BAILED OUT: THE UNCONSTITUTIONALITY OF MONEY BAIL AND SURETY BONDS

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INTRODUCTION

> [T]ake two misdemeanor arrestees who are identical in every way — same charge, same criminal backgrounds, same circumstances, etc. — except that one is wealthy and one is indigent. [W]ith their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not.[1]

The outcome for the wealthy arrestee who posted bond is pretty clear: because he[2] has his liberty, he "is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration."[3] On the other hand, because the poor arrestee remains detained, he "must bear the brunt of all of these . . . ."[4] He is immediately incarcerated for no other reason than he is poor. These hasty and often ill-considered decisions concerning bail, routine in most overwhelmed courtrooms, have extreme consequences. The initial and most significant of these is the deprivation of freedom the indigent detainee endures. Arrestees are presumed innocent: they have been convicted of no crime, pending allegations that are presumed to be untrue, and held for an uncertain length of time.[5] The presumptions of innocence and liberty, which are the foundation of the American judicial system, are regularly ignored in the bail process.[6] There are no justifications for detention as these

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1. ODonnell v. Harris Cty., 892 F.3d 147, 163 (5th Cir. 2018).

2. Throughout this note, I have chosen to use the pronoun "he" solely because the vast majority of detainees are male; this is not meant to exclude the similar and often increased impact on female arrestees. Similarly, the terms "detainee" and "arrestee" are used interchangeably and refer to both male and female defendants.

3. *ODonnell*, 892 F.3d at 163 (The court lists the potential social costs such as the loss of a job, housing, or custody in addition to the negative effect on case outcomes. Not only must indigent defendants bear the brunt of the social costs, but an indigent arrestee, charged with a nonviolent offense, can remain detained for days before seeing a magistrate or until the case is discharged, while a wealthy arrestee who is charged with a violent offense can be released from custody within hours.).

4. *Id.*

5. United States v. Salerno, 481 U.S. 739, 755 (1987) (Marshall, J. dissenting).

6. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 737 (2011).

arrestees have not been found to be a flight risk nor have they been deemed a danger to themselves or their communities.[7] On any particular day, approximately 460,000 presumably innocent people are held before trial, despite not having been convicted of any crime.[8] Many will have their charges dropped.[9]

There is voluminous evidence that shows better outcomes for defendants and society if arrestees are not detained.[10] Crucially, even short-term detention can decrease a defendant's community ties, including loss of a job, housing, public benefits, or custody; significant long-term debt; and disruption of family life.[11] Detention also impedes preparation of a defense, putting additional barriers between an arrestee and their attorney, and decreasing availability to interview witnesses or gather evidence.[12] And primarily because of the immense importance of avoiding detention, arrestees are under pressure to agree to a deal, making "pretrial detention [] the strongest predictor of guilty pleas,"[13] which leads to additional, often unforeseen, consequences.[14] It is also an immense burden on the government and taxpayers to house, feed, and care for those awaiting trial.[15]

When the court deprives a defendant of their liberty solely because they cannot afford bail, detention has additional adverse effects.[16] Detained defendants

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7. 18 U.S.C. § 3142(a), (e), (f) (1984).

8. Patrick Liu, Ryan Nunn, & Jay Shambaugh, *The Economics of Bail and Pretrial Detention,* HAMILTON PROJECT 1, 3 (2018), https://www.hamiltonproject.org/assets/files/BailFineReform_EA_121818_6PM.pdf.

9. Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts*, U.S. DEP'T OF JUST. 1,7 (2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf; Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Option*, PRETRIAL JUST. INST., (2013), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=0a75ba82-7733-dffc-b02a-5ebf9b02e1b1&forceDialog=0.

10. *See* Buffin v. City & Cty. of S.F., No. 15-cv-04959-YGR, 2019 U.S. Distr. LEXIS 34253, at 31 (N.D. Cal., March 4, 2019); Walker v. City of Calhoun, 901 F.3d 1245, 1281 (11th Cir. 2018). *See generally* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017).

11. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090 (2013) (noting that misdemeanor convictions "can affect future employment, housing, and many other basic facets of daily life."); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101, 104 (2012) (reporting that a misdemeanor conviction can limit a person's access to "employment, as well as educational and social opportunities;" can limit eligibility for "professional licenses, child custody, food stamps, student loans, health care" or public housing; can "lead to deportation;" and "heightens the chances of subsequent arrest, and can ensure a longer felony sentence later on").

12. Stack v. Boyle, 342 U.S. 1, 8 (1951).

13. Mary T. Phillips, *A Decade of Jail Research in New York City,* N. Y. CITY CRIM. JUST. AGENCY, INC., 1, 21 (2012), https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf (citing Gail Kellough & Scott Wortley, *Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions*, 42 BRITISH J. OF CRIMINOLOGY 186,191 (2002)).

14. *See generally* Roberts, *supra* note 11 (noting that misdemeanor convictions "can affect future employment, housing, and many other basic facets of daily life"); Natapoff, *supra* note 11 (reporting that a misdemeanor conviction can limit a person's access to "employment, as well as educational and social opportunities;" can limit eligibility for "professional licenses, child custody, food stamps, student loans, health care" or public housing; can "lead to deportation;" and "heightens the chances of subsequent arrest, and can ensure a longer felony sentence later on").

15. Liu et al., *supra* note 8.

16. Phillips, *supra* note 13.

are less likely to have their charges reduced: "prosecutors may be less willing to offer post-arraignment plea bargains when they already have the leverage of detention to encourage a guilty plea."[17] In addition, detainees are more likely to be convicted and sentenced to prison, and if incarcerated, to receive longer terms.[18] "The data strongly suggest that something about detention itself leads to harsher outcomes than would be expected if the defendant had been released while awaiting disposition."[19] It has been speculated that "it is not so much that detention results in harsh sentences, but that pretrial *release* results in *less* harsh sentences. Release gives the defendant a chance to prove that he or she can behave responsibly."[20]

This is not a new problem. More than fifty years ago, Attorney General Robert Kennedy, stated,

> usually only one factor determines whether the defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor, is simply, money. How much money does the defendant have?[21]

There has been considerable conversation and debate about America's broken criminal justice system in recent years,[22] with many going so far as to call it a criminal "injustice system"[23] or a criminal "punishment bureaucracy."[24] There has also been an immense increase in criminalization of the poor: both a surge in the number of behaviors that are now designated criminal, and an escalation in the consequences of a criminal conviction that exclusively impact low-income defendants.[25] Magnifying the impact, systemic discrimination against minorities

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17. *Id.* at 115.

18. *Id.*

19. *Id.*

20. *Id.* at 118 (citing Alan Rosenthal, Center for Community Alternatives, Address to the Subcommittee on Supervision in the Community of the New York State Commission on Sentencing Reform (Aug. 9, 2007)) (emphasis in original).

21. Robert F. Kennedy, Attn'y Gen., U.S. Dep't of Just., Closing Session at the Proceedings and Interim Report of the National Conference on Bail and Criminal Justice, 295 (May 29, 1964), https://www.ojp.gov/pdffiles1/Photocopy/355NCJRS.pdf.

22. *See generally* ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2019); BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2015); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2020).

23. KARAKATSANIS, *supra* note 22, at 7; Miguel Syjuco, *The Injustice System*, N.Y. TIMES, (Apr. 26, 2017), https://nytimes.com/2017/04/26/opinion/the-injustice-system.html; Conrad Black, *Injustice System*, NAT'L REV., (Oct. 9, 2014), https://nationalreview.com/2014/10/injustice-system-conrad-black-2/.

24. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform",* 128 YALE L.J.F. 848, 851 (2019); Lia Pikus, *Systems of Crime and Castigation: A Reevaluation of the Punishment Bureaucracy*, SIT Graduate Institute/SIT Study Abroad, Fall 2019, https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=4380&context=isp_collection.

25. *See generally* TIMOTHY LYNCH, CATO INST., CATO HANDBOOK FOR POLICYMAKERS, ch. 17 (8th ed. 2017), https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/overcriminalization; Jeremiah Mosteller, The Criminalization of Everything,

and the indigent is rampant.[26] "The United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and people of color."[27]

In the past few decades, some legislatures and courts have shown a modest increase in enthusiasm to consider bail reform, among other initiatives, to deter discrimination based on race, wealth, and mental illness.[28] While these efforts achieved a modicum of progress, the reforms have not gone far enough. What has been missing in the discussion about the money bail system is not only additional research showing that bail is unfair, unjust, and ineffective, but the forceful, constitutional argument that it violates due process, equal protection, and the Eighth Amendment rights against excessive bail and cruel and unusual punishment.

When a person is detained, the government interferes with a liberty interest, which has the potential to violate substantive due process.[29] Given the high costs of pretrial detention and the excessive response to low risks of flight or danger by most defendants, detention constitutes "impermissible pretrial 'punishment.'"[30] Adding to the problem, courts realistically do not seek detention in only the carefully limited circumstances required; it has become the rule, not the exception, to hold arrestees pretrial.[31] With rampant discrimination reducing the chances of fair implementation, procedural due process is highly dubious.

Since 1868, the Equal Protection Clause of the Fourteenth Amendment has guaranteed the right to equal protection of the laws for all people; in 1956, the United States Supreme Court affirmed that the Fourteenth Amendment "allow[s] no invidious discriminations between persons and different groups of persons."[32] Twenty years after the Supreme Court's landmark holding, the United States Fifth Circuit Court of Appeals applied the same reasoning to the discriminatory impact of money bail: "The incarceration of those who cannot [pay money bail], without

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CHARLES KOCH INST. (Aug. 14, 2019), https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/the-criminalization-of-everything; James R. Copland and Rafael A. Mangual, Overcriminalization America, MANHATTAN INST., (August 8, 2019), https://www.manhattan-institute.org/overcrim; FORREST STUART, DOWN, OUT, & UNDER ARREST (2016); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090 (2013).

26. *See generally* THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities [hereinafter TSP]; DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICA CRIMINAL JUSTICE SYSTEM (1999); Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 376 (1994) (finding a disproportionate increase of Hispanic defendants detained under the BRA); HARV. L. SCH. CRIMINAL JUSTICE POLICY PROGRAM, RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM (2020).

27. TSP, *supra* note 26, at 1*; see also* Julie Nice*, No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Poverty Law, & Dialogic Default*, 35 FORDHAM U.L.J. 629 (2008) (finding "a separate and unequal rule of law for poor people").

28. Beatrix Lockwood & Annaliese Griffin, *The State of Bail Reform*, MARSHALL PROJECT (October 30, 2020), https://www.themarshallproject.org/2020/10/30/the-state-of-bail-reform.

29. Meza v. Livingston, 607 F.3d 392, 399 (5th Cir. 2010).

30. Heaton et al., *supra* note 10, at 42.

31. *See* Liu et al., *supra* note 8.

32. Griffin v. Illinois, 351 U.S. 12, 17 (1956).

meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."[33] Poverty, like religion and race, cannot be the basis for treating people differently. There is no rational relationship between an arrestees' guilt or innocence and his pocketbook.[34]

Violations of the Eighth Amendment also loom over the practice of money bail: "Bail set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose is 'excessive,'"[35] an almost certain outcome for the indigent, where no amount can serve its purpose of assuring pretrial appearance. Bail becomes a detention order. The Court has also found that holding people due to poverty is cruel and unusual punishment.[36]

Certainly, there are times when a defendant cannot be released. When the risk of flight is high or the defendant is clearly a danger to themselves or their community (classic examples being capital punishment and domestic violence cases, respectively), they should be held before trial, with meaningful and substantial due process procedures.[37] But this must be the "carefully limited exception,"[38] and has nothing to do with financial considerations. In all other cases, non-monetary conditions can be imposed that serve the state interest of ensuring defendants return for trial. Money did not play a role in bail at its inception,[39] and it should not play a role now. It is high time for a finding that money bail is unconstitutional.

I. WHAT IS BAIL?

A. Purpose of Bail

As currently defined, "[b]ail is the deposit of money or the pledge of property that must be posted by the person to be released from jail in advance of their trial."[40] If the accused fails to appear in court as promised, the deposit is forfeited.[41]

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33. Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978).

34. Griffin v. Illinois, 351 U.S. 12, 17-18 (1956).

35. Stack v. Boyle, 342 U.S. 1, 5 (1951).

36. *See generally* Robinson v. California, 370 U.S. 660, 662-63 (1962) (holding that it is unconstitutional under the Eighth Amendment to punish an individual for a status, illness, or chronic condition); Reno v. Second Jud. Dist. Ct., 83 Nev. 201, 204 (1967) (finding poverty is a status and an ordinance criminalizing poverty violates due process); Edwards v. California, 314 U.S. 160, 184 (1941) (finding "indigence in itself is neither a source of rights or a basis for denying them"); Hicks v. District of Columbia, 383 U.S. 252, 257 (1966) (finding that the personal condition of being a vagrant cannot constitutionally be made a crime).

37. Liu et al., *supra* note 8, at 3.

38. United States v. Salerno, 481 U.S. 739, 755 (1987).

39. Jennifer Williams, *Stop Assuming Money Bail is an Effective Tool for Criminal Justice*, ABA APPELLATE ISSUES (Feb. 18, 2020), https://www.americanbar.org/groups/judicial/publications/appellate_issues/2020/winter/stop-assuming-money-bail-is-an-effective-tool-for-criminal-justice/.

40. Aaron Larson, *How Does Bail Work*, EXPERT LAW (Apr. 4, 2018), http://www.expertlaw.com/library/criminal-law/how-does-bail-work.

41. *Id.*

As far back as Roman times, and continuing through the 1800's in England, bail was "a device to free accused prisoners."[42] Historically, it was a personal pledge by a family member or friend of the defendant to ensure that the defendant appeared at future court proceedings,[43] allowing the arrestee to stay out of jail.[44] Bail was a way to protect the accused detainee's constitutional right in remaining free, allowing for the unhampered preparation of a defense, and preventing the infliction of punishment prior to conviction.[45] Until just over thirty years ago, assurance of appearance at future court proceedings was the only Court-recognized justification for bail.[46]

The Bail Reform Act (BRA) of 1984 allowed courts to detain arrestees pending trial if the government could demonstrate clear and convincing evidence that no release conditions would reasonably assure the safety of a person or community.[47] Most states now have statutes, court rules, or both, that list the purposes of bail which, in addition to assuring the future appearance of the defendant, usually include references to public safety.[48] This has been interpreted to mean a risk of future criminal behavior by the arrestee.[49] However, it is contrary

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42. U.S. DEP'T OF JUST., PROCEEDINGS AND INTERIM REPORT OF THE NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, xiii (1965).

43. John-Michael Seibler & Jason Snead, *The History of Cash Bail*, HERITAGE FOUNDATION (Aug. 25, 2017), https://www.heritage.org/courts/report/the-history-cash-bail.

44. Stack v. Boyle, 342 U.S. 1, 8 (1951).

45. *Ex parte* Anderer, 61 S.W. 3d 398, 405 (Tex. Crim. App. 2001) (en banc).

46. United States v. Salerno, 481 U.S. 739, 742 (1987) (finding that the BRA of 1984 was constitutional in allowing the consideration of public safety, in addition to assurance of appearance, as a reason for denying pretrial release).

47. 18 U.S.C. § 3142 (1984) (The BRA of 1966 did not add any court-recognized purpose for bail but did allow judges to consider other factors in setting bail. After several high-profile crimes committed by defendants in the 1970's and 1980's who had been released on bail, Congress passed the BRA of 1984, allowing courts to detain arrestees pending trial if the government could demonstrate clear and convincing evidence that no release conditions will reasonably assure the safety of a person or community. In 1987, the Court affirmed the Act's constitutionality in its ruling in United States v. Salerno, determining the right to pretrial release was important, but not fundamental. The dissent vehemently objected, calling it "incompatible with the fundamental human rights protected by our Constitution." *Salerno*, 481 U.S. at 755 (Marshall, J., dissenting)). The Second Circuit Court of Appeals had found the Act's "authorization of pretrial detention [on the ground of future dangerousness] repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes." *United States v. Salerno*, 794 F.2d 64, 71-72 (1986). Upon granting certiorari, the Court noted that although our criminal law system holds persons accountable for past actions, not anticipated future ones, the fact that the BRA may act unconstitutionally under some conceivable set of circumstances was not sufficient to render it wholly invalid. *Salerno*, 481 U.S. at 745.

48. Greg Hurley, *The Constitutionality of Bond Schedules*, NAT'L CTR. FOR ST. CTS. (Jan. 2016), https://ncsc.contentdm.oclc.org/digital/collection/criminal/id/279.

49. *See e.g.*, Colin Doyle, Chiraag Bains & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., 13 (Feb. 2019), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9a804d1d-f9be-e0f0-b7cd-cf487ec70339&forceDialog=0.B; Stevens H. Clarke et al., *The Effectiveness of Bail Systems: An Analysis of Failure to Appear in Court and Rearrest While on Bail*, NAT'L CRIM. JUST. REFERENCE SERV. 2 (1976), https://www.ncjrs.gov/pdffiles1/Digitization/32349NCJRS.pdf; Christopher Lowenkamp et al., *The Hidden Costs of Pretrial Detention*, NAT'L INST. OF CORR. 27 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FN

to history and the law to jail "persons by the courts because of anticipated but as yet uncommitted crimes."[50] Research shows that those waiting trial are no more likely to commit crimes than the general public.[51] The system is appropriately designed to hold people accountable for past actions, not anticipated future ones.[52]

There does not appear to be convincing evidence that bail actually serves to deter released defendants from committing new crimes or failing to appear (FTA) for trial, leading to harmful policy and negative consequences.[53] Research findings as to whether bail actually affects the rates at which defendants appear for future legal proceedings are mixed.[54] It has been estimated that ninety percent of

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L.pdf; Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty*, PRISON POL'Y 4 (2016), http://www.prisonpolicy.org/reports/DetainingThePoor.pdf.

50. Williamson v. United States, 184 F.2d 280, 282 (1950).

51. Don Stemen & David Olson, *Dollars and Sense in Cook County: Examining the Impact of Bail Reform on Crime and Other Factors*, SAFETY AND JUST. CHALLENGE 13 (Nov. 19, 2020), https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/11/Report-Dollars-and-Sense-in-Cook-County.pdf (concluding that new procedures had released many more defendants before trial without any concomitant increase in crime); *see also* John Matthews II & Felipe Curiel, *Criminal Justice Debt Problems*, 44 HUM. RTS. MAG. no. 3 (Nov. 30, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems (finding comparable FTA and no significant increase in new offenses committed by defendants on pretrial release under bail reform); Richard Williams, *Bail or Jail*, ST. LEGISLATURES MAG. (May 2012), https://www.ncsl.org/research/civil-and-criminal-justice/bail-or-jail.aspx (reporting Kentucky results of increased pretrial release without bond and new crimes committed by those released decreasing). *But see generally,* Paul G. Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County*, S.J. QUINNEY C. OF L. RES. PAPER no. 349 (Feb. 19, 2020), https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1189&context=scholarship (citing procedural defects that undercounted the number of releasees charged with committing new crimes in the Cook County study in Stemen & Olson *supra* note 51). *See generally* Lowenkamp et al., *supra* note 49.

52. *See Salerno*, 481 U.S. at 745.

53. Cohen & Reaves, *supra* note 9, at 10 (concluding that full cash bonds had lower predicted failure-to-appear rather than recognizance (twenty percent to twenty-four percent)); *see also* Lowenkamp et al., *supra* note 49, at 4 (finding longer pretrial detention are more likely to FTA and engage in new criminal activity); Will Dobbie, et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment*: *Evidence from Randomly Assigned Judges*, NAT'L BUREAU OF ECON. RES. (2016), https://www.nber.org/system/files/working_papers/w22511/w22511.pdf (finding adverse labor consequences and arrestees negotiating position but some social benefits of detention as well as social benefits of release); Clarke et al., *supra* note 49 (finding that forms of bail that rely solely on the threat of financial loss to ensure appearance in court proved to be the worst in terms of rates of nonappearance and rearrest and finding that unsecured pretrial release achieved the same public safety results and court appearance rates as secured bonds).

54. Cohen & Reaves, *supra* note 9, at 10 (concluding that full cash bonds had lower predicted failure-to-appear rather than recognizance (twenty percent to twenty-four percent)). *See also* Lowenkamp et al., *supra* note 49, at 4 (those who spend more than twenty-four hours in jail but are then released and less likely to make a future court date than those who spend less time in jail); Dobbie, et al., *supra* note 53 (finding adverse labor consequences and arrestees' negotiating position but some social benefits of detention as well as social benefits of release); Clarke et al., *supra* note 49 (finding that forms of bail that rely solely on the threat of financial loss to ensure appearance in court proved to be the worst in terms of rates of nonappearance and rearrest, and finding that unsecured pretrial release achieved the same public safety results and court appearance rates as secured bonds). *But see* Gerald R. Wheeler & Carol L. Wheeler, *Two Faces Of Bail Reform: An*

defendants in large urban counties are detained because they cannot meet bail and only ten percent were detained due to outright denial of bail for being deemed too dangerous for pretrial liberty.[55]

B. *Types of Bail*

For purposes of this article, the focus will be only on monetary conditions of pretrial release which includes (1) surety bonds, where a third party agrees to be responsible for the debt of the defendant either through the court or a commercial bail bond agent, (2) percentage bail, where the defendant deposits a percentage of the bail amount with the clerk, (3) property bonds, where the defendant or a person on their behalf pledges real property with a value at least equal to the amount of the bail, which is forfeit if the defendant fails to appear, or (4) cash bail, where the only form of bond accepted is the total amount of the bond which can be returned when the defendant appears.[56]

II. CONSTITUTIONAL CLAIMS

The Supreme Court "requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision not under the rubric of substantive due process."[57] Where defendants are treated differently by wealth,

> [d]ue process and equal protection principles converge in the Court's analysis in these cases. . . . [W]e generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause. . . . Only if alternative measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made

Analysis Of The Impact Of Pretrial Status On Disposition Pretrial Flight And Crime In Houston, 1 REV. OF POL'Y RES., POL'Y STUD. ORG. 168 (1981) (finding that bail reform in Houston did not significantly affect pretrial flight or crime).

55. Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009: Statistical Tables*, U.S. DEP'T OF JUST., 1, 15 (2013), http://www.bjs.gov/content/pub/pdf/fdluc09.pdf*; see also* Rabuy & Kopf, *supra* note 49.

56. *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail,* JUST. POL'Y 9 (Sept. 2012), http://www.justicepolicy.org/research/4364http://www.justicepolicy.org/research/4364; (not addressed here are non-monetary conditions of release, including, but not limited to (1) release on recognizance (ROR), (2) unsecured bail, (3) citation release, (4) immigration bond, (5) pretrial services, and (6) release subject to protective orders. These conditions would appear to be some of the best conditions to use to address concerns of public safety and reappearance since they are not based on wealth and have a reasonable relationship to achieving the state's goal. They are certainly subject to discretion, and therefore possible discrimination, but do provide the means of eliminating wealth as a determinate of pretrial detention. They can and should be used without regard for a defendant's ability to pay) [hereinafter Bail Fail].

57. United States v. Lanier, 520 U.S. 259, 272 n.7 (1997).

> sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment. [58]

Half a century earlier, the Supreme Court discussed equal protection in the context of race segregation:

> But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[59]

Since money bail bears on the Due Process Clause, the Equal Protection Clause, and the Eighth Amendment, this article will apply a hybrid analysis as courts have found proper.[60]

A. Due Process

The Fourteenth Amendment reads in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law,"[61] which protects individuals against arbitrary governmental action. The court examines procedural due process in two parts: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient."[62]

Judge Stevens noted that the right to liberty predates our judicial system:

> I had thought it self-evident that all . . . were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process

58. Bearden v. Georgia, 461 U.S. 660, 665-73 (1983).

59. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

60. *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) (finding that failure to provide defendant with transcript at public expense for appeal violates equal protection); Williams v. Illinois, 399 U.S. 235, 240-41 (1970) (finding that maximum imprisonment is required to be the same for all defendants, regardless of wealth); Tate v. Short, 401 U.S. 395, 398 (1971) (determining states are prohibited from converting a fine into a jail term because indigent defendant cannot pay fine); Pugh v. Rainwater, 572 F.2d 1053, 1068 (5th Cir. 1978) (finding detention of those who cannot pay money bail may infringe on both due process and equal protection requirements); Bearden v. Georgia, 461 U.S. 660, 672-73 (1983) (finding if a petitioner cannot pay a fine for reasons not of his own fault, the court can only imprison petitioner if alternative measures were not adequate to meet state interests in punishment and deterrence).

61. U.S. CONST. amend. XIV, § 1.

62. Ky. Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989) (internal citations omitted).

> Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.[63]

"Rules under which personal liberty is to be deprived are limited by the constitutional guarantees of all, be they moneyed or indigent, befriended or friendless, employed or unemployed, resident or transient, or good reputation or bad."[64] This basic right to freedom theoretically exists for anyone in the United States at all times, except in very specific, well-defined situations, such as after conviction of a crime punishable by incarceration.[65] For those merely *accused* of a crime, the Judiciary Act of 1789 provided that the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction."[66] From the beginning, courts have found this underlying presumption of innocence a fundamental principle of American criminal law.[67]

Innocence was presumed for all the accused, and bail was a decision of not *if*, but *how* to release a defendant.[68] "To deny bail to a person who is later determined to be innocent was thought to be far worse than the smaller risk posed to the public by releasing the accused."[69] As human sureties became harder to find, money replaced many as bail, working effectively to allow more people the opportunity to be released. "Money-bail practices were well known to the Framers as they drafted the Constitution and the Bill of Rights. Its purpose, to ensure the appearance of an accused individual at trial, was a well understood and uncontroversial element of the criminal justice system in early America."[70]

Since this country's founding, there have been two waves of bail reform. The BRA of 1966 was intended to stop judges from using the common practice of setting high bail amounts that defendants could not meet, stating the purpose explicitly in Section 2:

> The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending

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63. Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

64. *Pugh*, 572 F.2d at 1057.

65. *Article 5: Right to Liberty and Security,* EQUALITY AND HUM. RTS. COMM'N (Nov. 30, 2018), https://www.equalityhumanrights.com/en/human-rights-act/article-5-right-liberty-and-security (Specific situations enumerated include being found guilty of a crime and sent to prison, not doing something a court has ordered, reasonable suspicion that you have committed a crime, someone is trying to stop you committing a crime or they are trying to stop you running away from a crime, you have a mental health condition which makes it necessary to detain you, you are capable of spreading infectious disease, you are attempting to enter the country illegally, and you are going to be deported or extradited).

66. Stack v. Boyle, 342 U.S. 1, 4 (1951) (citing Hudson v. Parker, 156 U.S. 277, 285 (1895)).

67. Coffin v. United States, 156 U.S. 432, 458-60 (1985).

68. Baradaran, *supra* note 6, at 729 (quoting THOMAS WONTNER, OLD BAILEY EXPERIENCE: CRIMINAL JURISPRUDENCE AND THE ACTUAL WORKING OF OUR PENAL CODE OF LAWS 263 (London, James Fraser 1833)).

69. *Id.*

70. Seibler & Snead, *supra* note 43.

> their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice not the public interest.[71]

Then, with the BRA of 1984, a second recognized purpose of bail was established, namely "safety of any other person and the community."[72] As a result, the number of those held in prisons and jails before trial has exploded, far exceeding the number of those being held after a criminal conviction.[73]

The liberty interest at issue with money bail is defined by the tension between the conflicting purposes of bail: protecting the defendant's constitutional right in remaining free before trial while, in addition to ensuring appearance at trial, also securing the presence of the defendant in court in future proceedings and assuring the safety of the community. Beyond determining whether there exists a liberty interest that has been interfered with by the State, courts must also examine whether the procedures attendant upon that deprivation were constitutionally sufficient:

> When deprivation of the liberty interest leads to stigmatizing and physically invasive consequences, the Court grants greater procedural protections . . . If the deprivation of liberty will cause certain, immediate adverse consequences to the parolee or prisoner, the Court provides more due process than when the deprivation of liberty is uncertain and may occur at a later date.[74]

Substantive due process prevents the government from engaging in conduct that "shocks the conscience"[75] or interferes with rights "implicit in the concept of ordered liberty."[76] If a government action survives this scrutiny, "it must still be implemented in a fair manner,"[77] which is referred to as procedural due process.

The seminal case regarding possible violations of both substantive and procedural due process in pretrial detention was *United States v. Salerno*, where respondents argued to invalidate a provision of the BRA of 1984, which allowed pretrial detention for the first time based on future dangerousness.[78] The Court upheld the provision in the Act that arrestees can be detained if the government provides clear and convincing evidence that no conditions of pretrial release will assure the safety of the public.[79] This finding in and of itself does not directly implicate money bail. It seems apparent that in very small number of very serious cases, defendants must be detained to ensure their own and others' safety as there

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71. Bail Reform Act (BRA) of 1966, 89 P.L. 465, 80 Stat. 214 (1966).

72. Bail Reform Act (BRA) of 1984, 18 U.S.C. § 3142 (2008).

73. Liu et al., *supra* note 8, at 5.

74. Meza v. Livingston, 607 F.3d 392, 408 (5th Cir. 2010).

75. United States v. Salerno, 481 U.S. 739, 746 (1987) (citing Rochin v. California, 342 U.S. 165, 172 (1952)).

76. *Id*. (citing Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

77. *Id*. (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

78. *Id*.

79. *Id*. at 751.

are no conditions that will allow for their safe release.[80] The Act makes clear that this only applies to carefully limited circumstances.[81]

But, for arrestees who do not pose a future threat that can be established by clear and convincing evidence, and absent serious flight risk, pretrial detention violates their substantive due process rights because such detention constitutes impermissible punishment before trial. These defendants *do* have conditions of release that will assure the safety of the public, including pretrial supervision and pretrial services. The Supreme Court dodged the issues entirely in *Salerno* by deeming pretrial detention "regulatory"[82] instead of "punitive" and gave guidelines to decide how to determine which is which: first look at legislative intent and then whether the detention is excessive in relation to the goal Congress sought to achieve.[83]

The dissent took issue with the underlying classifying assumption: "The majority's technique for infringing this right is simple: merely redefine any measure which is claimed to be punishment as "regulation," and magically, the Constitution no longer prohibits its imposition . . . . [T]he majority's argument is merely an exercise in obfuscation."[84] Beyond "redefining" a particular practice, other courts have maintained that although pretrial detention for dangerousness may initially have been regulatory, it has over time become punitive. Due to both the length of detention, which in current times is measured in weeks and months (and occasionally years) instead of the historical measure of days,[85] and the reality that pretrial defendants are almost always housed under the same conditions of confinement as those who have been convicted,[86] it is, practically speaking, punishment.

Arguments aside about reclassification and whether legislative intent actually exists, Congress did avoid expressing any intent to impose punitive restrictions in the Act.[87] Without this, legislative intention defaults to "regulatory," and the determination "turns on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'"[88] The Court previously

80. Liu et al., *supra* note 8, at 3 (citing Zhen Zeng, *Jail Inmates in 2016,* U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. (2018)).

81. 18 U.S.C. § 3142.

82. United States v. Salerno, 481 U.S. 739, 747 (1987) (finding that if the detention is regulatory and not excessive in relation to the goal Congress sought to achieve, it is therefore not pretrial punishment nor in violation of the Due Process Clause)*; see also* United States v. Melendez-Carrion, 790 F.2d 984, 998-999 (1986) (defining regulatory detention as strictly limited in time, with mild conditions of confinement, couched in a history where pretrial detention was not a part of the general American approach to criminal justice).

83. *Id*.

84. *Id*. at 760.

85. *Melendez-Carrion*, 790 F.2d at 999.

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

87. 18 U.S.C. § 3142.

88. *Salerno*, 481 U.S. at 747 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

determined preventing crime by arrestees is a legitimate state interest,[89] and the Act did assign an alternative purpose: preventing danger to the community.[90]

But pretrial detention is "excessive in relation to th[is] alternative purpose."[91] Current scholars have expressed it this way:

> The smaller the risk and the greater the costs of detention, the more likely it is to be an excessive response. Our results provide compelling evidence that the costs of detention include increasing the likelihood of conviction and future entanglement with the criminal justice system. Given these and other costs of pretrial detention, it may be an excessive response to low risks of pretrial flight and crime - and therefore constitute impermissible pretrial "punishment."[92]

In *Salerno*, the Court maintained that this detention was not excessive since the Act carefully limits the circumstances under which detention may be sought, and maintained that in these circumstances, the government's regulatory interest in community safety outweigh an individual's liberty interest.[93] The Court noted that the Act is narrow as it "operates only on individuals who have been arrested for a specific category of extremely serious offenses," showing sufficient tailoring and constituting a rare exception to the general rule of pretrial release.[94] But even with the mental leap that the detention is regulatory and not punitive, the "narrow circumstances" that the Court believes limits judicial officials[95] are anything but narrow in application. Overwhelming majorities of those incarcerated are in jail not because they pose a threat or are at high risk of failing to appear in the future, but solely because they cannot pay "a financial condition of release that results in the pretrial detention of a defendant,"[96] which is hardly evidence that the Act is being applied as strictly as it was written.

The Act lists certain crimes of violence that are to be considered as the future threat "exceptions,"[97] such as crimes where the maximum sentence proscribed is ten or more years, offenses for which the maximum sentence is life imprisonment or death, serious drug offenses, certain repeat offenses, and felonies with minor

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89. *See* De Beau v. Braisted, 363 U.S. 144, 155 (1960) (finding a legitimate and compelling state interest in combatting local crime infesting a particular industry by barring convicted felons representing unions from collecting dues or levies).

90. 18 U.S.C. § 3142.

91. *Salerno*, 481 U.S. at 747 (quoting *Mendoza-Martinez*, 372 U.S. at 168-69).

92. Heaton et al., *supra* note 10, at 783.

93. *Salerno*, 481 U.S. at 747-48 (listing examples of when interest in community safety outweighs an individual's liberty interest such as times of war, insurrection, dangerous resident aliens awaiting deportation, the mentally unstable, juveniles and those at risk of flight. All of these were considered "exceptions to the general rule of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial.").

94. *Id*.

95. *Id*. at 750.

96. *ABA Standards for Criminal Justice Third Edition, Pretrial Release*, AMERICAN BAR ASS'N (2007), https://www.ncsc.org/data/assets/pdf_file/0030/34986/aba-standards-for-criminal-justice-pretrial-release.pdf.

97. *Salerno*, 481 U.S. at 749.

victims or involving possession or use of firearms.[98] But, the crimes that fit under these categories grow daily with increased legislation and broader legislative interpretation, defying any attempt to narrowly tailor the exception as the Court suggests. The Court justifies its ruling by asserting that

> [t]he Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.[99]

Delineation of these circumstances, the Court maintains, satisfies the standard required when the interests of public safety outweigh the liberty interests of the individual.[100] However, the defendant is arrested and held, depriving him of his liberty days *before* the state demonstrates probable cause and has a "full-blown adversar[ial] hearing."[101] It is this period of time that is most important, since the negative social effects of detention often occur within the first twenty-four hours.[102] Maintaining that the state must follow these procedures in order to prevent pretrial detention is too little and too late, as the detention has already commenced.[103]

Justice Marshall, in a dissent outlining the constitutional defects of due process elements of the BRA, found

> for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future.[104]

He continued that this idea has "long been thought incompatible with the fundamental human rights protected by the Constitution" and "disregards basic principles of justice."[105] Justice Stevens agreed that "allowing pretrial detention on

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98. 18 U.S.C. § 3142(f).

99. *Salerno*, 481 U.S. at 750, (quoting 18 U.S.C. § 3142(f)).

100. *Id*. at 750-751.

101. *Id*. at 764.

102. Lowenkamp et al., *supra* note 49, at 3.

103. *See Salerno*, 481 U.S. at 750-51 (The Court quickly dismissed the procedural due process challenge, determining the Act's procedures "adequate to authorize the pretrial detention of at least some [persons] charged with crimes, whether or not they might be insufficient in some particular circumstances." They continued to justify this assertion by stating that "there is nothing inherently unattainable about a prediction of future criminal conduct." This is an arguable presumption but granting its veracity, there may be something inherently unattainable for an *accurate* prediction. Considering research findings in this area and the evidence of overwhelming discrimination, the Court's statement appears to be questionable).

104. *Id*. at 755.

105. *Id*.

the basis of future dangerousness is unconstitutional."[106] He found that creating a class of indicted persons, who alone are eligible for detention based on future dangerousness, was not consistent with the presumption of innocence and the Eighth Amendment's Excessive Bail Clause.[107] Mere existence of articulable danger does not warrant detention unless it clearly cannot be alleviated by one of the many other combinations of release available. The ultimate inquiry is what is necessary to reasonably ensure a defendant's presence at trial. "[I]n the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternative forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint."[108] Worse yet, secured bail orders are imposed almost automatically on indigent arrestees, leading to inadequate process and lack of protection of bail as an instrument of oppression.[109]

In the twenty years following *Salerno*, changes in state and federal laws "increased detention by allowing judges to make predictions about a defendants' guilt and future proclivity to commit crime."[110] Those decisions became about *whether* to release rather than *how* to release, even though using the likelihood to reoffend as a consideration for bail violates the presumption of innocence.[111] The long-term impact was greatly increased detention rates.[112]

Discrimination based on wealth can hardly be said to qualify as implementing due process in a fair manner, as required by *Mathews v. Eldridge*.[113] There is no justice in necessitating payment for liberty. In 2018, the Fifth Circuit found violations to the Due Process Clause and Equal Protection Clause of the U.S. Constitution in Texas statutes concerning bail when indigent misdemeanor arrestees were deprived of their basic liberty interests because secured bail was imposed (almost) automatically without any individualized hearing.[114] County officials in this case imposed a scheduled bail amount ninety percent of the time, rejected recommendations for pretrial release sixty-six percent of the time, and awarded unsecured bond less than ten percent of the time, ensuring that some "payment [wa]s required for release in the vast majority of cases.[115] These procedures allowed magistrates to impose bail as "an instrument of oppression."[116] The court was aware of the indigence of the arrestees and was fully aware therefore

106. *Id*. at 768.

107. *Id*. at 769.

108. Pugh v. Rainwater, 572 F.2d 1053, 1058 (5th Cir. 1978).

109. CITY OF SANTA CLARA BAIL & RELEASE WORK GRP., FINAL CONSENSUS REPORT ON OPTIMAL PRETRIAL JUSTICE 1, 33 (Aug. 26, 2016), https://www.sccgov.org/sites/ceo/Documents/final-consensus-report-on-optimal-pretrial-justice.pdf [hereinafter REPORT ON OPTIMAL PRETRIAL JUSTICE].

110. Baradaran, *supra* note 6, at 739.

111. *Id*.

112. Liu et al., *supra* note 8 at 4.

113. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

114. ODonnell v. Harris Cty., 892 F.3d 147, 160 (5th Cir. 2018).

115. *Id*. at 154.

116. *Id*. at 159 (quoting Taylor v. State, 667 S.W.2d 149, 151 (Tex. Crim. App. 1984) (finding that the power to require bail and not just denial of bail can be used to oppress)) (internal quotations omitted).

that bail would "have the same effect as a detention order."[117] The practices of the courts in this case are similar to ones used by many courts today.

Plea bargains may present other procedural due process concerns. "To the extent the causal effect of pretrial on conviction rates reflects a reality that detained people plead guilty simply to get out of jail, it raises the question of whether such pleas are fully 'voluntary.'"[118] A valid guilty plea must be knowing and voluntary,[119] but plea bargains are always coercive in some sense. The government may not produce a guilty plea "by mental coercion overbearing the will of the defendant,"[120] and the plea must be "predicated on the assumption that the inducement at issue would not lead an innocent person to plead guilty."[121] Considering the overwhelming evidence in support that in fact it does,[122] it is imperative that the Court reconsider the due process implications of money bail.

In the 1980s, the Second Circuit determined that although releasing an accused person is risky, it is constitutionally mandated; incarceration to protect society from future crimes the government fears the accused may commit is not warranted.[123] Due process does not permit detention of those who are not convicted of a crime. "Equity would require that the poor have the same chance for pretrial release (which is related to their chance for a positive case outcome) as the rich; that cannot happen as long as money bail is used to determine who is released and who is not."[124]

Courts are supposed to limit preventative detention as it is "abhorrent to the American system of justice."[125] Congress legislated this in the BRA of 1984 which states, "The Judicial Officer may not impose a financial condition that results in the pretrial detention of the person."[126] Being held solely due to inability to pay bail infringes on liberty interests by the states and is discriminatory on the basis of wealth, constituting imposition of excessive restraint.[127] This amounts to bail as punishment, an instrument of oppression, coercive, and "incompatible with the fundamental human rights protected by our Constitution."[128]

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117. *Id*. at 158.

118. Heaton et al., *supra* note 10, at 784.

119. *Id*. at 784 (citing Brady v. United States, 397 U.S. 742, 748 (1970) (holding that a plea must be a "knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences")); *see also* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (holding, on procedural due process grounds, that a guilty plea must be knowing and voluntary).

120. Brady v. United States, 397 U.S. 742, 750 (1970).

121. Heaton et al., *supra* note 10, at 785 (citing Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).

122. Bail Fail, *supra* note 56, at 25-26.

123. *See* United States v. Salerno, 794 F.2d 64, 74 (2d Cir. 1986); United States v. Melendez-Carrion, 790 F.2d 984, 1002-03 (2d Cir. 1986) (all other appellate courts who were faced with the issue upheld the constitutionality of pretrial confinement for dangerousness).

124. Phillips, *supra* note 13, at 128.

125. *Ex parte* Davis, 574 S.W.2d 166, 169 (Tex. Crim. App. 1978).

126. 18 U.S.C. § 3142(c).

127. United States v. Salerno, 481 U.S. 739, 760 (1987) (Marshall, J., dissenting).

128. *Id*. at 755.

B. Equal Protection

As mentioned, bail reform has become the trend in recent decades.[129] Media attention and public awareness has given momentum to jurisdictions attempting to live up to the principle of the Equal Protection Clause, which "protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility."[130] The judicial system is intended to provide justice regardless of what are considered irrelevant factors: sex, race, age, disability, creed, national origin, religion, income, and more.[131] There is a great deal of evidence that this is still aspirational.[132] Often the discriminatory issue is race, but other bases for unequal treatment also merit examination.

> The discriminatory nature of money bail might be less troubling if bail were shown to be effective at guaranteeing a defendant's appearance in court or minimizing the risk that a defendant will engage in criminal activity while awaiting trial. This is the traditional thinking around money bail: that being forced to put up money to secure their release gives defendants some "skin in the game" – i.e., an incentive to show up in court and to refrain from pretrial misconduct. But the evidence does not support the notion that bail is more effective than other means at ensuring a defendant will appear for scheduled court dates, much less at preventing defendants from violating court orders or engaging in new criminal activity while they are on pretrial release. . . .
>
> What the evidence *does* reflect is that most defendants who are released from custody pending trial will appear for their court dates without any financial incentive, and that many of those who miss a court appearance do so for mundane reasons such as lack of reliable transportation, illness, or inability to leave work or find childcare, rather than out of a desire to escape justice.[133]

One of the most effective methods of ensuring a defendant's presence at trial are reminder phone calls and text messages about an upcoming court date.[134]

Claims of unlawful discrimination against the indigent in criminal proceedings have a long history in Fourteenth Amendment case law.[135] The federal government has weighed in on several cases by submitting a Statement of

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129. Lockwood & Griffin, *supra* note 28.

130. Plyler v. Doe, 457 U.S. 202, 245 (1982).

131. Griffin v. Illinois, 351 U.S. 12, 16-17 (1956).

132. *See generally* TSP, *supra* note 26; COLE, *supra* note 26; Williams, *supra* note 26, at 376 (finding a disproportionate increase of Hispanic defendants detained under the BRA); RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM, *supra* note 26.

133. REPORT ON OPTIMAL PRETRIAL JUSTICE, *supra* note 109, at 2.

134. Doyle, et al., *supra* note 49 at 22.

135. *See Griffin*, 351 U.S. at 14-15 (finding that failure to provide defendant with transcript at public expense for appeal violates equal protection); *see also* Tate v. Short, 401 U.S. 395, 398 (1971) (invalidating a facially neutral statute that authorized imprisonment for failure to pay fines because it violated the equal protection rights of indigents); Williams v. Illinois, 399 U.S. 235, 243 (1970) (invalidating a facially neutral statute that required convicted defendants to remain in jail beyond the maximum sentence if they could not pay other fines associated with their sentences because it violated the equal protection rights of indigents).

Interest.[136] Just a few years ago, it stated a desire to "reaffirm[] this country's commitment to the principles of fundamental fairness and to ensuring that 'the scales of our legal system measure justice, not wealth.'"[137] Despite local and state practices to the contrary, the Department of Justice maintained that "[i]ncarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment."[138]

The foundational wealth discrimination case was *Griffin v. Illinois*, where the Court found that failure to provide defendants with a transcript at public expense violated the Equal Protection Clause of the Fourteenth Amendment.[139] The dissent asserted that the statute at issue was facially constitutional, but the majority reminded the readers that a law nondiscriminatory on its face may be grossly discriminatory in its operation:

> [The] state can no more discriminate on account of poverty than on account of religion, race or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.[140]

Decades later, the Fifth Circuit Appellate Court came tantalizingly close to deciding the constitutionality of bail, but limited their conclusions to the due process and equal rights violations when the plaintiffs stopped short of extending their argument that money bail is a per se denial of equal protection to indigents.[141] In the end, the court affirmed the decision to enjoin the county from pretrial detention of arrestees without a judicial determination of probable cause[142] and affirmed that "the incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."[143] The court went on to state that it would be "an excessive restraint for the state to imprison an indigent if his appearance at trial could be reasonably assured by other means.[144] Such a

136. *See generally* Statement of Interest of the United States, Varden v. City of Clanton, No. 2:15-cv-34-MHT-WC 1, 3 (M.D. Ala. 2015), https://www.justice.gov/crt/file/761266/download [hereinafter Statement of Interest: Varden]; Statement of Interest of the United States, Wilbur v. City of Mount Vernon, Civ. Action No. 11-1100 (W.D. Wash., Aug. 8, 2013), http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf; Statement of Interest of the United States, Hurrell-Harring v. State of New York, Case No. 8866-07 (N.Y. Sup. Ct., Sept. 25, 2014), http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf.

137. Statement of Interest: Varden, *supra* note 136, at 3 (citing Att'y Gen. Robert F. Kennedy, U.S. DEP'T OF JUST., Address to the Criminal Law Section of the American Bar Association (Aug. 10, 1964), https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-10-1964.pdf.) [hereinafter Kennedy Address].

138. *Id*. at 1.

139. *Griffin*, 351 U.S. at 19.

140. *Id*. at 17-18.

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

142. Gerstein v. Pugh, 420 U.S. 103, 126 (1975).

143. *Pugh*, 572 F.2d at 1057.

144. *Id*.

belief…necessarily leads to the conclusion that monetary bail for indigents is unconstitutional."[145] But the court stopped short:

> The Court has never suggested that monetary bail is in any way constitutionally suspect. I am not unaware that challenges to the use of monetary bail have been made. But in the absence of even the slightest contrary intimation from the Supreme Court, I am unwilling to be the judge who holds those challenges find support in the Constitution.[146]

Braver judges have – and hopefully more judges in the future will – continue to hold that those challenges do find support in the Constitution.[147] The dissent in this very case would have:

> The panel, having before it the proper parties and a genuine controversy ripe for adjudication, attempted to conform monetary bail practices in Florida to "the moral imperative implicit in the noble concept of equal justice before the law." The en banc majority, wrongly and regrettably, has chosen to decline the invitation.[148]

In *M.L.B. v. S.L.J.*, the Supreme Court reaffirmed that a court may not block an indigent's access to an appeal afforded to others.[149] The Court found that once a state affords that right, they "may not bolt the door to equal justice."[150] The Court did put some boundaries around the eligibility, explaining that the right to counsel was less encompassing, or that circumstances were substantially different for bankruptcy or access to governmental benefits.[151] However, the Court designated a category of civil cases when the state must provide access to judicial process without regard to the ability to pay, particularly with the rights of marriage, family and children,[152] and the courts must not limit these rights by the specificity of the sentence.[153] This line of cases illustrated how "[t]he equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. The due process concern homes [sic] in on the essential fairness of the state-ordered proceedings anterior to the adverse state action."[154]

Affirming the precedent in *Griffin*, the Fifth Circuit Appellate Court in *ODonnell v. Harris County* affirmed the district court's finding of both disparate

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145. *Id*. at 1068-69 (In fact, the concurrence goes on to make the case that it defies logic to gauge the constitutionality of bail by considerations of due process or equal protection. Since an indigent person must rely on friends or family to offer their property as assurance for his appearance, it destroys the entire concept of monetary bail. The concurring judges assert that excessiveness is the only measure to be used as a constitutional guide if systems of monetary bail can continue).

146. *Id*. at 1069.

147. *Id*. at 1068 (Simpson, J., dissenting) (citing Arthur Goldberg, *Equality & Governmental Action*, 39 N.Y.U. L. REV. 205, 218 (1964)).

148. *Id*.

149. M.L.B. v. S.L.J., 519 U.S. 102, 106 (1996).

150. *Id*. at 110 (quoting Griffin v. Illinois, 351 U.S. 12, 24 (1996)).

151. *M.L.B.*, 519 U.S. at 114-15.

152. *Id*. at 116; *see also* Boddie v. Connecticut, 401 U.S. 371, 383 (1971).

153. *M.L.B.*, 519 U.S. at 112 (citing Mayer v. Chicago, 404 U.S. 189, 197 (1971)).

154. *Id*. at 120 (internal citations omitted).

impact and discriminatory purpose in the county's bail-setting system and concluded the district court was correct in finding the system was unconstitutional.[155] It also upheld the lower court's use of intermediate scrutiny, following previous Supreme Court holdings that heightened scrutiny is required when criminal laws detain poor defendants *because of* their indigence.[156] Although the county had a compelling interest in future appearance and lawful behavior, the court determined that the money bonds required by county officials were not narrowly tailored to meet that interest.[157] Knowing the arrestees were indigent, county officials were fully aware that bail was a detention order, making the true purpose of bail pretrial detention, and not future appearance or public safety.[158]

Only a month later in *Walker v. City of Calhoun*, an unemployed man alleged that the process the city used to set bail was unconstitutional.[159] Because there was an issue of the "fairness of relations between the criminal defendant and the State,"[160] the Appellate Court applied a due process analysis while also requiring an equal protection analysis since the State may have "invidiously denied one class of defendants a substantial benefit available to another class of defendants."[161] The district court had applied heightened scrutiny to this case, contending that "detention based on wealth is an exception to the general rule that rational basis review applies to wealth-based classifications."[162] The Appellate Court overruled, citing *San Antonio Independent School District v. Rodriquez*, which concluded that wealth-based discrimination was impermissible only where two characteristics were present: "because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[163] Under rational basis review, the City's final policy was held not to violate the Constitution even though the wealthy were released immediately, based on their ability to post bond, and the indigent had to wait up to forty-eight hours to be released on indigency grounds.[164] The dissent objected to this infringement on the rights of the indigent, listing a long line of precedent recognizing that wealth-based detention is unconstitutional.[165]

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155. ODonnell v. Harris Cty., 892 F.3d 147, 161 (5th Cir. 2018).

156. *Id*. at 161 (citing Tate v. Short, 401 U.S. 395, 397-99 (1971) ("invalidating a facially neutral statute that authorized imprisonment for failure to pay fines because it violated the equal protection rights of indigents"); Williams v. Illinois, 399 U.S. 235, 241-42 (1970) ("invalidating a facially neutral statute that required convicted defendants to remain in jail beyond the maximum sentence if they could not pay other fines associated with their sentences because it violated the equal protection rights of indigents") (emphasis in original).

157. *ODonnell*, 892 F.3d at 162.

158. *Id*. at 154.

159. Walker v. City of Calhoun, 901 F.3d 1245, 1251-52 (11th Cir. 2018).

160. *Id*. at 1259.

161. *Id*.

162. Walker v. City of Calhoun, No. 4:15-CV-0170-HLM, 2017 U.S. Dist. LEXIS 219543, at *3 n.2 (N.D. Ga., June 16, 2017) (quoting ODonnell v. Harris Cty., Tex., 251 F. Supp. 3d 1052, 1134 (S.D. Tex. 2017)).

163. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973).

164. *Walker*, 901 F.3d at 1267.

165. *Id*. at 1273 (Martin, J., dissenting) (citing Williams v. Illinois, 399 U.S. 235, 240-44 (1970) ("holding that Illinois's practice of extending a prisoner's sentence beyond maximum authorized by

The dissent would uphold the district court's application of strict scrutiny, noting that incarcerated persons do suffer complete deprivation of liberty – not just diminishment of benefit – and that any amount of jail time is significant and severe.[166]

A year later, the California Northern District Court disagreed with the Court of Appeals in *Walker*, and agreed with the dissents in *ODonnell* and *Walker*.[167]

> The Court previously found that whether the Sheriff's use of the Bail Schedule violates the Due Process and Equal Protection Clauses of the United States Constitution is an issue subject to strict scrutiny analysis. As the Court explained, heightened scrutiny is required . . . particularly "where fundamental deprivations are at issue and arrestees are presumed innocent." Because the Sheriff's use of the Bail Schedule implicates plaintiffs' fundamental right to liberty, "any infringement on such right requires a strict scrutiny analysis."[168]

These cases show a trend toward treating the indigent as a suspect class and applying a harsher analysis to rules and procedures that discriminate based on wealth. Without this designation, the courts would normally apply rational basis review.[169] At this lowest level of scrutiny, where a state needs a "legitimate purpose," which the courts have ruled can be virtually anything other than harming a politically unpopular group,[170] the indigent can arguably be classified as such.

But with strict scrutiny, the government must show a compelling interest that is narrowly tailored to the classification (or at least an important interest that is substantially related to the classification in the case of intermediate scrutiny); these challenges almost always fail.[171] Discrimination based on indigency would be rarely justified. Although "public safety" could be a compelling interest, there is no definite and close relationship between wealth and future appearance or public safety. Nor is there narrow tailoring when most suspects are being detained due to failure to provide financial assurance without regard for their dangerousness.

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statute of conviction because of a prisoner's 'involuntary nonpayment of a fine or court costs' is 'an impermissible discrimination that rests on ability to pay'"); Tate v. Short, 401 U.S. 395, 397-98 (1971) ("extending Williams to prohibit 'jailing an indigent for failing to make immediate payment of any fine'"); Bearden v. Georgia, 461 U.S. 660, 672-73 (1983) ("extending Williams and Tate to hold that a state court can't revoke probationary sentence for inability to pay fine or restitution without considering "alternate measures of punishment other than imprisonment"). "The Bearden line of cases involved criminal penalties imposed after a conviction. The former Fifth Circuit extended these cases' 'principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible' to '[t]he punitive and heavily burdensome nature of pretrial confinement.'" Rainwater, 572 F.2d at 1056).

166. *Walker*, 901 F.3d at 1275 (Martin, J., dissenting) (citing Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018)).

167. *Id*.

168. Buffin v. City & Cty. of S.F., No. 15-cv-04959-YGR, 2019 U.S. Dist. LEXIS 34253, at 32 (N.D. Cal., Mar. 4, 2019) (citing Stack v. Boyle, 342 U.S. 1, 10-11 (1951)).

169. *Buffin*, 2019 U.S. Dist. LEXIS 34253, at 33.

170. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 691-96 (6th ed. 2020); Romer v. Evans, 517 U.S. 620, 634 (1996).

171. CHEMERINSKY, *supra* note 170, at 691-96.

Historically, the Court has found a class "suspect" – warranting higher levels of scrutiny – if a legislative act is facially discriminatory or if it is facially neutral but has both discriminatory intent and impact, and creates inequity.[172] However, there is a different approach to the equal protection analysis: the Court has recently shown a willingness to consider new factors for creating suspect classifications.[173] There is a compelling case that indigent defendants meet all three of these newer factors: the discrimination has a historical basis, the class currently experiences a lack of political power, and the distinguishing feature (poverty) is arguably an immutable trait unrelated to the ability to contribute to society.[174] If so, this approach would provide another set of grounds for applying strict scrutiny to this "new" suspect class.

Decades ago, when the Court determined that defendants without money were to be afforded the same rights as those with money, free from invidious discrimination, the Court asked, "[W]hy fix bail at any reasonable sum if a poor man can't make it?"[175] Why indeed?

C. Excessive Bail

The only time bail is explicitly mentioned in the Constitution is the Eighth Amendment, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[176] As noted above, it was a familiar concept to the Founders.[177] The prohibition on excessive fines was even then considered a well-established, fundamental, and inalienable right.[178] Because fines were the most common form of punishment, forbidding their excess was all the more important.[179] The Eighth Amendment therefore "limits the government's power to extract payments, whether in cash or in kind, as 'punishment for some offense.'"[180]

The Eighth Amendment traces its foundations to the Magna Carta, requiring that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood."[181] Excessiveness is not measured by whether it is affordable, but whether it is "set at a figure higher than an amount

172. *Id*.

173. *Id*.

174. *Id*.

175. Griffin v. Illinois, 351 U.S. 12, 29 (1956).

176. U.S. CONST. amend. VIII.

177. Seibler & Snead, *supra* note 43.

178. Timbs v. Indiana, 139 S. Ct. 682, 696-98 (2019).

179. *Id*. at 695-96 (citing L. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 38 (1993) (The court noted that Virginia's Governor, Edmund Randolph, concluded that '"the exclusion of excessive bail and fines . . . would follow of itself without a bill of rights," for such fines would never be imposed absent "corruption in the House of Representatives, Senate, and President," or judges acting "contrary to justice"' (quoting Debate on Virginia Convention (June 14, 1788), in 3 Debates on the Federal Constitution 447, 467-68 (J. Elliot 2d ed. 1854))).

180. United States v. Bajakajian, 524 U.S. 321, 328 (1998).

181. Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 271 (1989) (requiring also genuine harm and that the amount must be fixed by one's peers who are sworn to sanction in a proportionate amount).

reasonably calculated to [assure the presence of the accused at trial]."[182] Very recently, the Supreme Court held that the Fourteenth Amendment incorporates the Eighth Amendment's prohibition on excessive fines clause against the states,[183] and stated that the prohibition on excessive fines is considered an inalienable right of all.[184] Flagrant abuses of the Eighth Amendment have the same long lineage as the Amendment itself, which continues to the current day.[185] This abuse is worrisome not just because of their immediate impact but also because exorbitant fines undermine other constitutional liberties.[186]

> It is at least arguable, furthermore, that whenever money bail results in detention because a defendant cannot pay, it is per se excessive. The premise of money bail is that the prospect of some financial loss is a sufficient deterrent to prevent pretrial flight. Detention is not necessary. If the bail is unaffordable and therefore results in detention, it is not functioning as a deterrent at all. It is functioning as an indirect means of detention. The use of unaffordable bail to detain pretrial defendants was precisely the practice that the original Excessive Bail Clause was intended to prevent. The counterargument is that, in some cases, an unaffordable bail amount is the only amount sufficient to create an adequate disincentive to flee. But if that is so, the reality is that no bail can reasonably assure that particular defendant's appearance. In that case, judges should explicitly order detention and explain the reason for doing so. Indeed, the Excessive Bail Clause arguably requires them to take this approach.[187]

The seminal case about using proper methods to fix bail is *Stack v. Boyle*,[188] when the only recognized interest of bail was preventing flight. In attempting to set guidelines, the Court admonished that bail must be set at a sum designed to ensure that goal and no more.[189] Twelve defendants were charged with violating the Smith Act and although bail for each was originally set for varying amounts, the district court fixed bail in the uniform amount of $50,000 each.[190] The government's only rationale for this recommendation concerned defendants in a previous case convicted under the act who forfeited bail.[191] Despite this, multiple appeals resulted in dismissal until the petitioners filed an application to the Supreme Court.[192] *Stack* did not challenge the traditional standards for determining bail,

182. Stack v. Boyle, 342 U.S. 1, 5 (1951)*; see also* White v. Wilson, 399 F.2d 596, 598 (9th Cir. 1968) (finding bail is not "excessive" merely because it is unaffordable for the defendant).

183. *Timbs*, 139 S. Ct. at 687.

184. *Id*. at 692-93.

185. *Id*. at 692.

186. *Id*. at 689 (documenting their use to retaliate against or chill political speech, for retribution, deterrence, or as a source of revenue).

187. Heaton et al., *supra* note 10, at 779.

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

189. *Id*. at 5.

190. *Id*. at 3.

191. *Id*.

192. *Id*. at 4.

which the court declined to address, but that the amount assessed to the defendants exceeded those standards.[193]

The next refinement came in *Salerno*, when the Court noted that the Excessive Bail Clause might require that the Government's proposed conditions of release or detention not be "excessive" in light of the perceived evil.[194] "Of course, to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response."[195]

In 1998, the Supreme Court revisited the term again: "If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."[196] The excessive fines clause, they admitted, provides no "guidance as to how disproportional a punitive forfeiture must be to the gravity of the offense in order to be [considered] excessive."[197] History does not seem to answer the question any more than the Constitution.[198] The Supreme Court referred to other considerations to determine excessiveness standards: "the first is . . . that judgments about the appropriate punishment for an offense belong in the first instance to the legislature[, and] the second is that any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise."[199]

The court has delineated that detention is a carefully limited exception, only for arrestees changed with serious felonies who pose a threat which no condition of release can assuage.[200] The dissent by Justice Marshall quotes a previous finding of the U.S. Court of Appeals for the Second Circuit:

> [I]t is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offense is . . . unprecedented in this country and . . . fraught with danger of excesses and injustice.[201]

Based on this language, scholars have proposed an analysis of Eighth Amendment excessiveness "requires a kind of cost-benefit analysis."[202] In the case of detention without bail, the analysis should turn on "whether the costs of detention to the detainee are excessive in relation to its benefit to the state. . . . In addition to the immediate costs to the detainee (loss of liberty and potential loss of employment, housing, et cetera), the results reported here demonstrate that detention can distort criminal adjudication."[203]

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193. *Id*. at 9 (Jackson, J., concurring).
194. United States v. Salerno, 481 U.S. 739, 754 (1987).
195. *Id*.
196. United States v. Bajakajian, 524 U.S. 321, 337 (1998).
197. *Id*. at 335.
198. *Id*.
199. *Id*. at 336 (internal citation omitted).
200. United States v. Salerno, 481 U.S. 739, 755 (1987).
201. *Id*. at 766 (quoting Williamson v. United States, 184 F.2d 280, 282 (2d Cir. 1950)).
202. Heaton et al., *supra* note 10, at 781.
203. *Id*. (internal citation omitted).

> [T]he benefit of detention lies in the number and severity of harms it prevents. If there is only a small risk that the defendant will abscond or commit a serious harm if released, then detention provides little benefit; it does not substantially promote the state's interests. Furthermore, detention may increase future criminal offending. . . . If it is not clear that the pretrial crime averted is worth the increase in future crime, detention might be an excessive response to the public safety threat. More generally, if the costs of detention vastly outweigh its expected benefit in preventing flight or pretrial crime, a court should conclude that it is an excessive response to the risk the defendant presents.[204]

The denial of bail was abhorrent to the Founders because it was being denied for illegitimate reasons: political, religious, or personal.[205] There was "arbitrary, discriminatory abuse."[206] Bail was denied for multiple reasons that are being repeated today, allowing for denial of bail based on *who* the defendant is rather than on *what* they are accused of doing.[207] These reasons, as outlined in the BRA of 1984, are clearly identified as impermissible.[208] The poor are most in need of the protections of the Excessiveness Clause without the use of factors most likely to be prejudicial towards them.

In some situations, the state is the only forum where a dispute can be resolved, making inability to pay a barrier to justice. In *Boddie v. Connecticut*, the court found that since the state courts were the only way to legally end a relationship, "due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages."[209] The court recognized that in some situations, "the judicial proceeding becomes the only effective means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy."[210]

The Constitution, BRA, precedent, and dicta firmly acknowledge that anyone accused of a charge that does not fall into the BRA's specific category of extremely serious offenses should be able to stay out of jail, excepting rare exigent circumstances. There are many non-monetary means of ensuring reappearance at trial and assuring public safety and since there is no connection between money and these goals, by definition using money as a means is always unreasonable. When bail results in detention due to inability to pay, it is excessive. Therefore, bail is unconstitutional.

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient

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204. *Id*. at 781-82 (internal citation omitted).

205. 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, 151 (2009).

206. *Id*. (internal citation omitted).

207. *Id*.

208. 18 U.S.C. § 3142.

209. Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

210. *Id*. at 376.

> to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death . . . .[211]

D. Cruel and Unusual Punishment

For those accused, but not convicted of a crime, there must be a strong necessity that warrants detention lest that detention be punishment for a presumed innocent person. Pretrial detention cannot be used for deterrence, punishment, or retribution, as the detainee is presumed innocent, maintains their legal rights, and is being held only to ensure his future presence or to ensure public safety.[212] A high risk of either of those threats could require detention; the wealth of the detainee is irrelevant. It should be a rare situation where there are no non-monetary conditions that can assure future appearance or community safety, and therefore requiring detention. Otherwise, release is presumed, with non-monetary conditions if necessary.

The Supreme Court has defined cruel and unusual punishment as punishment of such a character to shock the general conscience, intolerable to fundamental fairness, greatly disproportionate to the offense for which it is imposed, going beyond what is necessary to achieve an aim, "unnecessary and wanton infliction of pain," or unnecessarily cruel in view of the purpose for which it is used.[213] Holding indigent people, charged but not convicted, presumed innocent, because of their wealth (or race or religion or other irrelevant factors) is without question, all of these.

In *Robinson v. California*, the Supreme Court held that "it is 'cruel and unusual' punishment in the sense of the Eighth Amendment to treat as a criminal a person who is a drug addict."[214] This holding was based on the determination that addiction is a condition or status, not an act,[215] and it is therefore unconstitutional to charge such a person with a crime, thereby punishing them for a status.[216] Those who are insane, ill, or addicted should be treated for their disease and "not branded as criminals."[217] The same philosophy should be extended to those who are poor. Still today, money bond effectively punishes the status of poverty. Similar to drug

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211. Stack v. Boyle, 342 U.S. 1, 7-8 (1951).

212. Bell v. Wolfish, 441 U.S. 520, 564 (1979) (Marshall, J., dissenting).

213. *See* Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966); Estelle v. Gamble, 429 U.S. 97, 103 (1976).

214. Robinson v. California, 370 U.S. 660, 668 (1962) (Douglas, J., concurring); *see also* Powell v. Texas, 392 U.S. 514 533-34 (1968).

215. *Id.* at 662.

216. *Id.* at 668 (Douglas, J., concurring).

217. *Id.* at 669. There is debate about other potential "status" designations: homelessness, IQ, various mental and physical conditions and more, which are beyond the scope of this article.

addiction, poverty may be "contracted innocently or involuntarily"[218] or "be present at birth,"[219] and can be extraordinarily difficult to change, with some studies showing it to be arguably immutable. Just as illness is not a crime but a medical condition, when the system criminalizes the *economic condition* of poverty, it violates the Eighth Amendment's prohibition on cruel and unusual punishment. "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[220]

"[T]he use of a secured cash bond to detain poor individuals *before a conviction for a crime* is unconstitutional under *Robinson* and the Eighth Amendment."[221] It is not uncommon for the accused to spend more pretrial days in jail for non-violent misdemeanors than wealthy defendants who are charged with multiple violent felonies.[222] Presumed innocent arrestees are punished not for what they may have done, but for who they are: poor people. The criminal bail system's purposes are not, and cannot be, punitive. Yet, if a defendant cannot pay, they are effectively sentenced to jail based on poverty. Approximately half a million people every year face this reality.[223] Although they are not deemed a flight risk or a risk to public safety, they must remain in custody because they do not have the financial means to secure their release.

"What is 'cruel and unusual' is a continuously evolving standard. This standard is based largely upon shifting societal norms, values, and decency over time."[224] These standards of decency do not allow us to conduct ourselves in this cruel and unusual way.

CONCLUSION

> A great disservice is done poorer people by inferring that the dollar sign relegates them to a special kind of second class citizenship which renders them incapable or unwilling to obey the rules of normal conduct. . . . Some of the most highly respected citizens are those who do not have money but who have great personal worth.[225]

Money bail violates Due Process, Equal Protection, and Excessive Bail Clauses of the Constitution. No one should be deprived of liberty without due process because they lack assets. No one should be denied equal protection because they are indigent. And no one should be held in detention because they are poor and the courts will not assume a presumption of innocence and alternative ways to ensure their future appearance. Money has no correlation to failure to appear at trial and should no longer be used in any jurisdiction.

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218. *Id*. at 667.

219. *Id*. at 670.

220. *Id*. at 667.

221. Lauren Bennett, *Punishing Poverty: Robinson & the Criminal Cash Bond System*, 25 WASH. & LEE J. OF C.R. & SOC. JUST. 315, 346 (2018) (emphasis in original).

222. Liu et al., *supra* note 8, at 7-8; Bennett, *supra* note 221, at 348.

223. Dobbie et al., *supra* note 53, at 1.

224. Bennett, *supra* note 221, at 319 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

225. Pugh v. Rainwater, 572 F.2d 1053, 1069 (5th Cir. 1978).

We have, in fact, "created a system that is the complete antithesis of what was intended, a system that bears no causal nexus between money bail and guaranteed appearance."[226] "We have a duty to commit to principles of fundamental fairness and ensure that the 'scales of the legal system measure justice, not wealth.'"[227] Without money bail, the scales are one small step closer to even.

There are alternatives. Let's go back to the initial scenario: "two misdemeanor arrestees who are identical in every way — same charge, same criminal backgrounds, same circumstances, etc. — except that one is wealthy and one is indigent."[228] In the absence of money bail their stories do not diverge: both arrestees are released, with individualized conditions to assure their reappearance. They both maintain family connections, employment, aid in their own defense, meet their personal and financial obligations, stay in their homes, and more. Both return for trial, have the same outcome of their trials, serve the same sentence, if one is imposed, and bear the same costs of their behavior.

That sounds more like justice.

226. Williams, *supra* note 39.
227. Kennedy Address, *supra* note 137.
228. ODonnell v. Harris Cty., 892 F.3d 147, 163 (5th Cir. 2018).