bail reform and the push to end mass incarceration altogether.

*C. Chisolm Allenlundy**

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187. Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 507 (2017).

188. Class Action Complaint at 1, Edwards v. Cofield, No. 3:17-CV-321-WKW (M.D. Ala. May 18, 2017).

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