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Devil Take the Hindmost: Reform Considerations for States with a Constitutional Right to Bail

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**DEVIL TAKE THE HINDMOST:
REFORM CONSIDERATIONS FOR STATES WITH A
CONSTITUTIONAL RIGHT TO BAIL**

*Jordan Gross**

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I. INTRODUCTION

*In our society liberty is the norm, and detention prior to trial or
without trial is the carefully limited exception.¹*

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*In 2016, a total of 65% of [United States jail] inmates were awaiting court action on a current charge. . .*²

Bail administration in the United States was once characterized by a high degree of uniformity among jurisdictions. Today, bail administration is perhaps one of the most diverse criminal court procedures among states. Most original state constitutions contained two bail guarantees: the first, a prohibition against excessive bail, like that found in the Eighth Amendment to the United States Constitution; the second, a guarantee that “all persons shall be bailable by sufficient sureties,” except those charged with specific types of offenses. Historically, the exclusive function of bail was to secure the accused’s presence at trial, and an accused could secure conditional release pending trial if a third party—his surety—promised to take responsibility for producing the defendant for trial, or forfeit money or property if he didn’t. This type of conditional release—bail on “sufficient sureties”—was available to anyone charged with an offense not specifically designated as nonbailable. Nonbailable offenses in United States bail law were commonly limited to capital offenses. This meant most offenses were bailable. The right to be “bailable by sufficient sureties” for noncapital offenses is categorical—if an accused is charged with a bailable offense, the trial court must set bail, and it must release the accused if he meets bail. The right allows for no exceptions; an accused charged with a bailable offense cannot, for example, be detained pretrial without bail to prevent his flight or to protect the community. Today most states do not recognize a categorical right to bail by sufficient sureties for noncapital offenses.

Federal bail law developed on a separate track from state law. Unlike the original constitutions of most states, the United States Constitution contains no bailability provision. And the Supreme Court has rejected the notion that the Eighth Amendment’s excessive bail clause contains an implicit right to bail—the fact that excessive bail is prohibited, it has held, says nothing about whether there is a federal constitutional right to bail in the first place. Consequently, bailability in federal court is governed entirely by statute: initially by the Judiciary Act of 1789 and, since the mid-1960s, by the federal Bail Reform Act. Congress enacted the Bail

of 2018, for all his diligence and hard work as my research assistant during the early research phase of this project.

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

2. BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2016 SUMMARY (2018), https://www.bjs.gov/content/pub/pdf/ji16_sum.pdf [<https://perma.cc/KWM3-FWP3>].

Reform Act in 1966 and amended it in 1984. The 1966 Act was the product of a national bail reform conversation that highlighted the unfair impacts of money-bail on the indigent defendant. To address this concern, the 1966 Act heavily disfavored the use of money-bail and made no-money-bail the default condition of release in federal court. Congress amended the Bail Reform Act in 1984 as part of the Comprehensive Crime Control Act. The 1984 Act recognized an additional basis for pretrial detention in federal court, apart from securing the defendant's presence at future proceedings—protecting public safety (often referred to as “preventive detention”). Most states followed suit and abrogated their constitutional right to bail by sufficient sureties for noncapital offenses to allow for risk-based pretrial detention without bail for some noncapital offenses. Bail administration in these states generally has two primary features. One, preventive pretrial detention without bail is authorized for noncapital offenses based on an individualized showing that a defendant presents a risk of flight or a risk to the community. And two, money-bail is a release condition of last resort.

Money-bail, thus, has become a disfavored condition of release in federal court and in states with reformed bail administrations. But it continues to play two important functions in states that retain an absolute right to bail for noncapital offenses. First, in those states, the only basis for detaining an accused charged with aailable offense pretrial is the failure to meet bail. Therefore, the only avenue available for detaining dangerous, yetailable, defendants pretrial in those states is to set bail in an amount they cannot pay. This tactic, obviously, is completely ineffective in detaining wealthy defendants; but it works in most cases since most defendants in American state and local courts are poor. Two, where secured money-bail is routinely imposed, the bail bond industry becomes an integral part of bail administration, and that can save courts money. When a defendant seeks the services of a bondsman, the bondsman screens him to determine if he is bail-worthy; if he is, the bondsman, for a fee, will become the defendant's surety and accept responsibility for ensuring he appears at future court proceedings. This is a task for which the bondsman is highly motivated; if the defendant fails to appear, the bondsman stands to forfeit the collateral securing the bond. In this way, money-based bail administration can outsource some of the cost and burden of pretrial screening and supervision to the private sector.

“Every man for himself and the Devil take the hindmost” is an early 16th century proverb teaching “that those who lag behind will receive no

aid.”³ Even modest bail amounts may be out of reach for most defendants. Where commercial bail is available, the only way out of jail for those defendants is to pay a bondsman a fee to obtain a secured bail bond. This fee is non-refundable; it is not returned even if charges are dismissed or the defendant is acquitted. Many bondsmen will finance bond fees, which puts defendants in debt. On the other hand, defendants who remain in jail pretrial are more likely to plead guilty, and they are more likely to experience long-term financial and personal hardship. Under either scenario, the poor defendant falls further behind.

That secured money-bail penalizes poor defendants is hardly a recent discovery—it has been a topic of widespread discussion in the United States since the 1960s, and it is the driving force behind current bail reform efforts at the federal and state levels. As in earlier rounds of bail reform, much has been said recently about the pernicious effects of money-bail. There is little to add to this decades-long conversation that has not already been ably articulated by others. This article takes up a different question—in jurisdictions that continue to recognize an absolute right to bail for noncapital offenses and that routinely rely on secured money-bail as a condition of pretrial release, what are the risks and benefits of doing so in today’s legal and political climate? Although the themes of the current bail reform conversation have not changed much since the 1960s, the legal landscape has. Bail reform has taken different shapes in states that have moved away from money-based bail administration towards risk-based pretrial bail administration. Some of those states have completely overhauled their bail practices through constitutional amendments; some have voluntarily modified bail procedures through rule changes and legislation; and some have been forced to change their bail practices as a result of lawsuits. The most significant development in modern bail reform is courts’ increasing receptivity to claims that due process and equal protection guarantees are implicated when financial conditions of release result in the pretrial

3. Gary Martin, *The meaning and origin of the expression: The Devil take the hindmost*, PHRASE FINDER (2019), <http://www.phrases.org.uk/meanings/358400.html> [<https://perma.cc/D553-5Z7E>]. For an on-point application of the phrase in contemporary social commentary *See* Former Fla. Rep. Alan Grayson, *Devil Take the Hindmost*, HUFFINGTON POST (July 19, 2011, 7:50 PM), https://www.huffingtonpost.com/rep-alan-grayson/devil-take-the-hindmost_b_904042.html. [<https://perma.cc/C49S-HUWQ>] (“‘Let the Devil Take the Hindmost’ refers to a situation where the Devil is chasing us. Some of us . . . are able to run away from the Devil. And those others . . . they can’t run as fast. They’re the hindmost. They’re the ones that the Devil catches, and destroys The Devil in America today is poverty, unemployment, malnutrition, bigotry, selfishness, ignorance, disease and death.”).

detention of indigent defendants charged with minor, nonviolent offenses simply because they are unable to post bail.

Bail reform has been covered extensively in the popular media over the last several years. This coverage often includes calls to abolish money-bail in the United States and points to the federal court system and Washington D.C. as examples of successful no-money-bail systems. The current bail reform conversation, unfortunately, sometimes glosses over important details about modern bail administration. For one, there is no such thing as a truly no-money-bail jurisdiction in the United States—all state and federal bail administration laws authorize money-bail as a condition of release in some circumstances. Further, bail administration in the United States today is exceedingly jurisdiction specific. There is no standard approach among jurisdictions to pretrial release and detention practices, bailability, preventive detention, or the regulation of commercial bail bonding. As a result, there is no national consensus about who is bailable and why, what role for-profit sureties should play in bail administration, or even more fundamentally, what the purpose of bail even is. Finally, scant attention has been paid to the inextricable relationship between bailability and money-bail, or the legitimate and valid reasons a state might continue to embrace a categorical right to bail for noncapital offenses despite the well-publicized downsides of money-bail. On its own, money-bail is not the problem, and bail reform is not a “one size fits all” proposition. This Article submits that any meaningful discussion of bail reform at the state level must be jurisdiction-specific, and it must account for the practical, historical, and philosophical aspects of the state constitutional right to bailability.

Part II of this Article is an overview of the origins and history of English and American bail law. Part III describes the role and regulation of commercial bail bonding in the United States. Part IV traces the history and current state of bail reform in the United States. Part V considers legal and practical barriers to reform unique to right-to-bail states, particularly jurisdictions without the concentration and scale of resources to maintain the type of robust pretrial services programs that are the backbone of successful bail reform in large, urban jurisdictions. Moving away from money-bail in some jurisdictions may simply not be financially viable. But ignoring or perpetuating the undisputed negative impacts of money-bail may no longer be an option either, as courts become more willing to entertain constitutional challenges to bail practices that result in the routine pretrial detention of indigent defendants charged with low-level, non-violent offenses. This Article concludes that right-to-bail jurisdictions that rely on secured money-bail as a standard condition of

release, but that do not take steps to ameliorate the many hardships money-based bail administration visits on indigent defendants, may find themselves “hindmost” in today’s bail reform world, forced to play catch-up to a rapidly evolving jurisprudence and national sensibility.

II. HISTORY AND LAW OF BAIL ADMINISTRATION⁴

A. *Bail in England*

The American bail system traces its origins to the development of Anglo Saxon law in England over 1,000 years ago.⁵ The Anglo-Saxon penal system included the concepts of outlawry (declaring a wrongdoer outside the protection of the law and, therefore, subject to summary justice and execution), confiscation, and corporal and capital punishment.⁶ Relevant to the development of bail, wrongs once addressed by feuds came to be settled through a system of “bots”—making reparation to compensate grievances.⁷ Under this system, an accused charged with a

4. Scholars have written extensively on the history and evolution of bail in the English and American criminal justice systems. This section is not intended to be a comprehensive discussion of the history of bail; it is intended only to provide background for the main discussion in this article. For further history and information on the development of bail law and administration see RONALD GOLDFARB, *RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM* (1965); June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517 (1983); Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959 (1965); Caleb Foote, *The Coming of Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125 (1965); Timothy R. Schnacke, Michael R. Jones & Claire M. B. Brooker, *The History of Bail and Pretrial Release*, https://b3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf [<https://perma.cc/K4XY-EGHU>] (updated Sept. 24, 2010).

5. SCHNACKE, ET AL., *supra* note 4, at 1.

6. J. FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 57 (1883) (“The punishments appointed for [crimes known to Anglo-Saxon law] were either fines or corporal punishment, which was either death, mutilation, or, in some cases, flogging. Imprisonment is not . . . mentioned in the laws as a punishment, though it is referred to as a way of securing a person who could not give security.”); see also FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, Vol. I 26 (1895). (“Imprisonment occurs in the Anglo-Saxon laws only as a means of temporary security. . . . Before the Conquest, outlawry involved not only forfeiture of goods to the king, but liability to be killed with impunity.”).

7. STEPHEN, *supra* note 6, at 57 (“The *wer* was a price set upon a man according to his rank in life. If he was killed the *wer* was to be paid to his relations. . . . If he was outlawed his sureties (*borhs*) might have to pay his *wer*. *Bot* was compensation to a person injured by a crime.”); *Id.* at 59–60 (“[I]t should be remembered that in early times the really efficient check upon crimes of violence was the fear of private vengeance, which rapidly degenerated into private war, blood feuds, and anarchy. The institution of the *wer* itself implies this. . . . [I]t belongs properly to a period when the idea of public punishment for crimes had not yet become familiar; a period when a crime was still regarded to a great extent as an act of war[.]”); see also POLLOCK & MAITLAND, *supra* note 6, at 24 (“Personal injury is in the first place a cause of feud, of private war between the kindreds of the wrongdoer and of the person wronged. . . . But the feud may be appeased by the acceptance of a composition.

crime would be set free before trial, but only if a surety pledged both that the defendant would appear for trial, and that the “bot” would be satisfied if he were convicted.⁸ The pledge was the surety’s bond, or promise; bail was the amount that guaranteed the bond. Bail was equal to the amount of the “bot” (the reparation due the injured party). If the accused were found guilty or fled, the surety would be bound to pay the bot to the injured party.⁹ Thus, the original function of bail was to secure the defendant’s presence at trial and provide financial satisfaction to victims with meritorious claims in the event the wrongdoer absconded. Setting bail, therefore required assessing the likelihood that the victim would win at trial and the value of the victim’s claim.¹⁰ Not all accused defendants were bailable,¹¹ but those who were could secure their pretrial liberty by producing “sufficient sureties” with a bail amount “perfectly linked to the outcome of trial—money for money.”¹² This symmetry between the

Some kind of arbitration was probably resorted to from a very early time to fix the amount. The next stage is a scale of compensation fixed by custom or enactment for death or minor injuries, which may be graduated according to the rank of the person injured. . . . [T]his naturally leads to the kindred being first expected by public opinion and then required by public authority not to pursue the feud if the proper composition is forthcoming, except in a few extreme cases[.];” *Id.* at 26 (“*Wer* . . . is the value set on a man’s life, increasing with his rank. . . . *Bót* . . . is a more general word, including compensation of any kind.”).

8. See *State v. Brooks*, 604 N.W.2d 345, 349 (Minn. 2000), *as modified* (Mar. 15, 2000) (“Bail was an Anglo–Saxon invention designed to complement a monetary fine or ‘bot’ system, which was intended to guarantee both the appearance of an accused and payment of the ‘bot’ upon conviction. Bail developed when most of the punishments applicable to freemen were money fines.”) (citing *Carbone*, *supra* note 4, at 519–20).

9. *Brooks*, 604 N.W.2d at 349 (“The concept of bail surety evolved out of necessity when a shortage of traveling magistrates resulted in accused persons being jailed for lengthy periods before trial. The bail system and its reliance on personal surety emerged to prevent excessive pretrial detention. Personal surety referred to a reputable friend, relative, or neighbor into whose custody the accused would be released. This system allowed the accused to be released into the custody of the personal surety who would then be responsible for the accused’s appearance at trial. The bail amount was normally equal to the monetary penalty, so if the accused fled, he was presumed guilty and the personal surety became responsible for the monetary penalty.”) (citing DANIEL J. FREED & PATRICIA M. WALD, *BAIL IN THE UNITED STATES* 1–3 (1964); WAYNE H. THOMAS, JR., *BAIL REFORM IN AMERICA* 11 (1976); *Carbone*, *supra* note 4, at 520).

10. SCHNACKE, ET AL., *supra* note 4, at 2 (“Because the amount of the pledge was identical to the amount of the fine upon conviction, the system accounted for the seriousness of the crime and fulfilled the debt owed if the accused did not appear for trial.”).

11. POLLOCK & MAITLAND, *supra* note 6, at 48 (“Some of the gravest offences, especially against the king and his peace, are said to be *bótleás*, ‘bootless’; that is, the offender is not entitled to redeem himself at all, and is at the king’s mercy.”); see also STEPHEN, *supra* note 6, at 57–58 (“Speaking generally, all crimes were, on a first conviction, punishable by *wer*, *bot*, and *wite* [a fine paid to the king or other lord in respect of an offence] A certain number of cases were *bot*-less or inexecutable—and the punishment for them was death or mutilation on the first offence.”).

12. SCHNACKE, ET AL., *supra* note 4, at 2 n.6 (“If they fled, they were declared ‘outlaws,’ subject to immediate justice from whoever tracked them down. Apparently, however, certain offenses were considered to be ‘absolutely irreplevisable,’ requiring some form of prison to house the

amount of the “bot” and the amount required to secure the bond led one scholar to observe that “[t]he Anglo-Saxon bail process was perhaps the last entirely rational application of bail.”¹³

Anglo-Saxon law controlled in England from the sixth century until the Norman Conquest in 1066. Following the Norman invasion, wrongdoing previously considered a private matter instead became an affront to public peace for which the wrongdoer answered to the regional authority.¹⁴ Ultimately, disturbances to the peace became viewed as offenses against the Crown, a public criminal law concept that anchors the American criminal justice system today.¹⁵ Summary mutilations and executions, permitted under Anglo-Saxon law, were phased out, but the use of corporal punishment increased, which gave offenders an incentive to flee pretrial to avoid punishment.¹⁶ As penalties for wrongdoing changed, so did the idea that anyone was bondable, which led to recognition of non-bondable offenses.¹⁷ The principle of non-bondable offenses is reflected today in state constitutional bail provisions that exclude capital offenses from the absolute right to bail by sufficient sureties.¹⁸

offenders.”).

13. Carbone, *supra* note 4, at 520.

14. POLLOCK & MAITLAND, *supra* note 6, at 22 (“Preservation of the peace and punishment of offences were dealt with, in England as elsewhere, partly under the customary jurisdiction of the local courts, partly by the special authority of the king. In England that authority gradually superseded all others. All criminal offenses have long been said to be committed against the king’s peace[.]”).

15. POLLOCK & MAITLAND, *supra* note 6 at 24 (“In Anglo-Saxon as well as in other Germanic laws we find that the idea of wrong to a person or his kindred is still primary, and that of offence against the common weal secondary, even in the gravest cases. Only by degrees did the modern principles prevail, that the members of the commonwealth must be content with the remedies afforded them by law, and must not seek private vengeance, and that on the other hand public offences cannot be remitted or compounded by private bargain.”); POLLOCK & MAITLAND, *supra* note 6, at 24 (“The conception of an offence done to the State in its corporate person, or . . . as represented by the king” post-dated Anglo Saxon law).

16. *State v. Brooks*, 604 N.W.2d 345, 349 (Minn. 2000), *as modified* (Mar. 15, 2000) (“The Anglo-Saxon bail system changed when corporal punishment replaced the ‘bot’ system for most criminal offenses. Bail availability was increasingly restricted, in part because corporal punishment afforded an accused greater incentive to flee.”) (citing Carbone, *supra* note 4, at 521–22).

17. SCHNACKE, ET AL., *supra* note 4, at 2–3 (“The first to lose any right to bail . . . were persons accused of homicide, followed by persons accused of ‘forest offenses’ (i.e. violating the royal forests), and finally a catch-all discretionary category of persons accused ‘of any other *retto* [wrong] for which according to English custom he is not *replevisable* [bailable].”) (citing Carbone, *supra* note 4, at 523).

18. The first statute of Westminster foreshadowed the right to bailability by surety that was included in most states’ original constitutions. STEPHEN, *supra* note 6, at 234–35. It provided that “certain prisoners shall not be replevisable either ‘by the common writ or without writ;’ that others shall ‘be let out by sufficient surety[.]’” *Id.* Persons who were not bailable at that time included persons detained “for the death of man or by commandment of the king, or of his justices, or for the

Further developments in English bail law occurred in the twelfth and thirteenth centuries as the Crown began to exercise more centralized control over criminal processes. It did so, in part, to address corruption by local sheriffs, who were authorized to hold persons accused of crimes and to administer bail.¹⁹ English bail rights were developed and refined primarily in five foundational Anglo-American laws: the Magna Carta in 1215; the Statute of Westminster I in 1275; the Petition of Right in 1628; the Habeas Corpus Act of 1679; and the English Bill of Rights of 1689.²⁰ Following exposure of widespread abuse in the bail process, Parliament passed the first Statute of Westminster in 1275.²¹ The Statute “assembled and codified 51 existing laws—many originating from the Magna Carta.”²² One of the topics the Statute covered was bail. The Statute both departed from Anglo-Saxon law and reaffirmed it—it “departed from traditional Anglo-Saxon customs by establishing three criteria to govern bailability: (1) the nature of the offense (categorizing offenses that were and were notailable); (2) the probability of conviction . . . and (3) the

forest[;] . . . prisoners outlawed; men who had abjured the realm (and so admitted their guilt); approvers [an accomplice to a felony who confesses guilt and gives evidence against his confederates] (who had confessed); such as be taken with the manour” [also “manner”; apprehended with the stolen thing in one’s possession; caught in the act—see SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1818)]; “those which have broken the king’s prison; thieves openly defamed and known, and such as are appealed (accused) by approvers;” those “taken for felonious arsons; or for false money; or for counterfeiting the king’s seal; or persons excommunicate taken at the request of the bishop or for manifest offences; or for treason touching the king himself.” STEPHEN, *supra* note 6, at 234–35.

19. STEPHEN, *supra* note 6, at 234 (“The sheriff was the local representative of the Crown, and in particular he was the head of all the executive part of the administration of criminal justice. In that capacity he . . . arrested and imprisoned suspected persons, and, if he thought proper, admitted them to bail. The discretionary power of the sheriff was ill defined, and led to great abuses, which were dealt with by the Statute of Westminster the First . . . [of 1275]. This statute was for 550 years the main foundation of the law of bail.”).

20. Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 916–17 (2013).

21. See JOHNSON, *supra* note 18. See also *Statutes of Westminster* (1275, 1285, 1290), ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Statutes-of-Westminster> [<https://perma.cc/237P-4RPU>] (“Statutes of Westminster, three statutes important in medieval English history, issued in ‘parliaments’ held by Edward I at Westminster. Each comprised a miscellaneous series of clauses designed to amend or clarify extremely diverse aspects of the law, both civil and criminal.”).

22. Hegreness, *supra* note 20, at 918 (“While the Petition of Right reinforced the principle that a person could not be detained without being charged, the Habeas Corpus Act provided the right mechanism by which a person could obtain release when they were unlawfully detained forailable offenses. Although the procedure for habeas corpus was not codified until the Habeas Corpus Act, the essence of habeas corpus (which, in Latin, means ‘you shall have the body’) crystallized during the thirteenth century, contemporaneously with the codification of the right to bail in the Magna Carta and the Statute of Westminster I.”) (citing William F. Duker, *The English Origin of the Writ of Habeas Corpus: A Peculiar Path of Fame*, 53 N.Y.U. L. REV. 983, 992–96 (1978)).

criminal history of the accused, often referred to as [his] bad character or ‘ill fame[.]’”²³ At the same time, the Statute “rearticulated rather than abandoned the conclusion of the Anglo-Saxons that the bail process must mirror the outcome of the trial . . . each criterion . . . [reflects] a simple standard: the seriousness of the offense offset by the likelihood of acquittal.”²⁴ The Petition of Rights in 1628 established the principle that authorities could not detain a person without charges.²⁵

English law adopted additional reforms in the 1600s to address detention practices, which included long delays between a defendant’s arrest and the inquiry into his bailability. The Habeas Corpus Act of 1679 allowed a prisoner accused of any crime other than treason or an identified felony to seek a writ directing that he be promptly admitted to bail.²⁶ Other abuses addressed included the practice of setting bail in an amount that a detainee could not meet, which resulted in a *de facto* denial of bail. To address the issue of unpayable bail amounts, the English Bill of Rights of 1689 provided that “excessive bail ought not be required.”²⁷ This principle, of course, eventually made its way into the Eighth Amendment to the United States Constitution.²⁸

23. SCHNACKE, ET AL., *supra* note 4, at 3.

24. Carbone, *supra* note 4, at 526.

25. Hegreness, *supra* note 20, at 918 (“[T]he Petition of Right reinforced the principle that a person could not be detained without being charged, the Habeas Corpus Act provided the right mechanism by which a person could obtain release when they were unlawfully detained for bailable offenses.”).

26. STEPHENS, *supra* note 6, at 243 (The Act “provides that any person committed to prison ‘for any crime unless for treason or felony plainly expressed in the warrant of commitment,’ may obtain a writ of habeas corpus from the lord chancellor or any judge of the common-law courts. The writ being served on the gaoler, and certain conditions being complied with it as to expenses, a return must be made to the writ within three days. Upon the return, the judge is required to admit the prisoner to bail.”).

27. English Bill of Rights (1689) art. 10; Hegreness, *supra* note 20, at 919 (“After the Habeas Corpus Act was passed, only one great loophole remained: Officials could ‘requir[e] bail to a greater amount than the nature of the case demands.’ Such excessive bail was a *de facto* denial of bail for bailable offenses, violating the spirit, though not the letter, of the law. The English Bill of Rights closed this final loophole. Like the U.S. Bill of Rights that it inspired, the English Bill of Rights of 1689 forbade ‘excessive bail.’ The English Bill of Rights thus prevented *de facto* denials: when offenses are bailable, the amount set for bail cannot be ‘excessive.’”).

28. Hegreness, *supra* note 20, at 919.

B. *Bail in America*

1. Bailability under the Federal and State Constitutions

The bail laws of the individual states were, at one point, remarkably consistent; most original state constitutions²⁹ protected two distinct interests in bail. The first interest was a right to have bail set for most offenses. This guarantee appeared in the original constitutions of 41 states.³⁰ With minor variations in wording, they provided that all persons “shall beailable by sufficient sureties,” except for capital offenses³¹ or other serious offenses for which “the proof is evident or the presumption great.”³² In contrast, the federal Eighth Amendment does not contain an

29. Some states have amended or re-written their constitutions multiple times over the years. Mississippi, for example, rewrote its original constitution of 1817 in 1982, 1861, 1868, and 1890. Louisiana re-wrote its original constitution of 1812 in 1845, 1852, 1861, 1864, 1868, 1879, 1898, 1913, 1921, and 1974. Historical and contemporary versions of state constitutions can be accessed at: <http://www.stateconstitutions.umd.edu/Search/Search.aspx> [<https://perma.cc/DET2-ST3E>].

30. The nine states whose original constitutions contained no bailability provision are Georgia (GA. CONST. of 1777), Hawaii (HAW. CONST. of 1959), Maryland (MD. CONST. of 1776), Massachusetts (MASS. CONST. of 1780), New Hampshire (N.H. CONST. of 1784), New York (N.Y. CONST. of 1777), Virginia (VA. CONST. of 1776), West Virginia (W. VA. CONST. of 1863). North Carolina’s constitution of 1776 contained a bailability provision, (N.C. CONST. of 1776, art. 39) which was removed from its 1868 constitution. Its current constitution also does not contain a bailability provision. N.C. CONST. of 1971. This observation only covers state *constitutional* protections; states without constitutional bailability provisions often protected the right through statutory or common law. See Hegreness, *supra* note 20, at 916 (surveying state constitutional and statutory bail law and noting that of the nine states that did not include a bailability provision in their constitution, eight protected the right elsewhere by statute).

31. States’ designations of which offenses were, or are, capital offenses, of course, may vary. Generally speaking, states designated more offenses as capital offenses historically and not all crimes that carried a potential death penalty involved grievous harm to another person, as is the case under modern law. See Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 348–49 (1982) (“The scheme of classification of capital crimes in the colonial era is . . . too complex to support an inference that there was a widely accepted belief that all dangerous crimes were punished by the death penalty. Many dangerous crimes did carry the death penalty during the seventeenth and eighteenth centuries, but many did not. While the colonists of Massachusetts . . . defined as capital such dangerous crimes as murder, treason, and rape, the colonists also made capital several crimes that could not have posed a significant threat to society—children over sixteen cursing or smiting their natural parents . . . or a son over sixteen failing to ‘obey the voice of his father or his mother.’ Conversely, many crimes that must have posed a significant danger to a seventeenth century New England community, such as arson, burglary, and robbery, were absent from the colonists’ list of capital crimes.”).

32. Hegreness, *supra* note 20, at 916 (original constitutions of forty one states contained a “consensus right to bail—a reference to bailability by “sufficient sureties, except for capital offenses when the proof is evident or the presumption great[.]” and eight others protected the right by statute). See also Verrilli Jr. *supra* note 31, at 350. (The right to bail after 1789 also solidified through the vehicle of state constitutions. Specifically, although only two of the original colonies—North Carolina and Pennsylvania—retained a specific right to bail in their state constitutions, every state that joined the Union after 1789, excluding West Virginia and Hawaii, included a right to bail.). See also State

express right to bail; it does not mention bailability, nor sureties.³³ The second bail interest protected by state constitutions is a prohibition on excessive bail. With the exception of Illinois, all state constitutions mirror the federal Constitution and explicitly prohibit excessive bail.³⁴

Where bailability by sufficient sureties is guaranteed, a defendant charged with an offense that is not specifically designated as nonbailable is bailable as a matter of right. The only limitation on this right is the court's power to demand "sufficient sureties" to secure the defendant's appearance at future proceedings. Thus, a defendant charged with a bailable offense is entitled to pretrial release if the defendant produces "sufficient sureties."³⁵ A "sufficient surety" can be a condition of release with a financial component, such as a pledge of money or property as collateral subject to forfeiture if the defendant absconds. But it doesn't have to be—it can also be a non-financial bail condition, such as a promise to appear that is not backed by any monetary pledge or collateral.³⁶

v. Brooks, 604 N.W.2d 345, 350 (Minn. 2000), *as modified* (Mar. 15, 2000) ("Although the American colonies initially accepted many aspects of the English bail system, some eventually shied away from the Statute of Westminster's confusing categorization of who was bailable. Instead, these colonies redefined the right to bail. Pennsylvania, for example, adopted the Great Law of 1682, which provided that 'all Prisoners shall be Bailable by *Sufficient Sureties*, unless for capital Offenses, where the proof is evident or presumption great.' This language, which was ultimately incorporated into the Pennsylvania Constitution, became the model for almost every state constitution adopted after 1776. Consequently, approximately two-thirds of state constitutions . . . contain similar or identical language.") (citing Carbone, *supra* note 4, at 529–32).

33. Federal courts have, to date, uniformly rejected the argument that federal defendants charged with non-capital offenses have a right to bail. *See infra* note 92 and accompanying text. Some writers argue that it is an open question whether the omission of a bailability clause from the Eighth Amendment should be interpreted to mean there is no federal constitutional bailability right. *See, e.g.*, Hegreness, *supra* note 20, at 916 (the state constitutional backdrop of the federal Eighth Amendment shows there is a federal constitutional right to bail except in capital cases).

34. Hegreness, *supra* note 20, at 916.

35. *See, e.g.*, State v. Sutherland, 987 P.2d 501, 503–04 (Or. 1999) (en banc) (interpreting Oregon's constitutional provision that all "[o]ffences (sic), except murder, and treason, shall be bailable by sufficient sureties" to require the trial court to set bail in cases other than those involving murder or treason: "by using the mandatory 'shall,' the text of [Oregon's constitutional bailability provision], Article I, section 14, *requires* courts to set bail for defendants accused of crimes other than murder or treason. . . . under that provision [with the exception cases of murder or treason] . . . the defendant in a criminal case is entitled to be admitted to bail.") (internal quotation and citation omitted).

36. Burton v. Tomlinson, 527 P.2d 123, 126 (Or. App. 1974) ("The constitutional provision requires only that 'Offenses (sic) . . . shall be bailable by sufficient sureties.' Nowhere does it say that lawful release of a defendant may be accomplished only through the medium of sureties. Were this contention sound, release of a defendant on his own recognizance or by any other means would be constitutionally prohibited—an obvious absurdity."). *See also* Trujillo v. State, 483 S.W.3d 801, 806 (Ark. 2016) (rejecting the notion that "sufficient sureties" entitles a defendant bail by secured bond and prohibits cash-only bonds: "*Black's Law Dictionary* defines 'sufficient' as 'Adequate; of such quality, number, force, or value as is necessary for a given purpose.' 'Surety' as: 'A formal assurance;

2. Federal Constitutional Constraints on Bail

Bail and pretrial detention practices implicate the Eighth Amendment prohibition on excessive bail,³⁷ and federal due process guarantees.³⁸ Where an accused is indigent, equal protection may also be triggered.³⁹ Because the Eighth Amendment doesn't have a bailability provision, there is little federal constitutional jurisprudence on bailability. The Supreme Court addressed Eighth Amendment excessiveness in *Stack v. Boyle*,⁴⁰ decided in 1951. It has said relatively little on the matter since. *Stack* is a McCarthy-era case in which the federal government charged twelve defendants with conspiracy to violate the Smith Act.⁴¹ The twelve defendants initially had bail set in amounts ranging from \$2,500–\$100,000.⁴² One defendant, who was arrested outside the charging district, successfully moved to have his bail reduced to \$50,000 before his case was transferred to the charging district.⁴³ On the government's motion, the trial court subsequently set bail for each of the twelve defendants in the uniform amount of \$50,000.⁴⁴ The defendants then moved for a reduction in bail arguing that, in light of their individual financial resources, family ties, health, and criminal histories, their bail was excessive under the Eighth Amendment.⁴⁵ The district court denied the motion to reduce bail, and the defendants filed a petition for habeas corpus. This was also denied.⁴⁶ The defendants appealed to the Ninth

esp., a pledge, bond, guarantee, or security given for the fulfillment of an undertaking.' Here, applying the obvious and common meaning to the language in the constitution, 'sufficient sureties' is an adequate, formal assurance or guarantee for the stated purpose. In other words, an adequate guarantee to ensure the accused's presence at trial.").

37. The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required . . ." U.S. CONST. Amend. VIII.

38. In a federal prosecution, federal due process issues are cognizable under the Fifth Amendment and in a state prosecution, under the Fourteenth Amendment. *See* *United States v. Salerno*, 481 U.S. 739, 754–55 (1987) (Fourteenth Amendment requires that pretrial detention laws "serve a compelling governmental interest"; and that federal court proceedings comport with the due process clause of the Fifth Amendment). Federal due process in tribal court is guaranteed by federal statute and by the laws of individual tribes. *See* Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(8) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]").

39. *See infra* note 57 and accompanying text.

40. 342 U.S. 1.

41. *Id.* at 3. *See also* 18 U.S.C. §§ 371, 2385.

42. 342 U.S. at 3.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 3–4.

Circuit, which affirmed the district court. The Supreme Court granted certiorari.⁴⁷

The Supreme Court reversed the Ninth Circuit. The limited purpose of bail, the Court explained, is to assure the defendant's presence at trial. The district court's bail procedure was flawed, the Court held, because it ignored traditional standards⁴⁸ courts must consider to ensure that the amount of bail for each defendant is tailored to the purpose of bail.⁴⁹ Since the purpose of bail is limited to securing the defendant's presence at future proceedings, the Court concluded, bail set at a figure higher than an amount necessary to secure a defendant's presence is excessive.⁵⁰ The Court described \$50,000 as "unusually high," relative to the penalties faced by the defendants. But it did not hold the amount to be excessive. The flaw in the district court's ruling, the Court held, was that it lacked any factual basis to justify the amount as necessary to ensure each defendant's presence at trial.⁵¹ The issue in *Stack* was procedural—the Court held that pretrial detainees have a right to individualized bail determinations; it did not resolve whether a \$50,000 bail amount was excessive for any of the twelve defendants in that case.⁵²

47. *Id.*

48. *Id.* at 4 (citing the version of Fed. R. Crim. Pro. 46(c) in force at the time, which provided: "If the defendant is admitted to bail, the amount thereof shall be such as . . . will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."). The Court decided *Stack* before Congress enacted the Bail Reform Act of 1984, which, as discussed, recognized an additional purpose for bail—preventive pretrial detention of potentially dangerous defendants to protect public safety. *See infra* note 83 and accompanying text.

49. *Id.* at 5 ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure are to be applied in each case to each defendant. . . . [P]etitioners face imprisonment of not more than five years and a fine of not more than \$10,000. It is not denied that bail for each petitioner has been fixed in a sum much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action.").

50. *Id.* at 5 ("The modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purposes is 'excessive' under the Eighth Amendment.").

51. *Id.* at 5–6 ("Upon final judgment of conviction, petitioners face imprisonment of not more than five years and a fine of not more than \$10,000. It is not denied that bail for each petitioner has been fixed in a sum much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action in this case. The Government asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will, in obedience to a superior, flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act.").

52. Following the passage of the Bail Reform Act of 1984, the Court addressed the question of whether considerations other than a risk of flight, specifically future dangerousness, can inform a

Bail administration practices that burden a defendant's interest in pretrial liberty can raise due process concerns⁵³ under both the federal due process clause and under the laws of the states.⁵⁴ Every state has constitutional and statutory provisions relating to bail administration and procedure.⁵⁵ To the extent that they vary, these variations may create due process guarantees unique to different jurisdictions. Where indigents are affected differently by bail practices, equal protection guarantees may also be implicated.⁵⁶ The Supreme Court has invalidated facially neutral criminal laws that deprive a *convicted* defendant of liberty based on his indigence on equal protection grounds.⁵⁷ It is unclear whether these precedents extend to *pretrial* detention generally or to the practice of setting unpayable bail specifically.⁵⁸ It is also unclear what level of scrutiny—heightened or strict—applies in the bail administration context.⁵⁹

court's pretrial detention decision. *See infra* note 83 and accompanying text. However, the Court has provided scant guidance on substantive Eighth Amendment excessiveness. It has not addressed, for example, whether, as a constitutional matter, setting bail at an amount higher than a defendant can afford is permissible, or whether setting bail in any amount is excessive if there is no risk a defendant will flee.

53. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (invalidating Arizona constitutional bail provision denying bail to undocumented immigrants as violation of substantive due process).

54. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (internal citation omitted).

55. *See infra* notes 100–121, 123 and accompanying text.

56. *See infra* note 180 and accompanying text.

57. *See Tate v. Short*, 401 U.S. 395, 397–99 (1971) (invalidating 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 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).

58. *See WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE*, 4 CRIM. PROC. § 12.2(b) (4th ed.) (“notwithstanding the forceful argument by some commentators in support of the equal protection argument, the courts have not been inclined to accept the equal protection argument that bail is unconstitutional when set in an amount a particular indigent defendant cannot meet.”).

59. *Simpson v. Miller*, 387 P.3d 1270, 1276–77 (Ariz. 2017), *cert. denied Arizona v. Martinez*, 138 S. Ct. 146 (2017) (noting confusion over “the level of scrutiny courts should apply to mandatory detention laws” and concluding that bail restrictions are subject to heightened scrutiny, not strict scrutiny under Supreme Court precedent.); *see also Brangan v. Commonwealth*, 80 N.E.3d 949, 961 (Mass. 2017) (Although defendants are not constitutionally entitled to affordable bail, due process imposes “strict standards” when defendants are held on an unaffordable bail).

3. Bail Reform in the Federal Courts

a. Bail Reform Act of 1966 – Money-Bail Gets Sidelined

Because the United States Constitution contains no bailability provision, bail and detention decisions in federal court have long been governed by statute. The federal Judiciary Act of 1789 provided defendants charged with noncapital offenses a right to bail, and gave magistrates discretion to grant or deny bail to federal defendants charged with capital offenses.⁶⁰ Up until the 1960s, federal court bail administration looked much as it does today in states where secured money-bail bonds are routinely ordered as a condition of release—judges fixed bail amounts, and commercial money-bail bondsmen decided who got bail.⁶¹ Federal bail administration changed significantly under the leadership of United States Attorney General Robert Kennedy. In 1963, he instructed his United States Attorneys to request pretrial release on defendants' own recognizance wherever possible.⁶² He then convened the National Conference on Bail and Criminal Justice to bring participants in the criminal justice system together, specifically to discuss alternatives to money-bail.⁶³ The report and initiatives generated from this conference eventually led to passage of the federal Bail Reform Act of 1966.⁶⁴ This was the first time federal bail administration underwent major reform since Congress passed the Judiciary Act of 1789.

The main goal of the Bail Reform Act of 1966 was to address and ameliorate hardships to indigents caused by the use of money-bail in federal court.⁶⁵ The 1966 Act created an entirely new bail administration procedure aimed at preventing pretrial detention based solely on

60. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (codified at 18 U.S.C. § 3141 (1976)).

61. See *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J. concurring) (“The effect of . . . a system [based on secured money bail bonds] is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety – who in their judgment is a good risk. The bad risks, in the bondsmen’s judgment, and the ones who are unable to pay the bondsmen’s fees, remain in jail. The court [is] . . . relegated to the relatively unimportant chore of fixing the amount of bail.”).

62. SCHNACKE, ET AL., *supra* note 4, at 11 (citing National Conference on Bail and Criminal Justice, Proceedings and Interim Report (Washington D.C. Apr. 1965) at 297).

63. SCHNACKE, ET. AL., *supra* note 4, at 11.

64. Bail Reform Act of 1966, Pub. L. No. 89–465, 80 Stat. 214.

65. SCHNACKE, ET AL., *supra* note 4, at 12; Verrilli, Jr., *supra* note 31, at 330 n.13 (“The federal Bail Reform Act of 1966 . . . worked a significant change in th[e] process on the federal level. Under the money-bail system a severe hardship was inflicted on the indigent. Found to pose only a slight risk of flight, but without resources to meet even a modest bail, indigent defendants often languished in jail pending trial.”).

indigency.⁶⁶ The key features of the Act included a presumption that defendants were to be released pretrial on their own recognizance for noncapital offenses,⁶⁷ and a mandatory preference for release on non-monetary conditions and unsecured appearance bonds. Under the 1966 Act, a federal court could only require a cash deposit or a secured bond if it found non-financial conditions would not reasonably assure the defendant's future appearance.⁶⁸ The 1966 Act also created a hierarchy of conditions of release that disfavored the use of secured money-bail bonds.⁶⁹ Finally, the 1966 Act directed federal courts to consider the defendant's individual circumstances in evaluating what conditions of release were necessary to reasonably assure the defendant's future appearance. These considerations included the nature and circumstances of the crimes charged, the weight of the evidence against the defendant, the defendant's community and family ties, employment and financial information, character and mental condition, prior criminal history, and

66. See Bail Reform Act of 1966 § 2 (“The Purpose of the Act is to revise the practices related to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.”). Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1329–30 (2012) (“Federal bail remained relatively unchanged from the Judiciary Act of 1789 until 1966, when Congress passed the first bail reform act. The 1966 Bail Reform Act . . . was designed in large part to reduce the high bails imposed by judges to prevent release of certain defendants. The 1966 Bail Reform Act relied heavily on custodial supervision to ensure proper behavior, requiring judges to consider a variety of release conditions and release defendants under the most minimal release strictures possible.”).

67. Bail Reform Act of 1966, Pub. L. No. 89–465, 80 Stat. 214. Section 3 of the Act amended 18 U.S.C. § 3146(a) to read:

Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be order released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required.

Id.

68. *Id.* (“[w]hen [a determination is made that release on non-financial conditions will not reasonably assure the defendant's appearance] the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release . . . or, if no single condition gives that assurance, any combination of [five listed] . . . conditions[.]” The five conditions, in order, are: (1) release to a person or organization willing to supervise the defendant, (2) travel, association, or residence restrictions, (3) execution of an appearance bond, secured by a cash deposit with the court, not to exceed 10 percent of the bail amount, to be returned to the defendant upon performance of conditions of release, (4) execution of a secured bail bond, or deposit of a full cash bond, and (5) any other condition reasonably necessary to assure the defendant's appearance, including allowing for day or work release from custody.)

69. *Id.* (listing secured money bail bonds fourth, after refundable appearance bonds secured by a percentage of the bail amount and deposited directly with the court).

prior failures to appear.⁷⁰ In this way, the 1966 Act displaced the use of money-bail and established release on personal recognizance (no-money-bail) as the default pretrial release condition in federal court.⁷¹

b. Bail Reform Act of 1984 – Preventive Detention Authorized

Federal statutory bail reform in the 1960s focused entirely on flight risk—if a noncapital defendant were deemed likely to appear, the law would require his release. In focusing entirely on flight risk, Congress ignored the third rail of bail administration—preventive pretrial detention of noncapital defendants who may pose a risk of harm to the community while on pretrial release. Whether a court can lawfully detain a defendant pretrial who is merely *accused* of a crime based on a prediction of future dangerousness was an unresolved legal issue when Congress undertook federal bail reform in the 1960s. As noted, in money-based bail administration, an unauthorized, yet tacitly tolerated, practice to incapacitate bailable, yet potentially dangerous defendants is to set bail in an unpayable amount.⁷² This is one of the clearest examples of the misuse of money-bail in bail administration.⁷³ The courts, however, have never

70. *Id.* amending 18 U.S.C. § 3146(b).

71. Jurisdictions, like the federal courts and Washington D.C., are sometimes referred to as “no-money-bail” jurisdictions. This is inaccurate because all jurisdictions, including those, authorize money or property bail bonding, including secured money-bail bonds. In practice, however, not all jurisdictions authorize the trial court’s use of, and reliance on, money-bail to the same degree in bail administration. Thus, the pertinent question is the extent to which a jurisdiction’s laws disfavor, deprioritize, or discourage trial courts’ use of money or property bail bonds as a condition of pretrial release, and the extent to which it relegates secured money-bail to a position of last resort in its hierarchy of release conditions.

72. See John V. Ryan, *Last Days of Bail*, 58 J. OF CRIM. L. CRIMINOLOGY & POLICE SCI. 542, 548 (1967) (“Although it has never been proven, there have been repeated suggestions that the bail setter often sets bail with the intention of keeping a defendant in jail to protect society or a certain individual. That this manipulation of the bail system takes place is practically unprovable, since the bail setter has such wide discretion.”).

73. An-Li Herring, *States and Cities Take Steps to Reform ‘Dishonest’ Bail System*, NPR (December 17, 2016, 8:00 AM), <https://www.npr.org/2016/12/17/505852280/states-and-cities-take-steps-to-reform-dishonest-bail-system> [<https://perma.cc/Y8RW-DZRP>] (“It is common for judges to set bail based solely on the charges a defendant faces, without regard to the defendant’s criminal history or financial means. . . . [In 2014, New Mexico’s] high court prompted [a] reform effort with a ruling . . . that found that a defendant had been wrongly detained for more than two years on \$250,000 bail.”); Anne Kim, *Time to Abolish Cash Bail*, WASHINGTON MONTHLY, Jan.–Feb. 2017, <https://washingtonmonthly.com/magazine/januaryfebruary-2017/time-to-abolish-cash-bail/> [<https://perma.cc/T3JL-SMHG>] (“Under a system of cash bail, a defendant’s pretrial freedom is largely a function of his wealth—not about the risk of reoffending or failing to show up in court. Judges might set higher bail amounts for defendants they perceive as higher risk—on the theory that they won’t get out[.] . . . Indigent defendants who can’t afford even token amounts of bail stay

found that setting bail in an amount the defendant cannot afford in order to keep him locked up pending trial violates state or federal excessive bail prohibitions.⁷⁴

Congress took money-bail off the table in most federal cases with the 1966 Act by authorizing money-bail only as a last resort and prohibiting pretrial detention based on a defendant's inability to meet a financial condition of release. In some views, by doing this, Congress created a public safety gap because it left no authorized grounds for detaining dangerous, noncapital defendants pretrial.⁷⁵ In 1970, in response to concerns raised by the District of Columbia, which is governed by federal law, Congress amended the 1966 Act to permit courts in the District of Columbia to consider future dangerousness, along with risk of flight, in release and detention decisions in that jurisdiction.⁷⁶

The preventive pretrial detention debate continued at the federal level until Congress put it to rest with the Bail Reform Act of 1984,⁷⁷

trapped in jail as if they were high-risk suspects likely to commit new crimes or flee. Meanwhile, a murderer with money could be out on the streets.”)

74. LaFave, et al., *supra* note 58 (“[A]n impecunious person who pledges a small amount of collateral constituting all or almost all of his property is likely to have a stake at least as great as that of a wealthy person who pledges a large amount constituting a modest part of his property.’ But it is a substantial jump from that truism to the proposition that an amount of bail which a defendant cannot meet because of his poverty is thereby ‘excessive’ under the Eighth Amendment. Courts have refused to take that leap; they instead continue to adhere to the proposition that bail ‘is not excessive merely because the defendant is unable to pay it.’”) (citations omitted). *See also* Brangan v. Commonwealth, 80 N.E.3d 949, 954–60 (Mass. 2017) (court not required to set bail in amount defendant can afford if other relevant considerations weigh more heavily than the defendant’s ability to provide the necessary security for his appearance at trial; if defendant lacks financial resources to post bail, “such that his indigency likely will result in a long-term pretrial detention,” court must provide findings of fact and statement of reasons); *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988) (bail “is not constitutionally excessive merely because a defendant is financially unable to satisfy [it]”); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968) (“mere fact that petitioner may not have been able to pay the bail does not make it excessive.”); *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966) (“bail is not excessive merely because the defendant is unable to pay it.”); *State v. Pratt*, 166 A.3d 600 (Vt. 2017) (“Constitution does not require that a defendant have the ability to pay the required bail if it is otherwise reasonable”).

75. Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys’ Perspectives*, 32 PACE L. REV. 800, 813 (2012) (“Following the enactment of the 1966 Act, it became clear that the risk of flight alone was an inadequate ground on which to base the bail decision. [It was noted in the debates over the 1984 reforms] . . . that, since passage of the 1966 Act, the judiciary had adopted a de facto consideration of dangerousness ‘by denominating defendants as flight risks and setting a high bail’ . . . Thus, federal courts were taking matters into their own hands, effectively denying bail in cases where they deemed defendants to be dangerous by setting inordinately high bail, albeit on stated grounds of risk of flight.”) (citation omitted).

76. D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

77. Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3156 (1984).

which was part of the Comprehensive Crime Control Act of 1984.⁷⁸ The Bail Reform Act of 1984 continues to govern bail administration in federal court. The 1984 Act retained the 1966 Act's preference for pretrial release⁷⁹ of most federal defendants,⁸⁰ and for unsecured appearance bonds over secured bonds.⁸¹ The 1984 Act also specifically prohibited setting bail in an amount that results in the defendant's detention.⁸² For the first time in federal court, the 1984 Act explicitly authorized preventive pretrial detention without bail of noncapital defendants.⁸³ The 1984 Act authorized federal courts to consider future dangerousness in making detention decisions, and allowed detention of defendants without bail on a showing that release "will endanger the safety of any other person or the community."⁸⁴ The 1984 Act also created a rebuttable

78. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

79. The Act treats release of *convicted* defendants pending sentencing or appeal differently from release of defendants awaiting trial. *See* 18 U.S.C. § 3143 (release or detention pending sentencing or appeal).

80. 18 U.S.C. § 3142 requires the court to make a determination regarding each defendant's bail status and enter an order designating the defendant's custodial status under one of four categories: (1) released on personal recognizance or upon execution of an unsecured appearance bond; (2) released on a condition or combination of conditions; (3) temporarily detained to permit revocation of conditional release, deportation, or exclusion; or (4) detained. 18 U.S.C. § 3142(b) requires pretrial release on personal recognizance or an unsecured appearance bond unless release on these conditions will not reasonably assure the defendant's appearance, or will endanger community safety. 18 U.S.C. § 3142(c)(1)(B) requires imposition of the least restrictive condition or combination of conditions necessary to reasonably assure the defendant's appearance and community safety. *United States v. Karper*, 847 F. Supp. 2d 350, 354–55 (N.D.N.Y. 2011) ("[T]he general expectation of the Bail Reform Act is that a defendant shall be released on his own recognizance or unsecured bond. . .").

81. Although the Bail Reform Act of 1984 permits the use of secured bonds and property bonds, (*see* 18 U.S.C. § 3142(c)(B)(xi) & (xii) (release conditions may include execution of an agreement to forfeit property or money for a failure to appear or execution of a bail bond with "solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person")) the federal statutory scheme clearly favors release on personal recognizance or unsecured appearance bond. *See id.*

82. 18 U.S.C. § 3142(c)(2) (court may not impose any financial conditions of release that will result in the pretrial detention of a defendant). The Bail Reform Act of 1984 enumerates factors a court must consider in determining a defendant's eligibility for pretrial release: (1) the nature and circumstances of the offense (in particular whether it is a violent offense or involves narcotics); (2) the weight of the evidence; (3) the defendant's history and characteristics; and (4) the nature and seriousness of the danger that would be posed by the defendant's release. 18 U.S.C. § 3142(g). For a comprehensive discussion on the procedures and theories of pretrial release and detention, *see United States v. Ailemen*, 165 F.R.D. 571 (N. D. Cal. 1996).

83. Appleman, *supra* note 66 at 1329–30 ("The difficulties of successfully implementing the 1966 Bail Reform Act, such as setting the terms of release and ensuring that conditions were met, along with worries about the crimes committed by defendants out on conditional release, led to the passage of the 1984 Bail Reform Act.")

84. 18 U.S.C. § 3142(b), (f)(2)(B) (detention based wholly or in part on a determination of dangerousness must be supported by clear and convincing evidence).

presumption of detention for defendants charged with certain enumerated offenses, including some crimes of violence and some drug crimes.⁸⁵

The constitutionality of the 1984 Act was challenged shortly after it was enacted, and a circuit split subsequently developed on whether the 1984 Act's preventive detention provisions violate substantive due process or the Eighth Amendment.⁸⁶ The Supreme Court granted certiorari in *United States v. Salerno* to resolve the issue.⁸⁷ In *Salerno* the lower court had held the 1984 Act facially invalid, concluding that pretrial detention based on future dangerousness was “repugnant to the concept of substantive due process which . . . prohibits the total deprivation of liberty simply as a means of preventing future crimes.”⁸⁸ The Supreme Court disagreed, holding that the 1984 Act “fully comports with constitutional requirements.”⁸⁹

In *Salerno*, the Court established two principles that continue to shape federal bail law. First, it held that pretrial detention is regulatory, not punitive. As such, the Court held, pretrial detention “does not constitute punishment before trial in violation of the Due Process Clause.”⁹⁰ Second, it rejected the argument that the Eighth Amendment excessive bail prohibition contains an implicit right to bail. The fact that the Constitution prohibits excessive bail, the Court held, “says nothing about whether bail shall be available at all.”⁹¹ Rather, the Court read the

85. 18 U.S.C. § 3142(e) sets out three categories of criminal offenses that give rise to a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the defendant or community safety if the defendant is released. *Karper*, 847 F. Supp. 2d at 355 (“In cases involving crimes designated as violent, there is a rebuttable presumption that the defendant presents a danger to the community, . . . yet the burden of persuasion rests always with the Government.”) (citing *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001)).

86. Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 355 (1990) (“*Salerno* involved two constitutional issues: whether pretrial detention under the Bail Reform Act of 1984 violates the eighth amendment, and whether it violates the due process clauses of the fifth and fourteenth amendments. Succinctly stated, preventive detention poses one core constitutional question: whether the Constitution permits jailing presumptively innocent persons to prevent them from committing future crimes without any showing that the jailed persons are mentally imbalanced.”).

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

88. *United States v. Salerno*, 794 F.2d 64, 71–72 (2d Cir. 1986).

89. *Salerno*, 481 U.S. at 741.

90. *Id.* at 748. *See also*, *United States v. Ailemen*, 165 F.R.D. 571, 579–80 (N. D. Cal. 1996) (“The interest that *Salerno* identified consists of ‘preventing danger to the community’ (protecting society from dangerous persons). Interests that other courts have identified include assuring that the defendant will not flee before trial and preventing the defendant from jeopardizing the trial process through acts such as threats against witnesses.”) (citations omitted).

91. *Salerno*, 481 U.S. at 752–53. *Salerno* traced the origin of the Eighth Amendment to the English Bill of Rights Act which, the Court observed, “In England that clause has never thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.” *Id.* at 754 (quoting *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952)).

excessive bail clause to provide that *if* bail is imposed, it may not be excessive, not a guarantee that bail must be made available.⁹² “[L]iberty,” the Court said “is the norm” and “detention prior to trial or without trial is the carefully limited exception,” and it concluded that the Bail Reform Act’s pretrial detention provisions fell squarely within that carefully limited exception.⁹³ The Court expressed “no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.”⁹⁴ It has yet to address the issue it left open in *Salerno* – at what point does pretrial detention cease being regulatory and become punitive?⁹⁵

4. Preventive Pretrial Detention under State Law

In right to bail states, trial courts have wide discretion to set conditions of release for defendants charged with bailable offenses. But they may not refuse to set bail for those defendants, even in the interest of public safety.⁹⁶ In these jurisdictions, the defendant’s personal

The *Salerno* Court reasoned “that when Congress has mandated detention on the basis of a compelling interest other than prevention of flight . . . the Eighth Amendment does not require release on bail.” *Salerno*, 481 U.S. at 754–55. The petitioners in *Carlson*, the case *Salerno* quoted, it should be noted, were detained pursuant to immigration laws, which are administrative, not criminal laws. The language *Salerno* quoted from *Carlson*, thus, is dicta. Lower courts, however, understand the Court’s jurisprudence to permit pretrial detention without bail in criminal cases as long as detention is not imposed as punishment. *See, e.g.*, *United States v. Bundy*, No. 2:16-cr-00046-GMN-PAL, 2017 WL 3838032, at *8 (D. Nev. Sept. 1, 2017) (“[I]t is well settled that a defendant accused of committing a crime may be detained prior to a formal adjudication of guilt. . . . A defendant charged in a federal case who has had a bail hearing may be detained pending trial and subjected to ‘restrictions and conditions of the detention facility so long as those restrictions do not amount to punishment or otherwise violate the Constitution.’”) (citation omitted).

92. *Salerno*, 481 U.S. at 754–55 (Eighth Amendment does not grant absolute right to bail.). Some dispute whether the historical record supports *Salerno*’s reading of the Eighth Amendment bail clause because it was not supported by citation to precedent or history. At least one writer has argued that *Salerno* failed to take into account the prevailing understanding of bail when the Eighth Amendment was adopted. *See* Hegreiness, *supra* note 20, at 916–17. *See also* Verrilli, Jr., *supra* note 31, at 360 (written while the Bail Reform Act of 1984 was under discussion and which argues that the eighth amendment bail clause should be read to guarantee the right to bail and to disallow preventive detention).

93. *Salerno*, 481 U.S. at 755. *See* *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992). *See also* *United States v. Karper*, 847 F. Supp. 2d 350, 355 (N.D.N.Y. 2011) (“Risk of flight is not the exclusive basis for detaining an accused. The Bail Reform Act also instituted dangerousness as a basis for detention.”) (citing *United States v. LaFontaine*, 210 F.3d 125, 134 (2d Cir. 2000); *United States v. Jimenez*, No. 96-1705, 1996 U.S. App. LEXIS 37921 (2d Cir. Nov. 22, 1996).

94. *Salerno*, 481 U.S. at 747 n.4.

95. For an argument that contemporary pretrial detention practices often amount to punishment-like conditions that should trigger Sixth Amendment protections, *see* Appleman, *supra*, note 66.

96. The one exception to this categorical rule is a trial court’s ability to revoke bail for a

characteristics (such as her propensity for violence or the likelihood that she will flee), the type of offense she is charged with, and the strength of the state's evidence may be relevant to the type or amount of bail imposed, but they are irrelevant to whether she can be detained pretrial without bail.⁹⁷ Bailability for noncapital offenses in a right to bail state is a categorical proposition—a defendant charged with anything other than a capital offense is bailable. In contrast, a defendant charged with a capital offense is not necessarily nonbailable—that defendant can only be detained pretrial without bail on a showing that the proof of the crime with which she is charged is “evident” and the presumption that she committed it is “great.”⁹⁸

Although most state constitutions originally provided a right to bail for most offenses, most states now authorize preventive pretrial detention without bail in a wide range of cases if a defendant presents a risk of flight or danger to the community.⁹⁹ As of the drafting of this Article twenty-

defendant who violates conditions of release while free on bail. Although, technically, a defendant in a right to bail state could claim a continuing right to bailability following a revocation of bail, courts have interpreted bail revocation statutes to allow for pretrial detention without bail for defendants whose underlying bail has been revoked. LaFave, et al., *supra* note 58, at § 12.3(b) (“It is sometimes said that such conduct by the defendant constitutes a forfeiture of his previously-exercised right to bail, which doubtless is the proper conclusion in at least some circumstances.”) (citing *Shabazz v. State*, 440 So.2d 1200 (Ala.Crim.App. 1983) (although “the right to bail in a non-capital case” guaranteed by the state constitution is “absolute” and thus may not be denied by the state, it nonetheless possible that “an accused could forfeit his constitutional right to bail” by his affirmative conduct)).

97. LaFave, et al., *supra* note 58, at § 12.3(b) (“Just as it seems to be generally conceded that these right-to-bail provisions in the state constitutions foreclose denial of release to a defendant on the ground that no release conditions would suffice to ensure his appearance, it is likewise clear that they do not permit that broader variety of preventive detention authorized in the federal system—that is, detention based upon nothing more than a finding that a certain defendant charged with a serious offense would be dangerous to some other person or the community if released.”).

98. Right to bail provisions do not specify what the “presumption” relates to; courts and legislatures interpret it to mean a presumption that the defendant committed the crime charged. *See* Or. Rev. Stat. Ann. §135.240 (2)(a) (“When the defendant is charged with murder, aggravated murder or treason, release shall be denied when the proof is evident or the presumption strong *that the person is guilty*.”) (emphasis added); *State v. Arthur*, 390 So.2d 717, 720 (Fla. 1980) (“Simply to present the indictment or information is not sufficient. The state’s burden, in order to foreclose bail as a matter of right, is to present some further evidence which, viewed in the light most favorable to the state, would be legally sufficient to sustain a jury verdict of guilty.”).

99. By way of example, the Arizona Constitution, as enacted, provided: “All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.” ARIZ. CONST. of 1912, art. II, § 22ccc. It currently provides:

All persons charged with crime shall be bailable by sufficient sureties, except: 1. For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great. 2. For felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great

states, fewer than half, retain a constitutional right to bail by sufficient sureties for the vast majority of noncapital offenses. Alabama,¹⁰⁰ Alaska,¹⁰¹ Arkansas,¹⁰² Connecticut,¹⁰³ Delaware,¹⁰⁴ Idaho,¹⁰⁵ Indiana,¹⁰⁶

as to the present charge. 3. For felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge. 4. For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.

ARIZ. CONST. art. II, § 22. Further by way of example, the Constitution of Utah, as enacted, provided: "All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong." UTAH CONST. of 1895, art. I, § 8. It currently provides:

(1) All persons charged with a crime shall be bailable except: (a) persons charged with a capital offense when there is substantial evidence to support the charge; or (b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or (c) persons charged with a crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.

UTAH CONST. art. I, § 8.

100. ALA. CONST. of 1901, art. I, § 16 ("That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great[.]").

101. ALASKA CONST. art. I, § 11 ("In all criminal prosecutions, the accused shall have the right . . . to be released on bail, except for capital offenses when the proof is evident or the presumption great[.]").

102. ARK. CONST. art. II, § 8 ("All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.").

103. CONN. CONST. art. I, § 8 ("In all criminal prosecutions, the accused shall have a right . . . to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great[.]").

104. DEL. CONST. art. 1, § 12 ("All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is positive or the presumption great[.]").

105. IDAHO CONST. art. I, § 6 ("All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great.").

106. IND. CONST. art. I, § 17 ("Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong.").

Iowa,¹⁰⁷ Kansas,¹⁰⁸ Kentucky,¹⁰⁹ Maine,¹¹⁰ Minnesota,¹¹¹ Montana,¹¹² Nebraska,¹¹³ Nevada,¹¹⁴ North Dakota,¹¹⁵ Oregon,¹¹⁶, South Dakota,¹¹⁷ Tennessee,¹¹⁸ and Wyoming.¹¹⁹ In these states, defendants can be denied bail only for capital offenses, or other serious offenses, like murder, treason, or offenses punishable by life.¹²⁰ And, even then, bail can only

107. IOWA CONST. art. I, § 12 (“All persons shall, before conviction, be bailable, by sufficient sureties, except for capital offences where the proof is evident, or the presumption great.”).

108. KAN. CONST. B. of R. § 9 (“All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great.”).

109. KY. CONST. § 16 (“All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great[.]”).

110. ME. CONST. art. I, § 10 (“No person before conviction shall be bailable for any of the crimes which now are, or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be.”). Maine’s Supreme Court interprets this provision to provide for an absolute right to bail for non-expected offenses. *See Fredette v. State*, 428 A.2d 395, 405 (Me. 1981) (an “accused’s right to be admitted to bail [is] . . . absolute in regard to all but a few crimes, and as to these few, the right [is] . . . conditional, i.e., the right exists if there is absent “proof . . . evident or . . . presumption great”).

111. MINN. CONST. art. I, § 7 (“All persons before conviction shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.”).

112. MONT. CONST. art. II, § 21 (“All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.”).

113. NEB. CONST. art. I, § 9 (“All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great.”). Although Nebraska’s Constitution creates an exception to the right to bail for non-capital offenses other than murder or treason, it is included here as a constitutional right to bail state because in *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981) a federal court held the portion of this section denying bail to persons charged with certain sexual offenses is an unconstitutional violation of the Eighth Amendment to the Constitution of the United States. *But see* *Murphy v. Hunt*, 455 U.S. 478 (1982), vacating and remanding *Hunt v. Roth* for mootness.

114. NEV. CONST. art. I, § 7 (“All persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption great.”).

115. N.D. CONST. art. I, § 11 (“All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great.”).

116. OR. CONST. art. I, § 14 (“Offences [sic], except murder, and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident, or the presumption strong.”).

117. S.D. CONST. art. VI, § 8 (“All persons shall be bailable by sufficient sureties, except for capital offenses when proof is evident or presumption great.”).

118. TENN. CONST. art. I, § 15 (“That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great.”).

119. WYO. CONST. art. I, § 14 (“All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.”).

120. Rhode Island recognizes a right to bail similar to the states listed above, however, its constitution creates an exception for serious drug offenses as well, and it, therefore, is not counted here as a traditional right to bail state. *See* R.I. CONST. art. I, § 9 (“All persons imprisoned ought to be bailed by sufficient surety, unless for offenses punishable by imprisonment for life, or for offenses involving the use or threat or use of a dangerous weapon by one already convicted of such offense or

be denied only if the proof of the offense is “evident” or “positive” and the presumption that the defendant committed it is “great” or “strong.”

The critical point of departure in bail administration is whether a state recognizes an absolute constitutional right to bail for noncapital offenses or whether it authorizes pretrial detention of noncapital defendants without bail based on future dangerousness. Sometimes state statutes and rules make that line less than clear. In 2012, for example, two separate scholarly articles asserted that either forty-five or forty-six states and the District of Columbia authorize denial of pretrial release based on dangerousness.¹²¹ Included in that count were twelve states whose constitutions guarantee a right to bail by sufficient sureties in most noncapital cases – Connecticut, Delaware, Idaho, Indiana, Minnesota, Nebraska, Nevada, North Dakota, Oregon, Rhode Island, South Dakota, and Tennessee.¹²² It appears that these states were considered preventive

already convicted of an offense punishable by imprisonment for life, or for offenses involving the unlawful sale, distribution, manufacture, delivery, or possession with intent to manufacture, sell, distribute or deliver any controlled substance or by possession of a controlled substance punishable by imprisonment for ten (10) years or more, when the proof of guilt is evident or the presumption great.”). Rhode Island’s Supreme Court interprets this section to remove serious drug offenses from the category of bailable offenses based on the defendant’s potential dangerousness, which leaves an absolute right to bail intact for other offenses not specifically categorized as nonbailable. *Witt v. Moran*, 572 A.2d 261, 264 (R.I. 1990) (“no absolute right to bail exists in Rhode Island for defendants charged with the delivery of a controlled substance when the proof of guilt is evident or the presumption great[.]”).

121. See, e.g., Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 507–08 (2012) (stating that “[t]o date, forty-eight states and the District of Columbia have enacted laws permitting courts to either detain or conditionally release defendants determined to be dangerous” and asserting that “forty-six jurisdictions . . . allow pretrial detention of dangerous defendants”) and Appleman, *Justice in the Shadowlands*, *supra* note 66, at 1330 (“Most states have followed the path of the BRA, with forty-five states and the District of Columbia specifically permitting the determination of dangerousness as a predicate for denying pretrial release.”).

122. Baradaran and McIntyre list these states as among forty-six “allow[ing] pretrial detention of dangerous defendants.” *Supra*, note 121. The laws of these twelve states, however, do not authorize preventive pretrial detention without bail for bailable offenses. See *supra* notes 100–121. See also CONN. GEN. STAT. ANN. § 54-64(a) (specifying conditions of release for bailable offenses, taking into consideration risk of flight and dangerousness); DEL. CODE ANN. tit. 11, § 2105 (court must release on nonfinancial conditions for bailable offenses unless defendant presents risk of flight or dangerousness; in that event, court “shall permit the release of the defendant upon the furnishing of surety satisfactory to the court in an amount to be determined by the court.”); IDAHO CODE ANN. § 19-2903 (“Any person charged with a crime who is not released on his own recognizance is entitled to bail, as a matter of right, before a plea or verdict of guilty, except when the offense charged is punishable by death and the proof is evident or the presumption is great.”); IND. CODE ANN. § 35-33-8-4(a) (court must order “the amount in which a person charged by an indictment or information is to be held to bail” and making no allowance for denial of bail based on dangerousness); MINN. CONST. art. I, § 7 (“All persons before conviction shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.”) and MINN. ST. ANN. § 629.53; Minn. R. Crim. P. 6.02 (listing conditions of release; no provision for detention without bail for bailable offenses); NEB. REV. STAT. § 29-901.01 (court to consider what “condition or conditions of release

detention states because their statutory laws and rules either (1) permit trial courts to consider danger to the community in setting bail for bailable offenses, or (2) authorize pretrial detention without bail for defendants charged with capital offenses if they are determined to be dangerous. It is accurate that many right to bail states, by rule or statute, permit trial courts to consider potential danger to the community in setting conditions of release, including the amount of bail. But this does not mean that they authorize detention of defendants charged with bailable offense without bail based on a finding of future dangerousness. It means only that the trial court can take these factors into consideration in deciding what conditions of release are appropriate. Further, it is accurate that the states listed authorize preventive pretrial detention of capital defendants without bail if they are determined to be dangerous. This limited authority to detain a small segment of defendants for a narrow category of crimes such as capital offenses, murder, and treason, however, does not translate to a generalized power to deny pretrial release based on dangerousness for other defendants. All states that have capital crimes, in fact, authorize pretrial detention without bail of capital defendants under some circumstances. Thus, the power to potentially detain capital defendants or those charged with murder, treason, or crimes that carry a life sentence without bail is not a distinguishing feature in bail administration. The dividing line in bail administration is whether a jurisdiction recognizes an absolute right to bail for the majority of noncapital offenses, or whether it allows preventive pretrial detention without bail for a wide range of noncapital offenses. In identifying which side of that line a state falls on,

shall reasonably assure appearance and deter possible threats to the safety and maintenance of evidence or the safety of victims, witnesses, or other persons in the community”); NEV. R. STAT. ANN. § 178.484 (“Right to bail before conviction; exceptions; imposition of conditions; arrest for violation of condition. (l) Except as otherwise provided in this section, a person arrested for an offense other than murder of the first degree must be admitted to bail . . . (11) Before releasing a person arrested for any crime, the court may impose such reasonable conditions on the person as it deems necessary to protect the health, safety and welfare of the community and to ensure that the person will appear at all times and places ordered by the court[.]”); N.D. R. Crim. P. 46 (purpose of bail is to assure appearance defendant and listing release condition factors for bailable offenses); OR. REV. STAT. ANN. §135.240 (“When the defendant is charged with murder, aggravated murder or treason, release shall be denied when the proof is evident or the presumption strong that the person is guilty. When the defendant is charged with murder or aggravated murder and the proof is not evident nor the presumption strong that the defendant is guilty, the court shall determine the issue of release as provided [in the statute].”); 12 R.I. GEN. LAWS ANN. § 12-13-1 (“Every person who is held on any criminal process to answer to any indictment, information, or complaint against him or her shall be released upon giving recognizance with sufficient surety or sureties[.]”); S.D. CODIFIED LAWS § 23A-43-3 (conditions of release for bailable offenses if release without bail will not reasonably assure the appearance of the defendant); TENN. CODE ANN. §40-11-105 (“When the defendant has been arrested or held to answer for any bailable offense, the defendant is entitled to be admitted to bail[.]”).

a state's statutory law cannot be considered in isolation from its constitution.

III. BAIL BONDING AND THE ROLE AND REGULATION OF THE BONDSMAN

In common law England, under the *bot* system, a surety was typically a friend, employer or relative. The American innovation on bail by surety is the introduction of commercial sureties who charge the accused a non-refundable fee to post bail on his behalf.¹²³ This type of financial arrangement is outlawed in many nations. And it is explicitly legal in only one other country besides the United States—the Philippines.¹²⁴ The commercial bail bond industry in the United States originated in frontier America—San Francisco in the late 1800s where the “absence of close friends and extended family made it difficult to find people willing to put up bail money[.]”¹²⁵ Peter and Thomas McDonough, brothers who worked as bartenders in their father's saloon, started “putting up bail money as a favor to lawyers who drank [there]. . . . Once the lawyers' clients showed up for court, the brothers got their money back.”¹²⁶ The

123. See Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), <https://www.nytimes.com/2008/01/29/us/29bail.html> [<https://perma.cc/9GBK-A2RF>] (“‘It’s a very American invention,’ John Goldkamp, a professor of criminal justice at Temple University, said of the commercial bail bond system. ‘It’s really the only place in the criminal justice system where a liberty decision is governed by a profit-making businessman who will or will not take your business.’”).

124. Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry: How \$550 and a Five-day Class Gets You the Right to Stalk, Arrest, and Shoot People*, MOTHER JONES (May–June 2014), <https://www.motherjones.com/politics/2014/06/bail-bond-prison-industry/> [<https://perma.cc/QXH6-R4A5>] (“The potential for abuse is a major reason why commercial bail never caught on worldwide. The only other country that allows someone to make a profit off bail is the Philippines. In Canada, selling bail bonds can earn you two years in prison on a charge equivalent to bribing a juror. In Australia, a government commission rejected the idea of introducing commercial bail in part because ‘it lends itself to abuses such as collusive ties between bondsmen and organized crime or police, lawyers, and court officials.’”); Liptak, *supra* note 123 (“[P]osting bail for people accused of crimes in exchange for a fee, is all but unknown in the rest of the world. In England, Canada and other countries, agreeing to pay a defendant’s bond in exchange for money is a crime akin to witness tampering or bribing a juror — a form of obstruction of justice”); *Id.* (“The rest of the world considers the American system a warning of how not to set up a pretrial release system, F. E. Devine wrote in *Commercial Bail Bonding*, a 1991 book that remains the only comprehensive international survey of the subject. He said that courts in Australia, India and South Africa had disciplined lawyers for professional misconduct for setting up commercial bail arrangements.”).

125. Bauer, *supra* note 124; Liptak, *supra* note 123 (“America’s open frontier and entrepreneurial spirit injected an innovation into the process: by the early 1800s, private businesses were allowed to post bail in exchange for payments from the defendants and the promise that they would hunt down the defendants and return them if they failed to appear.”).

126. Bauer, *supra* note 124.

brothers eventually started charging a fee for this service, and so began the commercial bail bond business in the United States¹²⁷ By the 1940s, commercial bail bonds had become an established part of the American criminal justice system.¹²⁸ As of the drafting of this article, commercial, for-profit bail bonding is legal in all but four states—Illinois, Kentucky, Oregon, and Wisconsin.¹²⁹

Where commercial bail bonding is available, a defendant who does not have access to sufficient resources to post bail in cash can seek help from a bondsman, also known as a bail agent.¹³⁰ Although a defendant may be entitled to have a court set bail in right to bail states, he is not entitled to the bondsman's services—defendants deemed a risk by a bondsman can be turned down. In jurisdictions that authorize money-bail as a standard condition of pretrial release, secured money-bail is more heavily employed than other condition of release, including release on the defendant's personal or own recognizance.¹³¹ Thus, where used, secured money-bail can often become the default release mechanism, and setting the amount of bail then becomes the focus of pretrial detention decisions.

“Bail” and “bond” are distinct concepts that are sometimes conflated or confused. Legally, “bail” describes a “situation in which one holds something or someone for another.”¹³² In popular usage, it “has come to connote the process of getting out” of jail.¹³³ Unless a defendant is not

127. The company was called McDonough Bros. It was described by a contemporaneous news account as the “most notorious business house in San Francisco” and became known as the “Old Lady of Kearny Street.” Bauer, *supra* note 124. “The Old Lady ‘furnished bail by the gross to bookmakers and prostitutes, kept a taxi waiting at the door to whisk them out of jail and back to work.’”

128. Bauer, *supra* note 124.

129. See Cliff Collins, *The Question of Commercial Bail: Bail Industry Wants Oregon to Return to a System It Once Rejected*, 75 OR. ST. B. BULL. 17 (2014) (noting that forty-six states still use a commercial bail system) (citing Oregon Laws 1973 c.836 § 146); KY. REV. STAT. ANN. § 431.510(1) (“It shall be unlawful for any person to engage in the business of bail bondsman . . . or to otherwise for compensation or other consideration: (a) Furnish bail or funds or property to serve as bail; or (b) Make bonds or enter into undertakings as surety; for the appearance of persons charged with any criminal offense or violation of law or ordinance punishable by fine, imprisonment or death[.]); WIS. STAT. ANN. § 969.12 (“No surety under this chapter may be compensated for acting as such a surety.”); 725 ILL. COMP. STAT. 5/110-7 (providing that bail is to be deposited, in a percentage or the full amount, directly with the clerk of court).

130. Typically, a bondsman charges a defendant a non-refundable 10 percent fee and the surety charges the bondsman 10 percent of that—so “for every \$1,000 bond, the bondsman gets \$100 and gives \$10 to the surety.” Bauer, *supra* note 124.

131. Brian R. Johnson & Ruth S. Stevens, *The Regulation and Control of Bail Recovery Agents: An Exploratory Study*, 38(2) CRIM. JUST. REV. 190 (2013) (citing Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts*, BUREAU OF JUST. STAT. SPECIAL REP. (2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/A5A3-2P3D>]).

132. GOLDFARB, *supra* note 4, at 6.

133. GOLDFARB, *supra* note 4, at 6.

bailable, following arrest, a court sets the conditions of her pretrial release. Conditions of release may have non-monetary and monetary components. Universal non-financial conditions of release include requiring the defendant to promise to appear when ordered to do so by a court with jurisdiction over her and to not commit offenses while on release. In modern bail administration, other non-monetary pretrial release conditions may include submitting to electronic monitoring, alcohol or drug testing, abiding by orders of protection, or attending counseling.

A “bond” is a promise to appear (or to procure the defendant’s appearance) at future court hearings. A bond can be either secured or unsecured. An unsecured bond is one that is backed by the defendant’s written promise alone to appear in court or pay the bail amount if he doesn’t (also called a “personal bond” or “unsecured appearance bond”). A defendant whose pretrial release is not conditioned on posting money or property as security is released on her “own recognizance” (also “personal recognizance”)—i.e. her own promise to appear unsecured by any collateral. A secured bond is one that is backed by the deposit or encumbrance of money or property with the court, or backed by a third party promise to pay the bail amount should the defendant fail to appear. Many jurisdictions have published bail schedules that set fixed bail amounts for specific offenses. Some jurisdictions authorize detention facilities or law enforcement officers to release defendants who post bail in the amount listed on the bail schedule without having to first appear before a judicial officer.

There are several types of secured money-bail bonds, including cash bonds, deposit bonds, and property bonds. Cash bonds (also called “all-cash bonds”) are secured by depositing the full amount of bail with the court. An important point of departure among jurisdictions that recognize a right to bail by sufficient sureties is whether a trial court can require a defendant to post the entire amount of his bail in cash (“cash only” bail), or whether a defendant must be given the opportunity to finance a secured bail bond through a commercial bondsman. This issue goes deep to the heart of a state’s bail administration philosophy. State courts that permit “cash only” bail do so on the ground that the purpose of bail is to ensure the defendant’s presence at trial, and that the right to bail does not include a right to access release on less than the full amount of bail in cash by means of a secured bail bond.¹³⁴ State courts that prohibit “cash only” bail

134. See *Saunders v. Hornecker*, 344 P.3d 771, 778 (Wyo. 2015) (“cash only” bond constitutionally permissible because purpose of bail in Wyoming is to ensure defendant’s presence to answer the charges without excessively restricting his liberty pending trial; noting split in other states “regarding the definition of ‘sufficient sureties.’”); *Trujillo v. State*, 483 S.W.3d 801, 805–06 (Ark.

identify the purpose of bail as protecting the defendant's pretrial liberty interest, and hold that denying him the ability to secure his pretrial release by use of a surety runs contrary to that constitutional policy.¹³⁵

Property bonds are secured by encumbering real or personal property. A property bond gives the court a lien on property in the amount of bail. Deposit bonds require deposit of just a percentage of the bail amount directly with the court, with the full bail amount due should by the defendant fail to appear. If a court orders a secured money-bail bond and a defendant does not have enough cash or property to put up as collateral to meet bail, the defendant must find someone else who will promise to pay the court the full amount of bail if the defendant fails to appear. In the bail context, this third party guarantor is a "surety" who agrees to finance or secure a bail bond on behalf of the defendant, and the defendant is the surety's principal.¹³⁶

A surety bond is the guarantor's promise to the court to produce the principal or meet the principal's financial obligation to the court if the principal fails to meet the court's conditions of release.¹³⁷ The surety for a bail bond can be someone with a personal connection to the defendant, such as a friend, employer, or relative. It can also be a nonprofit organization. In most states, the surety can also be a commercial for-profit

2016) (purpose of bail is to ensure presence of defendant); *Ex parte Singleton*, 902 So. 2d 132 (Ala. Crim. App. 2004) (cash-only bail does not violate state constitution); *Fragoso v. Fell*, 111 P.3d 1027 (Ariz. Ct. App. 2005) (same); *Fullerton v. County Court*, 124 P.3d 866 (Colo. App. 2005) (same); *State v. Briggs*, 666 N.W.2d 573 (Iowa 2003) (same); *State v. Jackson*, 384 S.W.3d 208 (Mo. 2012) (same); *State v. Gutierrez*, 140 P.3d 1106 (N.M. Ct. App. 2006) (same).

135. See *State v. Barton*, 331 P.3d 50, 59 (Wash. 2014) (purpose of bail is to protect the accused; state constitution guarantees those accused of bailable offenses the right to access bail by sufficient sureties); *State v. Golden*, 546 So. 2d 501, 503 (La. Ct. App. 1989) (cash-only bail violates state constitution); *State v. Brooks*, 604 N.W.2d 345, 352 (Minn. 2000) (state constitutional right to bail by "sufficient sureties . . . is unambiguous and . . . prohibits cash only bail"); *Lewis Bail Bond Co. v. General Sessions Court of Madison Cnty.*, No. C-97-62, 1997 WL 711137 (Tenn. Ct. App. Nov. 12, 1997) (cash only bail unconstitutional under state constitution); *Smith v. Leis*, 835 N.E.2d 5 (Ohio 2005); *State v. Hance*, 910 A.2d 874, 875 (Vt. 2006) (cash only bail violates state constitutional right to be "bailable by sufficient sureties;" option of bail bond or deposit of cash in lieu thereof belongs to defendant).

136. A "surety" can be both a "[a] person who is primarily liable for paying another's debt or performing another's obligation" and "[a] formal assurance; esp[ecially] a pledge, bond, guarantee, or security given for the fulfillment of an undertaking." *Black's Law Dictionary* (2000 ed.).

137. See *Saunders*, 344 P.3d at 778 ("One who is bound with and for another who is primarily liable, and who is called the principal; one who enters into a bond or recognizance to answer for the appearance of another in court, or for his payment of a debt, or for the performance of some act, and who, in case of the failure of the principal, is liable to pay the debt and damages; a bondsman, a bail . . . other definitions of 'surety' . . . [can] include . . . '[s]ecurity against loss or damage; security for payment or for the performance of some act.'") (*citing surety* AM. ENCYCLOPAEDIC DICTIONARY (1895); *surety* CENTURY DICTIONARY (1895); and *surety*, WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (1895)).

entity, a business that provides surety bail bonds in exchange for a fee. In jurisdictions that permit commercial bail bonding,¹³⁸ the surety is typically an insurance company acting through an agent, typically a bail bondsman. If a bail bondsman determines the defendant is bail-worthy, the bondsman provides the court a secured bail bond, which represents a commitment to ensure the defendant's presence at future hearings and to pay the defendant's bail should the defendant fail to appear. In return for this service, the bondsman charges the defendant a nonrefundable fee and requires the defendant to sign a contract, which often includes promises to submit to conditions in addition to those imposed by the court. If the defendant violates the terms of his contract with the bondsman, in most jurisdictions the bondsman, or the bondsman's agent, can apprehend the defendant and deliver him to jail.

Bail bondsmen typically are not the actual surety (or guarantor) of a bail bond. Rather, bondsmen usually obtain policies from large insurance companies¹³⁹ to cover losses occasioned by defendants who abscond.¹⁴⁰ Where this is the arrangement, the bondsman is acting as an agent for the surety, not as the surety itself.¹⁴¹ The insurance company makes money by charging the bondsman a percentage of the bond fees the bondsman collects from defendants.¹⁴² If the defendant fails to appear and fails to pay his bail, and the bondsman does not pay the defendant's bail, the court can look to the surety company for payment.¹⁴³

138. Four states prohibit commercial bail bonding. *See* Collins, *supra* note 129.

139. An example of a large insurance company that specializes in cash bail is Crum & Forster Insurance, a subsidiary of a Toronto-based international conglomerate, Fairfax Financial Holdings Limited. *See* Kim, *supra* note 73.

140. *Id.* ("Bail is similar to homeowners' or auto insurance, [if] . . . the judge sets your bail at \$10,000 . . . in most states, you would pay 10 percent to 15 percent of that bond amount as a premium. In return, the bond agent is guaranteeing the court that should you fail to appear and the bail agent failed to produce you, they would pay the court that \$10,000. . . [T]he 'premiums' paid by defendants cover the fees that bail agents themselves pay to large insurance companies to guarantee payment on a bail bond. If somebody jumps bail, a bondsman calls on his insurer . . . [b]ondsmen are essentially brokers for these bigger firms.").

141. *Id.* ("The website of the Professional Bail Agents of the United States includes a page titled 'How to Become a Bail Agent.' Half of the text is about choosing an insurance company to back your bail bonds. . . .").

142. *Id.* ("The profit a bondsman makes is the difference between the premiums charged to a defendant and the premiums the bondsman has to pay the insurance company. That gives bondsmen an incentive to ensure that their clients show up in court: forfeiting a bond would have the same effect on their insurance as totaling a car. . . . But the biggest 'risk' bondsmen seem to assess is whether defendants can pay their premiums.").

143. State laws typically require notice to the surety and bond agent of the forfeiture and provide for a grace period to produce the defendant or provide a legitimate reason (often designated by statute) why the defendant cannot be brought before the court. *See, e.g.,* GA. CODE ANN. § 17-6-70 (West 2019). For a collection of state bail forfeiture laws, current as of 2013, *see* *Bail Forfeiture Procedures*,

Commercial bail bondsmen make a profit by collecting a non-refundable fee in exchange for providing a bond to secure the defendant's release. The amount of the fee may or may not be regulated by the state, and it is typically 10% of the bail amount.¹⁴⁴ The fee is not returned even if the defendant is acquitted or the charges against her are dropped. Some bond agents may offer defendants an opportunity to finance bail, called a "credit bond," a practice that does not appear to be regulated in many jurisdictions.¹⁴⁵ Although bail agents may function as creditors, they have far more leeway in collecting debt than other creditors, including the power to impose restrictions on a defendant's movements and the power to arrest defendants.¹⁴⁶

The bail bond market is lucrative and the industry is organized. According to one source, at least 32 surety companies underwrite bail in the United States, and they collectively underwrote approximately \$14

NAT'L CONF. OF ST. LEGIS. (June 28, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/bail-forfeiture-procedures.aspx> [<https://perma.cc/VGX4-UWF7>] (note that this source was last updated in 2013 and may be outdated). *See also* FED. R. CRIM. P. 46(e) ("[i]f there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.").

144. *See* Kim, *supra* note 73 ("[S]ome states, like Maryland, cap premiums at a fixed percentage, other states also set a *minimum* amount, eliminating room for price competition. In Virginia, for example, state law requires that bail bondsmen 'shall not charge a bail bond premium less than 10 percent or more than 15 percent of the amount of the bond.' Some states have also passed laws requiring judges to set money bail for certain kinds of offenses, such as domestic violence, thereby foreclosing judges from other options, such as release on personal recognizance.").

145. Lysée Mitri, *Bail Bond Assoc., Lawmakers Sue Supreme Court for Pre-detention Rules*, KRQE (July 28, 2017, 10:16 PM), <http://krqe.com/2017/07/28/bail-bond-assoc-lawmakers-sue-supreme-court-for-pre-detention-rules/> [<https://perma.cc/V9BF-S55X>] ("A credit bond allows a defendant to pay a large amount owed to the bonding company in small weekly installments, a practice the local criminal court judges have sought to more tightly regulate. When a judge issues a bond for a defendant awaiting trial, that defendant has two options — either pay the full amount to the criminal court and then get it back after showing up for trial; or, if the defendant can't come up with the full bond amount, he or she can pay 10 percent of that amount to a bonding company, who will then be responsible for paying the bond in full if the defendant fails to show up to court. Credit bonds are an increasingly common way of doing business, particularly since it gives one bonding company a competitive edge over another in the eyes of a client, and because bond amounts continue to rise across the country.").

146. Jessica Silver-Greenberg and Shaila Dewan, *When Bail Feels Less Like Freedom, More Like Extortion*, N.Y. TIMES, (Mar. 31, 2018), <https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html> [<https://perma.cc/F7MH-Q3DS>] ("bond agents have become the payday lenders of the criminal justice world . . . When clients . . . cannot afford to pay the bond company's fee to get them out, bond agents simply loan them the money, allowing them to go on a payment plan. But bondsmen have extraordinary powers that most lenders do not. . . . [S]ome states give them broad latitude to arrest their clients for any reason — or none at all. A credit card company cannot jail someone for missing a payment. A bondsman, in many instances, can. Using that leverage, bond agents can charge steep fees, some of which are illegal, with impunity[.] . . . They can also go far beyond the demands of other creditors by requiring their clients to check in regularly, keep a curfew, allow searches of their car or home at any time, and open their medical, Social Security and phone records to inspection.").

billion worth of bail bonds in 2012.¹⁴⁷ Unlike other forms of insurance, bail surety is virtually a no-risk business—“[p]roperty and auto insurance companies typically pay out 40 to 60 percent of their revenue in losses . . . the financial records of [the] 32 surety companies [referenced above] . . . cumulatively paid less than 1 percent in bail losses.”¹⁴⁸ It is this intersection of insurance regulation and criminal justice, and the nature of the commercial surety market that distinguishes bail administration in the United States from pretrial release and detention practices in the rest of the world.

To the extent states monitor the bail bond industry at all, primary responsibility for regulating and supervising the commercial bail bond industry typically falls to a state’s insurance commissioner, not the courts or any arm of the criminal justice system.¹⁴⁹ The qualifications required to become a bail bondsman (also called commercial bond agent) vary among states. A commercial money-bail system may include private “bail recovery agents” (also called bail enforcement agents, bounty hunters, runners, solicitors, surety recovery agents, or bail bond enforcers) who are in the business of attempting to locate and recover absconded defendants for bail bond agencies.¹⁵⁰ This is an under-examined¹⁵¹ and often loosely-

147. See Kim, *supra* note 73 (“No one really knows how big the commercial bail bond industry is in the United States. Some of the nation’s largest bail bond insurers are either foreign owned, such as Crum & Forster, or privately held, such as the American Surety Company, whose president is also chairman of the American Bail Coalition. A 2012 study by the Justice Policy Institute estimated that the industry writes roughly \$14 billion in bail bonds per year, and the Professional Bail Agents of the United States says that there are about 14,000 bail agents nationwide.”).

148. Bauer, *supra* note 124. See also Silver-Greenberg & Dewan, *supra* note 146 (“The system . . . has worked well for the industry, even attracting private equity investors. Mom-and-pop bail companies are backed by large surety companies, which guarantee the full amount of the bond in exchange for a portion of the premium. Together, the surety companies and the bail bond agents collect about \$2 billion a year in revenue. . . . While most insurance companies expect losses of up to 50 percent, one surety company, Continental Heritage of Florida, had no losses in its bail division for almost two decades. And an industry giant, AIA Bail Bond Insurance Company, said it underwrote more than \$800 billion in bonds in 2016. Its losses: zero.”).

149. Silver-Greenberg & Dewan, *supra* note 146 (“Bond companies fall into a sort of regulatory gulf between criminal courts and state insurance departments, which are supposed to regulate them but seldom impose sanctions. With rare exception, defense lawyers and prosecutors are too busy with their caseloads to keep bond companies in line. Further complicating things, it is often unclear whether consumer protection laws apply, and insurance departments say they lack the resources to investigate complaints.”).

150. Johnson & Stevens, *supra* note 131, at 195.

151. Appleman, *supra* note 66, at 1308–09 (“[F]inancial liability [for bail forfeiture] has led to many bondsmen employing recovery agents, usually known as bounty hunters, to ensure that . . . indicted defendants appear for their court dates. The last time the Supreme Court addressed the role of bounty hunters and bondsmen—one hundred and fifty years ago—it acknowledged the historical common law privileges of both bondsmen and bounty hunters, holding that the right to apprehend a fleeing defendant originates from the contract relationship between bondsmen and their clients.

regulated practice.¹⁵² Some commercial bail jurisdictions authorize licensed bail agents who write bonds to also apprehend defendants who abscond, but prohibit independent bail recovery agents.¹⁵³ Some jurisdictions that permit bail recovery agents to operate require them to be licensed,¹⁵⁴ others regulate the practice, but don't require a license.¹⁵⁵ Some states do not regulate bail recovery agents at all.¹⁵⁶

IV. CONTEMPORARY BAIL REFORM - DÉJÀ VU ALL OVER AGAIN. SORT OF.

The 1960s saw a national effort to reform the bail system in the United States. In 1961, Louis Schweitzer and Herbert Sturz founded the Vera Institute of Justice to bring attention to the large number of defendants who were being detained pretrial because they could not afford money-bail.¹⁵⁷ The Vera Institute created the Manhattan Bail Project, which assessed the risk that pretrial defendants would fail to appear at future hearings in the absence of money-bail bonds. Based on interviews

Despite vast changes in both criminal law and procedure, however, the Court has not addressed the topic since.”).

152. Johnson & Stevens, *supra* note 131, at 191 (“Currently, some states are engaged in a variety of legislative activities related to the licensing and regulation of bounty hunters. . . . In contrast, other states are eliminating or vetoing bail recovery legislation. For example, California, which had first enacted legislation requiring the certification and training of bounty hunters in 1999, allowed the provisions to lapse in 2010 through the operation of a sunset clause. As a result, there are currently no established standards for bounty hunters in that state; age, criminal background limitations, and training requirements for bounty hunters in California are no longer in effect. Meanwhile, in Wisconsin, a state where the surety bail system has been banned since 1979, the legislature included a provision in its 2011 budget bill that would have reintroduced the commercial bail industry and allowed bounty hunters to operate in that state. However, Wisconsin Governor Scott Walker vetoed this section of the budget bill.”) (internal citations omitted).

153. Johnson & Stevens, *supra* note 131, at 196 (Arkansas, Florida, Ohio and Texas allow licensed bail agents to apprehend defendants, but prohibit independent bail recovery agents).

154. Johnson & Stevens, *supra* note 131, at 198 (Connecticut, Delaware, Indiana, Iowa, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, South Carolina, South Dakota, Utah, Virginia, and Washington require bail recovery agents to obtain a license, but have varying age, continuing education, and criminal history disqualification requirements).

155. Johnson & Stevens, *supra* note 131, at 199 (Arizona, Colorado, Georgia, Kansas, Tennessee, and West Virginia require bail recovery agents to register, but do not require them to be licensed. These states have varying age, continuing education, and criminal history disqualification requirements).

156. Johnson & Stevens, *supra* note 131, at 200 (Eighteen states —Alabama, Alaska, California, Hawaii, Idaho, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Vermont, and Wyoming do not regulate the qualifications of bail recovery agents, although at least one —Idaho —makes bail agents responsible for contractors and employees acting on their behalf (*citing* Idaho Code § 41-1045)).

157. SCHNACKE, ET AL., *supra* note 4, at 12.

with defendants, and using individualized information, the Project made specific release recommendations to judges.¹⁵⁸ The centerpiece of the Project was release on the defendant's promise to appear at future court proceedings—defendants deemed to pose little risk of flight were released on written promises to appear without posting a money bond.¹⁵⁹ By the third year the Project was running, only a small fraction (less than two percent) of defendants who were released without having to post money-bail failed to appear.¹⁶⁰ Other cities undertook similar projects, setting in motion the first round of bail reform in the United States. By 1965, around the same time Congress overhauled federal bail administration,¹⁶¹ fifty-six local jurisdictions had instituted bail projects modeled after the Manhattan Bail Project, and New Jersey and Connecticut had established similar statewide projects.¹⁶²

Washington D.C. is often pointed to as a jurisdiction at the leading edge of money-bail reform.¹⁶³ In 1994, in the middle of a crime wave, D.C. amended its Code using language based on the federal Bail Reform Act of 1984. The amendments to D.C.'s Code expressly authorized preventive pretrial detention in cases involving serious or violent offenses,¹⁶⁴ following an adversarial hearing, at which the defendant is entitled to counsel.¹⁶⁵ Prior to the 1994 amendments, D.C. courts used unpayable bail to immobilize high-risk defendants, despite a prohibition in its Code on the use of money-bail to secure a defendant's detention.¹⁶⁶ Although preventive detention without bail is authorized under D.C.'s current Code, it is rarely used in misdemeanor cases—defendants are

158. SCHNACKE, ET AL., *supra* note 4, at 12.

159. SCHNACKE, ET AL., *supra* note 4, at 12.

160. SCHNACKE, ET AL., *supra* note 4, at 12.

161. The federal act "led to parallel reforms of bail in the states. Twenty states created a presumption toward release on recognizance in bailable categories." Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT'L L. REV. 399, 408 n. 45 (1996).

162. SCHNACKE, ET AL., *supra* note 4, at 12.

163. Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.'s Way*, WASH. POST, (July 4, 2016), https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?utm_term=.3ca239fcd17d [<https://perma.cc/9PXX-5B99>] ("This is not how the system works for those charged in almost every other local and state court in the country. But it is how the District has run its rough-and-tumble courthouse for more than two decades.").

164. See D.C. CODE ANN. § 23-1321(c)(3).

165. D.C. CODE ANN. § 23-1322(b)(2)-(d)(7) (West 2017).

166. *O'Donnell v. Harris County*, 251 F. Supp. 3d 1052, 1078 (S.D. Tex. 2017) (citing testimony of Jude Truman Morrison of the D.C. Superior Court: "[I]n cases of any seriousness, judges made an effort nontransparently, never saying what they were doing out loud, to immobilize high-risk people . . . with money bonds that they hoped would be beyond their reach.").

detained pretrial without bail in only approximately 1.5 percent of those cases.¹⁶⁷ Although secured money-bail is still authorized under the D.C. Code, it is rarely used.¹⁶⁸

Bail reform can be voluntary or involuntary. Some jurisdictions have voluntarily pursued bail reform by amending their laws or court rules to explicitly authorize preventive pretrial detention, and to encourage or require pretrial release on non-financial conditions whenever possible. Other jurisdictions have changed their bail administration practices as a result of litigation and federal court intervention. States that have voluntarily changed their laws recently to minimize the use of money-bail, and to encourage or require pretrial release on non-financial conditions include New Mexico,¹⁶⁹ New Jersey,¹⁷⁰ Colorado,¹⁷¹ Illinois,¹⁷² and Maryland.¹⁷³ Municipalities voluntarily pursuing money-bail reform

167. *Id.*

168. *Id.*

169. In 2016, by constitutional amendment, New Mexico voters codified into state law a 2014 decision by the New Mexico Supreme Court holding that setting high bail for the purposes of preventing pretrial release violated the state constitution and the state's rules of criminal procedure. *See State v. Brown*, 338 P.3d 1276 (N.M. 2016); *see also* Herring, *supra* note 73 (In 2016, New Mexico "joined an increasing number of U.S. jurisdictions that have begun to implement risk-based systems of pre-trial detention as a potentially fairer and more effective alternative to traditional money bail. . . . In recent years, dozens of cities and states throughout the country have begun to explore risk-based alternatives to bail. . . . Municipal courts in 50 cities in Alabama have adopted similar reforms . . .").

170. Issie Lapowsky, *One State's Bail Reform Exposes the Promise and Pitfalls of Tech-Driven Justice*, WIREd, (Sep. 5, 2017), <https://www.wired.com/story/bail-reform-tech-justice/> [<https://perma.cc/7KBR-JPS7>] (New Jersey's "Bail Reform and Speedy Trial Act, which went into effect on January 1 [2017] and is designed to virtually eliminate bail in the state. Of all of the attempts to curb the use of bail nationwide, New Jersey's approach is perhaps the most audacious."); *see also* *State v. Robinson*, 160 A.3d 1, 7 (2017) (explaining New Jersey's new pretrial detention system, which only allows money bail as a last resort and which "outlines a hierarchy of release decisions to assure a defendant's return to court and protect both public safety and the integrity of the criminal justice process . . .").

171. Jon Schuppe, *Post Bail: America's Justice System Runs on the Exchange of Money for Freedom. Some Say That's Unfair. But Can Data Fix It?*, NBC NEWS, (Aug 22, 2017), <https://www.nbcnews.com/specials/bail-reform> [<https://perma.cc/2A3S-HW6P>] ("Philanthropic organizations are funding projects in more than three-dozen states to eliminate bail and adopt algorithm-based risk-assessment tools. Judges are pushing similar efforts in Maryland, Arizona, and Indiana. Lawmakers are the driving force in a handful of other states, including Illinois and California."); Kim, *supra* note 73 ("The states that have already moved or are moving to . . . a risk-based system are Kentucky, Colorado, Alaska, and New Jersey, all of which have recently passed or are implementing bail reform legislation that would dramatically reduce, if not end, the use of cash bail. . . . A number of efforts to curb cash bail on a system-wide level have been instituted lately, including statewide legislation in New Jersey and broad-sweeping court orders in Massachusetts, Houston, and Chicago.").

172. Kim, *supra* note 73.

173. *See* MD. CODE ANN., CRIM. PROC. 4-216.1(c)(1) (West 2017) (requiring that all defendants be released "on personal recognizance or unsecured bond" unless a judge can explain the need for

include Philadelphia, Jackson, Atlanta, and New Orleans.¹⁷⁴ Bail reform in some jurisdictions has been part of global criminal justice reform measures.¹⁷⁵ State courts' use of money-bail has attracted the attention of federal lawmakers who have introduced legislation that would encourage jurisdictions to eliminate money-bail.¹⁷⁶

Some jurisdictions have moved away from secured money-bail not by choice, but because they have been unsuccessful defendants in lawsuits challenging their bail administration practices. Civil rights groups and the United States Department of Justice have filed lawsuits challenging the routine use of money-bail for low-level offenses on constitutional grounds.¹⁷⁷ These lawsuits claim that money-bail practices, to the extent

pretrial detention on the record).

174. Teresa Mathew, *Bail Reform Takes Flight in Philly*, CITYLAB (Feb. 2, 2018), <https://www.citylab.com/equity/2018/02/bail-reform-takes-flight-in-philly/552212/> [<https://perma.cc/Y9SS-WWPW>] (reporting that "the Philadelphia City Council unanimously voted to pass a resolution calling on the city's District Attorney and Pennsylvania officials to end the practice of using money bail as a means of pre-trial detainment" and that "Officials in Jackson, Miss., agreed last month to stop using money bail in misdemeanor cases as part of a legal settlement. Several other cities in Mississippi have done the same. In 2016, New Orleans implemented a pilot program that used a risk-assessment tool to cut down on cash bail. Atlanta is considering a proposal to eliminate cash bonds next week. Nashville has plans to overhaul its pre-trial release program early this year."). See also Hon. Jeffrey A. Kremers, *Milwaukee Moves Away From Money Bail System*, 90 WIS. LAW. 6 (Jun. 2017), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=90&Issue=6&ArticleID=25667> [<https://perma.cc/DV2M-EP4U>].

175. Schuppe, *supra* note 171 ("Across the country, reformers are chipping away at money bail, arguing that it discriminates against the poor, ruins innocent people's lives, fuels mass incarceration and contributes to wrongful convictions. The movement is part of a much broader effort to end abuses across the criminal justice system, from biased policing to burdensome court fees to mandatory minimum prison sentences.").

176. Schuppe, *supra* note 171. In 2017, Rep. Ted Lieu of California sponsored the "No More Money Bail Act of 2017," House Bill 1437, which would prohibit the use of money-bail in the federal system and withhold federal funding for states that do not move to risk-based pretrial detention systems. The text of the proposed House Bill can be accessed at <https://www.congress.gov/bill/115th-congress/house-bill/1437> [<https://perma.cc/7AXF-RNKH>]. Senator Bernie Sanders recently introduced companion legislation in the Senate. The text of the proposed Senate Bill can be accessed at <https://www.sanders.senate.gov/download/no-money-bail-act-2018?inline=file> [<https://perma.cc/B7W3-MZV2>].

177. Schuppe, *supra* note 171. See also Kim, *supra* note 73 ("Aspects of money bail are also under fresh judicial challenge. A . . . class action suit . . . Walker v. City of Calhoun, is challenging the constitutionality of bail 'schedules'. . . . [I]n Maryland . . . the state attorney general released an advisory opinion in October 2016 concluding that the state's current money bail system could be unconstitutional, on the grounds that imposing bail defendants can't afford may violate the Eighth Amendment's prohibition on 'excessive bail' and the Fifth Amendment's guarantee of due process. In late November, the Standing Committee on Rules of Practice and Procedure of the Maryland Court of Appeals recommended overhauling the state's bail system, a significant first step toward reform and one that has taken advocates years to achieve."). See also *Ending Money Bail*, EQUAL JUSTICE UNDER L., <https://equaljusticeunderlaw.org/money-bail-1> [<https://perma.cc/V9V4-ZK88>] (listing cases Equal Just. Under Law has filed challenging bail practices in California, Alabama, Kansas, Louisiana, Mississippi, and Missouri).

they detain indigent defendants pretrial because they cannot afford money-bail, violate equal protection and due process guarantees. Litigation targets have included Calhoun, Georgia¹⁷⁸ and Harris County, Texas, which operates one of the largest municipal court systems in the United States.¹⁷⁹

The Harris County lawsuit is the most notable recent victory for no-money-bail proponents. In April 2017, a federal judge ordered Harris County to cease pretrial detention of people charged of low-level crimes. The District Court found that Harris County violated indigent pretrial detainees' equal protection rights with money-bail customs and practices that purposefully detained misdemeanor defendants pretrial who would otherwise be eligible for release, but who were detained because they were too poor to meet secured bond release conditions.¹⁸⁰ The Fifth Circuit upheld the District Court's decision for the most part.¹⁸¹ The outcome is

178. *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *14 (N.D. Ga. Jan. 28, 2016), *vacated*, 682 F. App'x 721 (11th Cir. 2017) (ordering the city to "implement post-arrest procedures that comply with the Constitution" and stipulating that "until [the city] implements lawful post-arrest procedures, [the city] must release any other misdemeanor arrestees in its custody, or who come into its custody.").

179. *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1167 (S.D. Tex. 2017) (holding that state magistrates "cannot, consistent with the federal Constitution, set . . . bail on a secured basis requiring up-front payment from indigent misdemeanor defendants otherwise eligible for release, thereby converting the inability to pay into an automatic order of detention without due process and in violation of equal protection.").

180. *Id.* See also *Schultz v. State*, 330 F. Supp. 3d 1344, 1358–59 (N.D. Ala. 2018) (granting preliminary injunction based on finding that plaintiff had demonstrated a substantial likelihood of success on the merits that the money-bail system in Cullman County, Alabama violates the Fourteenth Amendment right against wealth-based detention and the right to pretrial liberty—which the court described as the "confluence of equal protection and due process" because "it creates one standard of pretrial release for wealthy defendants and another for indigent defendants.").

181. *ODonnell v. Harris County*, 892 F.3d 147, 161 (5th Cir. 2018) (*citing Rainwater*, 572 F.2d at 1056–57) (pre-trial "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible" under both "due process and equal protection requirements") and *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (indigents are protected by equal protection "at all stages of [criminal] proceedings"). Because the Fifth Circuit agreed with the District Court's resolution, it specifically declined to reach the question of whether "the equal protection clause requires a categorical bar on secured money bail for indigent misdemeanor arrestees who cannot pay it." The Fifth Circuit further upheld the district court's application of intermediate scrutiny under *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973); *Griffin*, 351 U.S. at 9 ("Both aspects of the *Rodriguez* analysis apply here: indigent misdemeanor arrestees are unable to pay secured bail, and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration. . . . [T]his case presents the same basic injustice: poor arrestees in Harris County are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond. Heightened scrutiny of the County's policy is appropriate."). As of the drafting of this Article, the Supreme Court of California was getting ready to decide similar issues in *Humphrey (Kenneth) on H.C.*, 417 P.3d 769 (2018). In *Humphrey*, the California Supreme Court will decide the following under state law: (1) Does due process and equal protection require consideration of a criminal defendant's ability to pay in setting money-bail; (2) May a trial court consider public

of the Harris County bail litigation is of particular significance because the core legal issues involved in that lawsuit will likely reach the Supreme Court eventually.

Bail reform comes in many shapes and this is a quick-moving area of law. Generally speaking, however, the goal of most contemporary bail reform has been to lessen trial courts' reliance on financial conditions of pretrial release, particularly for defendants charged with non-violent, low-level offenses. To accomplish this, reform measures will do one or more of the following: first, authorize preventive detention without bail for defendants who pose an unacceptably high risk of flight or danger to others while on pretrial release; second, require or encourage trial courts to use pre-trial risk assessment to evaluate defendant's likelihood to flee or commit crimes while on pretrial release; and, third, eliminate or curtail trial court discretion to impose financial bail conditions of release, particularly for non-violent misdemeanor offenses.

Moving away from money-bail to non-financial conditions of release requires a structure and rules on which to base pretrial release decisions. That is where pretrial risk assessment factors in. Trial courts, pretrial services agencies, and bondsmen, of course, engage in pretrial risk assessment when they make a bail decision or recommendation. But new to modern bail administration is the proliferation and accessibility of pretrial risk assessment instruments. These are developed and distributed by non-profits and academics and promoted as data-driven, evidence-based, objective evaluations of defendants' risk of flight and propensity to commit crimes while on pretrial release.¹⁸² They are also criticized as

and victim safety in setting money-bail? Must it? (3) Under what circumstances does the California Constitution permit bail to be denied in noncapital cases?

182. Schuppe, *supra* note 171 ("There are dozens of risk assessment tools in use today, developed by universities, governments, private companies and nonprofit agencies. They are used at various points of the criminal justice system, from pretrial to sentencing to parole. . . . The Public Safety Assessment, created by the Laura and John Arnold Foundation, has been adopted by Kentucky, Arizona and more than two dozen local jurisdictions, but none to the extent of New Jersey."); *see also* Kim, *supra* note 73 ("[R]isk assessment instruments . . . help judges decide whether a defendant should be released into the community and on what conditions. . . . In Colorado . . . which passed bail reform legislation in 2013, many judges now use the Colorado Pretrial Assessment Tool (CPAT), a twelve-question matrix that assesses a defendant's risk of flight and danger to the community using such variables as age of first arrest, prior failures to appear, and current mental health issues or alcohol and drug problems."). *But see* Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 375 (2018) ("The ideas and practices associated with evidence-based criminal justice have likely advanced in no small part from a hope that data, science, and technology will bring improvements to a system in need of reform. However, enthusiasm for the potential of new technologies may have led us to put the cart before the horse: widescale adoption of risk assessment before knowing anything about whether it will bring meaningful improvement. Risk assessment tools wear the clothes of an evidence-based practice—they are developed with the use of large data sets

biased against poor and minority defendants, as undermining judicial discretion, and as unreliable predictors of future dangerousness.¹⁸³

Contemporary bail reform has sparked a counter offensive by the multibillion¹⁸⁴ dollar commercial bail bond industry.¹⁸⁵ It is led primarily

and sophisticated techniques and endorsed by social scientists running policy simulations—but risk assessments should not be considered evidence-based until they have shown to be effective.”).

183. Lapowsky, *supra* note 170 (“The Arnold Foundation, which designed New Jersey’s PSA tool, now used in several states and dozens of local jurisdictions, attempts to sidestep [the problem of built-in bias] by vastly limiting the number of risk factors it considers to eliminate racial or gender indicators. The Foundation analyzed 1.5 million pre-trial records from across the country and narrowed its algorithm down to look at just nine risk factors: the person’s age at the current arrest, whether the current offense is violent, pending charges at the time of the offense, prior misdemeanor convictions, prior felony convictions, whether those prior convictions were for violent crimes, prior failure to appear in the past two years, prior failure to appear instances that are older than two years, and prior incarceration sentences. Unlike other tools, it doesn’t weigh factors like education, income, or employment, any of which might disadvantage certain demographic groups.”). *But see* Rick Jones, *The Siren Song of Objectivity: Risk Assessment Tools and Racial Disparity*, 42 CHAMPION MAG. 5, 6 (Apr. 2018) (“While advocates claim that risk assessment algorithms can reduce the impact of bias in the criminal justice system, opponents caution otherwise. The same bias that can impact a judge’s or prosecutor’s view of a client can also infiltrate the creation of an algorithm. And much like predictive policing, the appearance of objectivity in a scientific tool can make hidden bias even harder to combat. In the study performed last year, ProPublica examined the risk scores of 7,000 people arrested in Broward County, Florida, between 2013 and 2014. The study found the COMPAS score (the Correctional Offender Management Profiling for Alternative Sanctions tool developed by Northpointe) was inaccurate in predicting the likelihood of future violent crime, to the tune of an 80 percent failure rate. More troubling, however, was how the tool failed. It was worse for black clients[.]”); Julia Angwin et al., *Machine Bias: There’s Software Used Across the Country to Predict Future Criminals. And it’s Biased Against Blacks*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [<https://perma.cc/CW32-FNBC>].

184. Bail bonding is currently reported to be a two-billion-dollar industry in the United States. *See* Silver-Greenberg & Dewan, *supra* note 146.

185. Thanithia Billings, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System*, 57 B.C. L. REV. 1337, 1353 (2016) (“During the mid-1990s, commercial bail bond organizations, including the National Association of Bail Insurance Companies and various state bail organizations, worked with the American Legislative Exchange Council (“ALEC”) to create an initiative titled “Strike Back!” . . . an aggressive and concerted effort to eliminate pretrial services agencies and release on personal recognizance bond to promote the interests of the commercial surety industry. Due in large part to campaigns led by bail bond industry lobbyists, some states have passed legislation that imposes burdensome administrative reporting requirements on PSAs. Critics of this legislation argue that it is designed to displace pretrial services programs by imposing harsh administrative burdens upon them such as stringent reporting standards. These same reporting standards are not required of commercial bail bondsmen despite both entities essentially serving the same function: securing the release of pretrial defendants. These legislative attacks on pretrial services organizations are part of a national strategy promulgated by ALEC.”); Marimow, *supra* note 163 (“In Maryland, Montgomery County courts use a form of risk assessment, although judges still set bail. Legislation to overhaul the system statewide has never made it out of the House Judiciary Committee in the face of opposition from the bail industry”); *see also* Silver-Greenberg & Dewan, *supra* note 146 (“State after state has taken steps to reduce or eliminate the practice of making that freedom contingent on money. In response, the bond industry has worked to undermine reforms and regulations, arguing that commercial bail is still the most efficient and

by two advocacy groups—the American Legislative Exchange Council (ALEC) and the American Bail Coalition (ABC). ALEC was established in 1973 to advocate for legislation favorable to the United States bail industry.¹⁸⁶ ABC, formally the National Association of Bail Insurance Companies, was established in 1992; its stated mission is “the long term growth and continuation of the surety bail bond industry.”¹⁸⁷ ABC has been a member of ALEC since 1993, and it has lobbied, heavily and successfully, for commercial bail interests in the United States.¹⁸⁸

Bail reform opponents have backed litigation¹⁸⁹ and lobbying efforts¹⁹⁰ to derail or undermine state efforts to move away from money-based bail administration. In August 2018 California would have become the first state to abolish money-bail. That reform was derailed by a coalition backed by the bail bond industry that gathered enough voter signatures to delay the law until at least November 2020, when it will be

taxpayer-friendly way to keep the public safe and the courts running smoothly.”). Even in jurisdictions that continue to authorize secured money-bail bonds, the bail bond industry has been impacted by moves towards risk-assessment pretrial detention. See Kim, *supra* note 73.

186. See Amanda Gullings, *The Commercial Bail Industry: Profit or Public Safety?*, CTR. ON JUV. & CRIM. JUST. (May 2012), http://www.cjcj.org/uploads/cjcj/documents/Profit_or_Public_Safety.pdf [<https://perma.cc/3PE5-QFRG>].

187. Bauer, *supra* note 124 (“According to an old ABC newsletter, the organization was formed when a handful of surety executives gathered in Florida in 1992. ‘They were worried,’ the newsletter read. There was a ‘jihad against commercial bail . . . Government pretrial service agencies had made deep inroads into the corporate surety market.’ Up to that point, the use of commercial bail had been steadily declining. The sureties committed to reversing the trend.”); see also Kim, *supra* note 73 (“Many of . . . industry-favorable laws were passed during the 1990s as the result of an extensive effort by the conservative American Legislative Exchange Council [ALEC] to promote the bail bond industry.”).

188. Shane Bauer, *Here’s What Sandra Bland’s Death Says About Our Broken Bail System*, MOTHER JONES (July 27, 2015), <https://www.motherjones.com/politics/2015/07/sandra-bland-bail-bond-system/> [<https://perma.cc/TK2U-3DVY>] (“Before ABC began lobbying, in 1990, commercial bail accounted for just 23 percent of pretrial releases, while release on recognizance accounted for 40 percent. Today, only 23 percent of those let go before trial are released on recognizance, while 49 percent must purchase commercial bail. Since 1990, average bail amounts have almost tripled for felony cases. Between 2004 and 2012, revenues of the ABC companies whose income comes almost entirely from bail increased 21 percent.”). See also Kim, *supra* note 73 (“[T]he bail industry has worked hard to insulate its position by pursuing and winning favorable legislation in the states.”).

189. Schuppe, *supra* note 171 (“The bail bond industry, facing extinction, has backed two federal lawsuits seeking to end the algorithm’s use.”).

190. Nicole Hong & Shibani Mahtani, *Cash Bail – A Cornerstone of the Criminal Justice System Is Under Threat*, WALL ST. J. (May 22, 2017, 11:26 AM), <https://www.wsj.com/articles/cash-bail-a-cornerstone-of-the-criminal-justice-system-is-under-threat-1495466759> [<https://perma.cc/L8TU-GP2Q>] (“Bail agents are pouring money into lobbying. Since 2011, bail-bonds companies and insurers have donated more than \$288,000 to the campaigns of Maryland state legislators, including the chairman of the Senate Judicial Proceedings Committee. The state senate recently passed a bill undercutting a court rule that sought to eliminate cash bail in Maryland.”).

put before California voters in a referendum.¹⁹¹ Litigation challenges include arguments that detaining otherwise bailable defendants pretrial without bail as a preventive measure violates the federal constitution because, it is argued, the Eighth Amendment contains an implied right to bail for noncapital offenses.¹⁹² Challenges to trial courts' use of pretrial risk assessment instruments, predictably, include "wrongful release" claims brought by victims of crimes committed by defendants while on pretrial release after being deemed a low risk by a pretrial risk assessment algorithm.¹⁹³ The Arnold Foundation is the target of a products liability

191. Michael McGough, *The fate of California's cash bail industry will now be decided on the 2020 ballot*, Sacramento Bee, (Jan. 17 2019), <https://www.sacbee.com/news/state/california/article224682595.html#storylink=cpy> [<https://perma.cc/9KXD-A9JQ>] ("A law passed in August that would have abolished cash bail in California starting later this year will instead appear on the November 2020 ballot, representing a big victory and relief for the state's more than 3,000 bail bondsmen faced with the prospect of their career being outlawed. . . . Senate Bill 10 would have abolished California's cash bail system effective Oct. 1. . . . Needing 365,880 signatures by registered voters within 90 days, a coalition called Californians Against the Reckless Bail Scheme picked up more than 575,000 signatures in 70 days to put SB 10 on the November 2020 ballot, the American Bail Coalition announced in a news release."). See also Hong et al., *supra* note 190 ("[The] executive director of the American Bail Coalition . . . said [2017] would be a 'make-or-break year' for cash bail. Earlier this year, he traveled to six state capitals—in California, Nevada, Connecticut, New York, Colorado and Texas—in 11 days to try to stop overhaul efforts. He said he is hopeful the Trump administration will slow momentum for changing bail procedures, including by cutting back on Justice Department grants that help jurisdictions experimenting with new bail systems.").

192. Alan Feueraug, *New Jersey Is Front Line in a National Battle Over Bail*, N.Y. TIMES (Aug. 21, 2017), <https://www.nytimes.com/2017/08/21/nyregion/new-jersey-bail-reform-lawsuits.html> [<https://perma.cc/9KXD-A9JQ>] ("Less than a year after New Jersey established a sweeping new law that all but eliminated cash bail, the state has found itself facing a challenge familiar to others that have overhauled their bail systems: an energetic legal attack from the bail industry. In June and July [2017], two [federal] lawsuits were filed . . . challenging [New Jersey's] . . . Criminal Justice Reform Act While the suits have taken different legal tacks, they do have something in common: one was filed by a large corporate bail underwriter and the other has received support and publicity from professional bail agents. . . . the first suit was backed by the Lexington National Insurance Corporation, a bail underwriter; it alleges that a defendant with means to post cash bail with the help of a bondsman, but who is required to submit to non-financial conditions of release (like electronic monitoring and home detention) leads to a severe deprivations of liberty in violation of the federal constitution."); see also Kim, *supra* note 73 ("Former U.S. Solicitor Paul Clement recently filed a lawsuit against the State of New Jersey [Holland v. Rosen], arguing that the new no-money bail system, which uses the Arnold Foundation tool, instead violates the federal constitution.").

193. Schuppe, *supra* note 171 (reporting that a number of cases have sparked legal challenges; one "prompted by the outcry against the release of a man accused of soliciting sex from a girl, led to an appellate court ruling on the handling of sex offenders and defendants' juvenile histories. Authorities also complained about the release of serial criminals and people accused of fleeing police. But the strongest backlash came in response to the release of people charged with gun crimes. . . . The most dramatic example was the death of Christian Rodgers, shot in South Jersey in April, allegedly by a man who'd been released a few days earlier on a gun possession charge. Rodgers' mother has filed a wrongful death lawsuit against the state, saying the PSA did not do enough to protect him."); see also Lapowsky, *supra* note 170 (New Jersey's move to no-money bail has "prompted a number of lawsuits, including one filed by the mother of Christian Rodgers, a 26-year-old man who was

and wrongful death suit in New Jersey alleging that its proprietary pretrial risk assessment instrument failed to detect the dangerousness of a defendant who committed a murder after being released pretrial on his own recognizance.¹⁹⁴ In the sentencing context, trial courts' use of proprietary algorithms has been challenged on due process grounds. These challenges include arguments that the proprietary nature of the instruments prevents defendants from challenging the accuracy and validity of the risk assessment, and that they improperly factor in gender and race in assessing risk.¹⁹⁵ Somewhat less predictably are lawsuits challenging state courts' authority to pass rules relating to bail as a violation of state separation of powers guarantees,¹⁹⁶ or as an arbitrary use of court's rule-making power.¹⁹⁷ Lobbying and public relations efforts

allegedly murdered by a man named Jules Black, just days after he was released from jail without bail earlier this year. That suit targets both [the governor] as well as the Arnold Foundation, the nonprofit organization that designed the PSA tool. Perhaps unsurprisingly, the case is backed by the bail-bond industry, including reality star Duane Chapman, better known as Dog the Bounty Hunter.”).

194. See Jeff Clayton, *Arnold Foundation Hires Bill Clinton's Former Lawyer to Clarify The Foundation's Complete Lack of Neutrality on Bail Reform*, AM. COAL. COALITION (Dec. 26, 2017), <http://www.americanbailcoalition.org/press-releases/laura-john-arnold-foundations-neutrality-bail-reform-facade/>, [https://perma.cc/G9QH-SVCF] (reporting that “the Arnold Foundation is being sued [in *Rodgers v. Arnold Foundation*, et. al.] for products liability and wrongful death in New Jersey because their risk-tool counted a prior felon in possession of a firearm with a record a mile long as low-risk, only to be released on his own recognizance and then brutally murder another man days later.”).

195. *State v. Loomis*, 881 N.W.2d 749, 753 (Wis. 2016) (rejecting defendant's argument that trial court's reliance on the Correctional Offender Management Profiling for Alternative Sanctions at sentencing (COMPAS) risk assessment at sentencing violates due process because the proprietary nature of COMPAS prevents a defendant from challenging the accuracy and scientific validity of the risk assessment; and because COMPAS assessments take gender and race into account in formulating risk assessment).

196. Lysée Mitri, *supra* note 145 (federal lawsuit filed in New Mexico backed by bail industry “targets the new Supreme Court rules that changed how judges set bond for accused criminals awaiting trial. Right now, people are being held in jail without the option to bond out until they see a judge. The suit argues that's unconstitutional [because it violates state separation of powers in the state].”).

197. Samantha Bryson, *Bail Bond Company Sues Court Judges Over New Regulations, Commercial Appeal*, Commercial Appeal (Mar. 16, 2015) <http://archive.commercialappeal.com/news/crime/bail-bond-company-sues-court-judges-over-new-regulations-ep-995097186-324443561.html> [https://perma.cc/896B-48TY] (reporting that a “Memphis bail bond company filed a lawsuit against the Shelby County Criminal Court and all 10 of its judges in hopes of blocking a new set of local regulations aimed at reining in some of the industry's more controversial business practices. . . . The new rules also allow the court to drug test bail bondsman, and set further limits on how many bonds a company can issue at the same time.”).

have focused on undermining confidence in pretrial services agencies¹⁹⁸ and risk assessment instruments.¹⁹⁹

Arguments for and against bail reform have not changed much since the 1960s. However, political and legal changes have significantly altered the bail reform context. One difference is courts' increasingly heavy reliance on financial conditions of release in bail administration, even as many jurisdictions move away from money-bail as a routine condition of release. In 1990, nationally, trial courts imposed money-bail as a condition of release for 24 percent of pretrial detainees. In 2009, they imposed money-bail as a condition of release for almost 50 percent of pretrial detainees.²⁰⁰ The increased use of money-bail naturally increases the size, strength, and influence of the bail bond industry. And that industry is operating in a vastly different campaign and lobbying climate than the 1960s.²⁰¹ Another change is the proliferation of technology and

198. See Gullings, *supra* note 188 (“Since the 1990s commercial bail associations have unified to advocate bail policies at state and federal levels which will work to ensure market stability for the bail industry. . . . Both ALEC and the for-profit bail bonding industry have attempted to push nationally a model bill titled the ‘Citizens Right to Know: Pretrial Release Act,’ which would place numerous (and in most cases, additional) reporting requirements on pretrial release service agencies. In support of this and other bills, in April 2010, AIA and ALEC sent copies of the publication, *Taxpayer Funded Pretrial Release – A Failed System*, to 2,500 legislatures across the country. In addition to writing, distributing, and lobbying for criminal justice policies to expand their profits, the commercial bail industry has consistently worked in direct opposition against publicly funded pretrial service agencies. Bail bondsmen across the country have prioritized limiting the amount of funding that is allocated to pretrial service agencies. . . . From a business perspective, publicly funded pretrial release programs are the only competition the bail industry faces; therefore, they are the only substantial threat to their ability to profit from an offender’s pretrial release. In response to this competition, the bail industry has worked ardently to undermine the accountability and funding of pretrial release programs.”) (citing SCHNACKE ET AL., *supra* note 4, at 25).

199. A statement on the American Bail Coalition website about Nevada’s adoption of a pretrial risk assessment tool is illustrative of the narrative: “We are not sure how to measure this, but it makes clear what we have been saying all along—this is all about class-war talking-point justice and some mythical bipolar false construct that we can properly identify the right and wrong people using a static, check-box algorithm.” Jeff Clayton, *Results In: Nevada Bail Reform Project a Failure*, AMERICAN BAIL COALITION, <http://www.americanbailcoalition.org/press-releases/results-nevada-bail-reform-project-failure/> [<https://perma.cc/P3U4-DYUX>].

200. See Silver-Greenberg & Dewan, *supra* note 146 (“The use of financial conditions for bail has not always been as widespread as it is today. In 1990, only 24 percent of those released from jail before trial were required to pay. That number soared to almost 50 percent in 2009, the most recent year for which national figures are available. In some jurisdictions, the number is far higher: In New Orleans in 2015, 63 percent of misdemeanor defendants and 87 percent of felony defendants had to pay to be released before trial, according to a study by the Vera Institute of Justice, a nonprofit that seeks to improve the criminal justice system.”).

201. See Gullings, *supra* note 186 (“Many individual bail bond companies have hired their own lobbyists to advocate for local legislation, such as county ordinances which will limit pretrial service programs. These individual business owners have also united to form statewide associations . . . and even nationwide associations, like the American Bail Coalition, to advocate for state legislation. These statewide associations have also recruited assistance from the powerful conservative think tank,

the development of pretrial risk assessment algorithms, which hold out the possibility of a low-cost and efficient means to screen defendants for pretrial release eligibility, a function often outsourced to bail bondsman in traditional bail administration. Finally, non-profit and community bail funds, and crowdsourcing are becoming increasingly more available and accessible means for indigent defendants to post bail without having to pay the bondsman's fee.²⁰²

The debate between money-bail reformers and money-bail supporters can be condensed around three main themes. One, fairness. Money-bail enriches the surety industry at the expense of poor people. Or, alternatively, it is an equalizer because it permits allailable defendants access to pretrial liberty. Two, economics. Eliminating money-bail reduces jail populations²⁰³ without an increase in the failure to appear rate.²⁰⁴ Or, alternatively, it preserves public resources by relieving

ALEC, to advance their political agenda and opposition to pretrial release programs at both the state and national levels. Unfortunately, despite the success rates of many pretrial release programs across the country, the bail bondsmen are able to purchase a more powerful lobby to persuade state legislatures to support their political agenda. Bondsmen are able to gain this political support through large campaign contributions, sponsoring legislation (such as ballot measures) which establishes political allies, and donating to political parties. Pretrial service programs on the other hand, because they are publicly funded, do not have the organizational capacity or the fiscal resources to lobby for their programs in the same fashion that the bail industry has been able to.”). See also Katherine Beckett et al., *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238, 241 (2016) (“Similarly, institutions that have flourished as a result of mass incarceration often work to ensure its continued existence. For example, private corporations that own and operate prisons (or profit from them), prison officers’ unions, the bail industry, and even county clerks often seek to block progressive criminal justice.”) (citations omitted).

202. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 587–88 (2017) (“In recent years, community groups in jurisdictions across the United States have increasingly begun to use bail funds to post bail on behalf of strangers, using a revolving pool of money.”). Community bail funds and non-profit bail bonding is not a new concept – individual citizens and non-profit groups pooled and donated money to fund bail for civil rights activists protesting racial segregation in the south who were rounded up in mass arrests and charged with inflated or frivolous charges. See Goldfarb, *supra* note 4, at 59–91. But changes in technology, particularly the reach of social media, make publicizing efforts to raise money easier. See *id.*; see also Caroline Grueskin, *The Uncertain World of Crowdfunding Your Day in Court*, WIRED (NOV. 15, 2015, 7:00 AM), <https://www.wired.com/2015/11/the-uncertain-world-of-crowdfunding-lawyer-fees-and-bail/> [<https://perma.cc/D8C7-ZR97>].

203. According to the U.S. Bureau of Justice Statistics, 95 percent of the jail population growth since 2000 was attributable to an increase in defendants being held pretrial. Teresa Wiltz, *Locked Up: Is Cash Bail on the Way Out*, Stateline, (Jan. 03, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/01/locked-up-is-cash-bail-on-the-way-out> [<https://perma.cc/RHW6-NVH4>].

204. Lapowsky, *supra* note 170 (“Just months in[to bail reform] . . . New Jersey saw a 19 percent reduction in its jail population overall between January 1 and May 31 of this year, with just eight people being held on bail throughout the entire state over that time period. Others are either being released with certain conditions or detained without bail.”).

jurisdictions of the need to administer expensive pretrial services agencies. And, three, public safety. Money-bail undermines public safety because it allows defendants with resources to purchase their freedom, regardless of the nature of the allegations against them. Or, alternatively, it enhances public safety because high bail amounts can keep dangerous defendants out of circulation while awaiting trial. A corollary issue concerns the efficacy and reliability of pretrial risk assessment instruments. Either they are efficient, low-cost evidence-based instruments that promote uniform, objective pretrial release and detention decisions. Or, alternatively, they are a flawed substitute for judicial judgment and experience whose reliability is skewed by built-in biases. Thus, depending on the argument, moving away from money-bail to risk assessment either produces a fairer and more cost-effective system, or creates an unnecessary taxpayer burden that infringes on judicial discretion and produces unreliable results.

V. OBSERVATIONS AND OPTIONS FOR RIGHT TO BAIL JURISDICTIONS

Then or now, one is hard pressed to find support at the national level for money-based bail administration among policymakers, the legal profession, and the media—there is an extraordinary level of consensus in those sectors about the need to reform money-bail practices that routinely jail large numbers of poor people charged with non-violent, low-level offenses.²⁰⁵ For good reason. Detention is expensive and empirical research shows that pretrial detention of defendants charged with non-violent misdemeanors is generally unnecessary to protect the public or ensure their presence at future hearings; it also shows that individualized pretrial release determinations achieve those goals more effectively.²⁰⁶ Money-bail works tremendous hardships on poor defendants and their

205. Herring, *supra* note 73 (“Most of the legal establishment, including the American Bar Association and the National District Attorneys Association, hates the bail bond business, saying it discriminates against poor and middle-class defendants, does nothing for public safety, and usurps decisions that ought to be made by the justice system.”). Gullings, *supra* note 186, at 4 (“The commercial bail industry has been negatively critiqued for nearly one hundred years and the criticisms have largely remained the same: commercial bail does not ensure public safety and discriminates against those who cannot afford it. In spite of this, commercial bail remains the primary avenue for pretrial release [in the United States], due in part to the political power it wields through extensive lobbying activities.”).

206. Bauer, *supra* note 124 (“Criminal-justice policy happens to be a field with one of the greatest disconnects between what we know and what we do,” said Michael Jacobson, former director of the Vera Institute. “It’s a research-driven field like medicine, but we also have toxic politics to deal with. . . . If you were just basing policy off research, there would be no consideration of money bail.”).

families and communities.²⁰⁷ Racial minorities experience these hardships most acutely.²⁰⁸ Pretrial detention significantly impacts the outcome of a defendant's case because it hampers his ability to assist in his defense and it can pressure a plea deal.²⁰⁹ Money-bail differently impacts defendants with limited financial resources,²¹⁰ while allowing defendants with means

207. Schuppe, *supra* note 171 (“allowing people to pay for their release has proved unfair to people who don’t have much money. The poor are far more likely to get stuck in jail, which makes them far more likely to get fired from jobs, lose custody of children, plead guilty to something they didn’t do, serve time in prison and suffer the lifelong consequences of a criminal conviction. Those who borrow from a bail bondsman often fall into crippling debt.”); Bauer, *supra* note 124 (“Even a few weeks in jail can wreak havoc on the lives of the accused. Seventy-one percent of jail inmates had jobs when they were arrested, according to the Bureau of Justice Statistics. Losing those jobs because they can’t post bail leaves their families at risk. Studies also show that people become more likely to reoffend the longer they are detained pretrial. With just two to three days of detention, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held less than 24 hours. Low-risk defendants held 8 to 14 days are 51 percent more likely to recidivate within two years than equivalent defendants held one day or less.”).

208. Silver-Greenberg & Dewan, *supra* note 146 (“Commercial bail fees, often scraped together by multiple family members, siphon millions from poor, predominantly African-American and Hispanic communities. Over a five-year span, Maryland families paid more than \$256 million in nonrefundable bail premiums, according to a report by the state’s Office of the Public Defender. More than \$75 million of that was paid in cases resolved with no finding of guilt, and the vast majority of it was paid by black families.”). See also *Moving Beyond Money: A Primer on Bail Reform*, HARV. L. SCH. 7 (2016) (“Money bail also results in ‘increased rates of pretrial detention for Black and Latino defendants’ because of the ‘well-established linkages between wealth and race.’”).

209. Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017) (study, based on “detailed data on hundreds of thousands of misdemeanor cases resolved in . . . the third-largest county in the United States” establishes “that detained defendants are 25% more likely than similarly situated releasees to plead guilty, are 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice as long on average,” differences that “persist even after fully controlling for the initial bail amount, offense, demographic information, and criminal history characteristics”); Appleman, *supra* note 66 at 1320 (“Pretrial detention also augments the possibility of conviction. Incarcerated defendants before trial are more likely to be found or plead guilty and serve prison time than those released pretrial. The mere possibility of pretrial imprisonment often compels defendants to plead guilty and give up their right to trial. The prospect of being incarcerated, even for a short time, can look ruinous to poor defendants, as this often means the loss of their livelihood, severe disruptions to their family lives, or both. Accordingly, when confronted with an unaffordable bail, a large number of pretrial detainees simply plead guilty.”); Kim, *supra* note 73 (“The inability to afford bail can have serious collateral consequences for defendants. For example, research by the Laura and John Arnold Foundation found that people detained pretrial were more than four times more likely to be sentenced to jail than people who were released, more likely to be given longer sentences, and more likely to be recidivists. People in jail are less able to meet with their lawyers, point them toward important witnesses, and put together the best defense. The disruptions resulting from staying in jail might mean the loss of a job or housing, which leads to economic instability or other consequences that could prompt a rearrest. People in pretrial detention are also more likely to plead guilty before the trial, because that might be the only way to avoid spending months or years in jail awaiting their time in court.”).

210. Bauer, *supra* note 124 (“Of the nearly 750,000 people in America’s jails at any given time, two-thirds are awaiting trial. Of accused felons held until case disposition, 89 percent are there because they can’t afford bail.”).

to purchase their pretrial liberty, regardless of the seriousness of the offense with which they are charged, or their risk of flight.²¹¹ In sum, the United States locks up a lot of poor, low-level defendants pretrial,²¹² which is expensive,²¹³ counterproductive, and generally unnecessary.²¹⁴ Many aspects of the American criminal justice system make it a crime to be poor.²¹⁵ Money-based bail, in a very real sense, punishes the poor who have not even been adjudicated guilty of any crime.

211. This is precisely what Tiffany Li, a member of a wealthy California family charged with felony murder did in 2017. California charged Ms. Li with felony murder in the shooting death of the father of her children, and the court set her bail at \$35 million. California law allows money-bail to be secured by property in lieu of cash, but doubles the bail amount when it is secured by property. Ms. Li posted \$4,240,000 in cash, and the balance of more than \$60 million in property. This was reportedly the highest bail amount ever set in that county. Prosecutors originally asked that Ms. Li be held pretrial without bail, a request the court denied. Christine Pelisek, *California Heiress Posts 'Unprecedented' \$35M Bail After Allegedly Plotting to Kill Her Ex*, PEOPLE MAG. (Apr. 06, 2017, 3:36 PM), <http://people.com/crime/california-murder-suspect-tiffany-li-posts-35-million-bail/> [<https://perma.cc/GL2W-PYXN>].

212. See Kim, *supra* note 73 (“[T]he majority of people currently in the nation’s jails are defendants legally presumed innocent and awaiting trial. According to the U.S. Bureau of Justice Statistics, 467,500 of the nation’s 744,592 jail inmates in mid-2014—or 63 percent—were ‘unconvicted’ defendants in pretrial status, up from roughly 56 percent of the nation’s 621,149 jail inmates in 2000. . . . According to a 2015 survey by the National Association of Counties, 69 percent of county jail administrators judged the majority of their inmates to be ‘low-risk’ defendants.”).

213. Schuppe, *Post Bail*, *supra* note 171 (“The number of people behind bars in the United States has jumped more than threefold, to 2.1 million, since 1980, according to the Bureau of Justice Statistics. Of the 693,300 prisoners held in local jails in December 2015, 62 percent were waiting for trial, at an estimated cost of \$14 billion a year. The Prison Policy Initiative projects that 70 percent of those pretrial detainees are charged with non-violent crimes — mostly involving drugs or property offenses.”). See also Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. at 787 (estimating that the release on personal bond of the lowest-risk detainees would have resulted in 1,600 fewer felonies and 2,400 fewer misdemeanors within the following eighteen months).

214. See Kim, *supra* note 73 (“One factor driving th[e] current wave of bail reform is new research finding that alternatives to up-front money bail work better to ensure that defendants show up in court. A 2013 study by the Pretrial Justice Institute . . . found that ‘unsecured’ bonds, which require no money up-front . . . are just as effective as traditional cash bail in ensuring court appearances and preventing rearrests. In a controlled experiment in Colorado, defendants released on an unsecured bond, regardless of their risk, were less likely to commit new crimes than defendants released on traditional money bail. And all but the highest-risk defendants were more likely to show up in court. A 2011 study funded by the Justice Department also found that simply mailing defendants a reminder to show up in court significantly reduced the number of people who failed to appear. In an experiment involving more than 7,800 misdemeanor defendants in Nebraska, only 8.3 percent failed to show up after getting a mailed reminder about their court date, along with information about what would happen if they failed to show. By comparison, 12.6 percent of defendants who got no such reminder were no-shows.”).

215. See Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying The Price*, NAT’L PUBLIC RADIO (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [<https://perma.cc/TF9M-HBDU>] (“in at least 43 states and the District of Columbia, defendants can be billed for a public defender; in at least 41 states, inmates can be charged room and board for jail and prison stays; in at least 44 states, offenders can get billed for their own probation

Notwithstanding quantifiable and undisputed benefits of moving away from money-based bail, a number of states continue to rely heavily on financial conditions of release in bail administration and on the involvement of bail bondsmen in pretrial release and supervision. If the case for bail reform is so obvious to national legal observers, why all states have not embraced risk-based pretrial release and detention bail practices needs to be asked. Bail reform has received a tremendous amount of national attention in the popular press and legal circles over the last several years. Most of this attention focuses on the negative aspects of money-based bail practices and the excesses of the commercial bail bond industry generally. But bail administration in the United States is a matter of uniquely local concern with a deep constitutional roots, accompanied by many legal complexities. As such, it is not something for which there is a uniform or easy fix. Addressing the ills of money-based bail administration, therefore, requires consideration of legal and practical hurdles to reform on the state and local level in jurisdictions where secured money-bail is entrenched. The bail bond industry, to be sure, is a major player in promoting secured money-bail in the United States And the industry has put up a good fight in jurisdictions that have recently pursued bail reform through lawsuits and legislative campaigns. But its efforts have also been rebuffed, most recently in New Jersey. It is, therefore, overly-simplistic to assign sole or even primary responsibility for stalled and patchy bail reform in the United States to the bail bond industry. A more comprehensive analysis requires jurisdiction-specific consideration of states' constitutional and statutory bail administration laws and practices, and of practical reasons why trial courts continue to rely heavily on secured money-bail in some jurisdictions.

The reason secured money-bail cannot be completely eliminated in right to bail jurisdictions is fairly straightforward from a legal perspective—setting high bail amounts is the only way to protect the public from dangerous bailable defendants in those states. Modern bail reform is about what conditions of release will occupy a dominant role in pretrial release practices. At its core, it is a choice between money-based bail practices, on one hand, and risk-based practices, on the other. But

and parole supervision; and in all states except Hawaii, and the District of Columbia, there's a fee for the electronic monitoring devices defendants and offenders are ordered to wear.”). *See also In a Mississippi Jail, Convictions and Counsel Appear Optional*, N.Y. TIMES (Sept. 25, 2014), <https://www.nytimes.com/2014/09/25/us/in-a-mississippi-jail-convictions-and-counsel-appear-optional.html> [<https://perma.cc/97UL-LLEY>] (In Mississippi there is no state law setting a time limit on detention before an indictment resulting in “poor people . . . sitting in jail for weeks and even months before they ever see a lawyer.”).

these are not mutually-exclusive propositions. Secured money-bail can be a part of risk-based bail administration—in fact, as noted, all jurisdictions in the United States, including those that authorize preventive pretrial detention without bail for noncapital defendants, authorize secured money-bail as a condition of release. And traditional bail incorporates risk-based practices—risk assessment is routinely used in traditional bail administration to inform the amount of bail or other conditions of release, and to determine whether a capital defendant should have bail set. The difference is that risk-based bail administration can function without money-bail, but traditional bail administration cannot. Risk-based bail administration can incorporate money-bail (as all United States jurisdictions do), but traditional bail cannot fully incorporate risk-based pretrial detention principles. This is because the traditional right to bail never authorizes detention of noncapital defendants without bond, regardless of risk, it only allows courts to calibrate conditions of release to risk. Traditional bail needs money-bail to preserve the option of setting unpayable bail to protect public safety. While perhaps justly criticized as a manipulation of money-bail, unpayable bail is an inevitability in a right to bail jurisdiction.²¹⁶

Abrogating an absolute constitutional right to bail, of course, requires a constitutional amendment. This is a potentially cumbersome, lengthy, expensive and divisive process that requires voters to tackle questions about the purpose and limits of pretrial detention, and whether to vest trial courts with power to detain accused persons pretrial as a public safety measure. Pure risk-based bail administration rejects the core normative value of the traditional right to bail—that a person who is merely accused of a crime should remain at liberty pretrial if he can provide the court sufficient guarantees that he will return for future proceedings. This is a right “as old as the law of England itself.”²¹⁷

216. A trial court’s discretion to set unpayable bail, of course, is not limitless and is subject to some outer limits under due process guarantees. See *Brangan*, 80 N.E.3d at 962–63 (bail in amount likely to result in long-term pretrial detention is functional equivalent of order for pretrial detention, and must be evaluated in light of due process requirements applicable to deprivation of liberty, including procedure to test accuracy of trial court’s assessment of defendant’s perceived dangerousness.); see also *United States v. Mantecon-Zayas*, 949 F.2d 548 (1st Cir. 1991) (trial court could impose financial condition defendant could not afford, resulting in detention, provided court “complied with the procedural requirements for a valid detention order, including written findings of fact and a written statement of reasons for determining that the financial condition imposed was an indispensable condition for release.”).

217. See Stephen, *supra* note 6, at 233 (“The right to be bailed in certain cases is as old as the law of England itself, and is explicitly recognized by our earliest writers. When the administration of justice was in its infancy, arrest meant imprisonment without preliminary inquiry till the sheriff held his tourn at least, and, in more serious cases, till the arrival of the justices, which might be delayed

Ultimately, the ease with which a particular jurisdiction's foundational laws can be amended and its voters' readiness to engage with these issues is one of the most important factors in a state's bail reform prospects.

Successful bail reform requires trade-offs and institutional bandwidth, barriers to change rarely acknowledged in the popular media. Individual jurisdictions may have practical reasons they have not pursued bail reform, and lack of resources is probably chief among them. Risk-based bail administration requires a mechanism by which large numbers of defendants can be screened effectively and quickly if courts are to promptly release defendants the state has no interest in detaining pretrial. It also requires some capacity to supervise defendants who are released pretrial subject to non-financial conditions. If secured money-bail is available, some pretrial screening and supervision can be outsourced to the bondsman.²¹⁸ Thus, to move away from money-based bail administration, courts must have a reliable and affordable substitute for the pretrial screening and supervision functions provided by the bail bond industry. In jurisdictions that have successfully implemented risk-based bail reform, like the federal system and Washington D.C., that role is filled by professional pretrial services agencies under the supervision of the courts. And that, of course, costs money.²¹⁹

Making risk assessment and non-financial release conditions the backbone of bail administration presupposes courts can make risk-based determinations on a short turnaround. Indeed, the debate over money-bail often overlooks the fact that trial courts must make detention decisions shortly after the defendant's arrest, often processing large numbers of defendants based on scanty information and without input from defense counsel. In jurisdictions that cannot fund robust state-wide pretrial services agencies and that do not provide appointed counsel for

for years, and it was therefore a matter of the utmost importance to be able to obtain a provision release from custody.”). A “tourn” was a court presided over by a sheriff. *Tourn*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/tourn> [<https://perma.cc/QE87-TGVQ>]. See also *Simpson*, 387 P.3d at 1274 (“Freedom from pretrial detention absent extraordinary circumstances traces to the common law, where the general rule was against pretrial incarceration and in favor of bail, except for capital crimes—an exception grounded in the belief that defendants in such cases would flee to save their lives.”).

218. In jurisdictions that have outlawed or significantly sidelined commercial bail bonding, defendants work directly with pretrial services agencies, not bail bondsmen, in undergoing pretrial release assessment. Johnson & Stevens, *supra* note 131, at 196.

219. Marimow, *supra* note 163 (“When District [of Columbia] judges talk about the system, they almost always encounter skepticism about how other jurisdictions could replicate it. Federal prosecutors handle most local criminal cases in the District. The federal government entirely funds the independent pre-trial agency whose \$62 million budget pays for about 350 employees and includes a drug-testing lab, treatment services and mental-health and drug courts.”).

defendants at detention hearings,²²⁰ this puts trial courts to the choice of unnecessarily detaining a defendant pretrial or gambling with public safety.²²¹

Pretrial risk assessment instruments, and their developers and proponents, are the unknown quantity in today's bail reform. These instruments are typically provided at no cost to jurisdictions willing to accept the developer's terms of use. At first blush, free computer-based pretrial risk assessment instruments may seem an ideal solution for jurisdictions that cannot afford a full-scale professional pretrial services agency like that in D.C. These instruments, however, are relatively new and untested and their use may have as yet-unknown unintended consequences.²²² A jurisdiction that adopts a pretrial risk assessment instrument without adequately vetting it and properly training those tasked with its administration risks incorporating a faulty or unreliable element into its bail administration that could compromise public safety or discriminate against certain defendants. And, in light of recent wrongful release lawsuits, choosing a specific risk assessment instrument is now a decision that carries with it potential exposure to litigation.

Money-based bail administration undeniably offers a certain level of ease and predictability in application. Jurisdictions that routinely rely on secured money-bail usually have bail bond schedules. Bail bond schedules are published and they are simple to use—they list offenses along with an amount of bail deemed presumptively reasonable for each offense. Bail bond schedules, theoretically, can help reduce the risk of idiosyncratic bail determinations among judges in the same jurisdictions, making them less vulnerable to constitutional excessiveness challenges, or due process and equal protection challenges. To the extent bail bond schedules produce

220. Another point of departure among jurisdictions is whether defendants are afforded a right to counsel at public expense for the bail hearing. Federal procedure provides indigents the right to counsel at public expense at the bail hearing, but most states do not. *See* FED. R. CRIM. P. 44(a) (defendant “who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal.” John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831 (2017) (“There is a widely-held belief that the state provides counsel to indigent criminal defendants at their initial appearance in state court. However, the majority of states do not provide counsel to indigent defendants at their initial appearance when a judicial officer determines conditions of pretrial release.”).

221. *See* Wiltz, *supra* note 203 (“Typically, judges only get a few minutes to assess a defendant’s case, . . . [s]o often . . . judges set bail without knowing the full circumstances, which hamstrings them.’ The fear is I’m going to let somebody go and they’re going to go out and do something terrible, or they won’t come back, so I’ll set bail,’ [one judge] said.”).

222. *See* Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125 (2018).

uniform treatment of similarly-situated defendants, money-bail administration can claim the virtue of promoting an appearance of fairness and consistency across a jurisdiction. But only to a point—the automatic application of bail bond schedules to the disadvantage of indigent defendants can also open a jurisdiction’s bail administration to equal protection and due process challenges.²²³

Jurisdictions that use bail bond schedules often authorize peace officers to accept bail directly from an arrestee without having to appear before a judicial officer.²²⁴ By obviating the necessity of a hearing, this “catch and release” practice can avoid unnecessary short-term detention of low level arrestees. The advantage of allowing peace officers to immediately release some arrestees if they can post bail pursuant to a bail schedule may not be obvious in large urban jurisdictions with ready access to judicial officers. But in rural, low-population states where judicial officers have jurisdiction over vast geographic areas and detention facilities are few and far between, allowing peace officers to accept bail from defendants without a hearing and without booking them into jail may be indispensable. This practice would not be possible if a risk-assessment needed to be performed first. Thus, in some instances, money-based bail can actually facilitate the routine pretrial release of persons charged with low-level offenses (assuming they can post bail) and relieve time pressures on the judicial system that are triggered by a custodial arrest.²²⁵

A point frequently made in the popular media money-bail is that it results in the detention of defendants who are presumed innocent. The

223. See *Brangan*, 80 N.E.3d at 959 (individualized bail determination that takes defendant’s financial resources into account required by due process and equal protection; courts have found use of master bail bond schedules to set same bail amount for everyone for a particular offense unconstitutional, without regard to individual financial circumstances or alternative conditions of release) (citing *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978)) (“incarceration of those who cannot” meet master bond schedule, “without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements”); *Walker v. Calhoun*, No. 4:15–CV–0170–HLM, 2016 WL 361612 *10 (N.D. Ga. Jan. 28, 2016), (“Any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses to obtain pretrial release, without any consideration of indigence or other factors, violates the Equal Protection Clause”) (citing cases), *vacated on other grounds by Walker v. Calhoun*, 682 Fed. Appx. 721 (2017).

224. See, e.g., MONT. CODE ANN. § 46-9-302(1) & (2) (West 2019) (except in cases involving enumerated domestic violence offenses, judges may establish bail schedules for offenses over which the judge has original jurisdiction and defendant may be released on bail by posting bail with a peace officer without first appearing before a judge).

225. A defendant arrested without a warrant must be presented to a judicial officer for a probable cause determination “promptly” after arrest, which the Court has interpreted to mean without unreasonable delay. The Court has not set a fixed time for the probable cause hearing, but has held that a hearing more than 48 hours after arrest is presumptively unreasonable. *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (*McLaughlin* explicitly included bail hearings in the determinations that must be made within 48 hours).

argument is that it is unfair to detain an accused pretrial for want of money because he has not been found guilty of any crime. This argument ignores the fact that the potentially dangerous defendant who is detained pretrial without bail in a preventive detention jurisdiction can make precisely the same claim because he too is presumed innocent. The presumption of innocence, well-known, but little understood by the general public, is perhaps the least compelling argument in favor of bail reform. Contrary to popular understanding, the presumption of innocence can claim no constitutional pedigree.²²⁶ It is an evidentiary rule that requires the fact finder to start from a clean slate at trial, not a legal mandate requiring lawyers and judges to ignore evidence of guilt at the pretrial stage. There is a difference between legal truth and factual truth, and it is at play when a defendant who actually did something is acquitted or charges against him are dismissed—although he committed an act in fact, if the state does not meet its evidentiary burden at trial, or if there is a legal defect in the investigation and prosecution requiring dismissal (such as a botched search), the defendant has not committed a crime as a matter of law. In making pretrial detention decisions, courts routinely consider the likelihood that the defendant committed the crime with which is he charged based on the evidence available at that juncture. This principle is reflected in state constitutional bail provisions that allow trial courts to detain capital defendants without bail if the proof against the defendant is “evident” or the presumption of his guilt is “great.” These provisions would make no sense if the law recognized a presumption of innocence at the pretrial detention stage.

States unwilling or unable to undertake constitutional bail reform and eliminate the absolute right to bail for noncapital offenses in favor of preventive pretrial detention have options. One option, of course, is to do nothing. The Harris County litigation, however, is a cautionary tale for jurisdictions with money-based bail systems that attract the attention of bail reformers.²²⁷ Economic inequities produced by money-based bail

226. See Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST: STUD. CHURCH L. & MINISTRY 106 (2003).

227. Jolie McCullough, *How Harris County's Federal Bail Lawsuit Spreads Beyond Houston: Texas Counties Are Watching to See How Harris County's Fight Against Court-Ordered Bail Practices Will Affect Them*, TEXAS TRIB. (Oct. 2, 2017, 12:01 AM), <https://www.texastribune.org/2017/10/02/how-harris-countys-bail-lawsuit-spreads-beyond-houston/> [<https://perma.cc/9L6E-UGTT>]. As a result of the Harris County litigation, the state of Texas found itself scrambling to restructure its bail system. Jolie McCullough, *Gov. Greg Abbott's Influence Has Shifted Texas Bail Reform Efforts Toward a Bill That Would Give Him More Control*, TEXAS TRIB. (Mar. 18, 2019, 12:22 PM), <https://www.texastribune.org/2019/03/18/bail-reform-texas-legislature-damon-allen-act-bills/> [<https://perma.cc/P2DR-945D>].

administration have also attracted the attention of the United States Department of Justice²²⁸ and members of Congress.²²⁹ Like Harris County, jurisdictions that choose to wait and see, or that simply lack the political wherewithal to change course, may find themselves the target of litigation and the subject of federal court injunctions. Should Congress pass federal legislation that jeopardizes federal funds for states that do not move away from money-bail, or should the Supreme Court take up state bail administration as a federal constitutional matter, jurisdictions that wait too long to tackle bail reform may find themselves playing catch-up to federal mandates and lose valuable time in which to experiment with local solutions.

This is not to say that all right to bail jurisdictions that do not abandon money-based bail practices are at similar risk of litigation or federal scrutiny. Reliance on money-bail as a condition of release, standing alone, does not raise federal constitutional concerns. Rather, it is the routine use of money-bail resulting in the widespread pretrial detention of indigents in the absence of a state interest for detaining them that may cross the federal equal protection line.²³⁰ In light of recent federal court holdings,

228. In 2016, the Department of Justice, under President Obama, also issued a “Dear Colleague” letter to state and local courts around the country, advising them that courts “must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.” Lapowsky, *supra* note 170.

229. In 2016, California Representative Ted Lieu introduced a bill that would withhold federal funding from states that do not reform their money-bail systems. *See* No Money Bail Act of 2016, H.R. 4611, 114th Cong. (2d Sess. 2016).

230. The Fifth Circuit concisely identified the issue in upholding the district court in the Harris County litigation as follows:

In sum, the essence of the district court’s equal protection analysis can be boiled down to the following: take 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. Applying the County’s current custom and practice, with 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. As a result, the wealthy arrestee 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. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

ODonnell, 892 F.3d at 163. *See also* *Pugh v. Rainwater*, 557 F.2d 1189, 1201 (5th Cir. 1977) (Florida bail system, which failed to provide for: (1) a presumption in favor of release on recognizance and (2) priority for nonfinancial alternatives, violated equal protection of indigents because it gave court “essentially unreviewable discretion to impose money bail . . . [E]qual protection standards are not satisfied unless the judge is required to consider less financially onerous forms of release before he imposes money bail. Requiring a presumption in favor of non-money bail accommodates the State’s interest in assuring the defendant’s appearance at trial as well as the defendant’s right to be free pending trial, regardless of his financial status.”). *See also* *ABA urges U.S. Supreme Court to review*

states whose bail practices do not require courts to impose non-financial conditions of release for low-risk defendants whenever possible, if challenged in federal court, may end up on the wrong side of contemporary federal equal protection jurisprudence. They also risk exposure to civil wrongful detention claims.²³¹

It is possible to address some of the main criticisms of money-based bail administration short of abrogating the constitutional right to bail. Right to bail states can, for example, amend their statutory laws to encourage or require trial courts to forgo secured money-bail for low-risk defendants. This can be accomplished by requiring automatic release on personal recognizance of defendants with no significant criminal history who are charged with non-violent misdemeanors that carry minor penalties. Courts can also be encouraged or required to use risk assessment tools to support their bail decisions. This hybrid approach incorporates some of the principles of preventive detention by differentiating between non-violent, misdemeanor offenses, on one hand, and violent or felony offenses, on the other. And this practice should lead to routine pretrial release on non-financial conditions of defendants who are a low risk of flight or danger to the community. However, unless trial courts are required to treat money-bail as a last resort, introducing risk assessment as just another bail consideration may end up effecting a change on paper that is not carried out in practice.²³²

constitutionality of structured bail systems, (Jan. 29, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/01/aba-urges-u-s-supreme-court-to-review-constitutionality-of-stru/> [<https://perma.cc/7J3R-KS8G>] (reporting that “[t]he American Bar Association filed an amicus brief Monday with the U.S. Supreme Court, contending that the Calhoun, Ga., bail system, which ties pretrial release directly to a fixed-payment schedule of offenses, violates the Equal Protection and Due Process clauses of the 14th Amendment” and noting that “scores of jurisdictions nationwide use similar inflexible money-bail systems in their criminal justice proceedings although many states and local entities have discarded their use in recent years.”).

231. Wiltz, *supra* note 203 (“High-profile cases have highlighted the cracks in the system. Sandra Bland, an Illinois woman with a history of depression, apparently hanged herself in a Texas jail after being unable to post bail for a routine traffic stop in 2015. Her family won a \$1.9 million wrongful death suit in September.”).

232. Ian MacDougall, *The Failure of New York’s Bail Law*, ATLANTIC MONTHLY, (Nov. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/11/the-failure-of-new-yorks-bail-law/546212/> [<https://perma.cc/8KK2-GPJK>] (“New York City’s history . . . underscores the limits of systemic reforms. Legal change on paper alone is not enough to change long-entrenched judicial practice, a lesson that’s already becoming apparent in jurisdictions that are part of the new wave of bail reforms. In Chicago, for example, representatives from criminal-justice groups have found that judges have not changed their practices to conform to a new cash-bail process implemented this summer by the chief judge[.]”); *Id.* (“From the outset, overworked criminal-defense lawyers lacked the time and resources to dig into their clients’ backgrounds and challenge the many bail determinations that departed from the law. For prosecutors, the incentives favor the present state of affairs: A defendant in jail is far more likely to take a plea deal, giving the government a win, than

Distinguishing between defendants based on the nature of the crime charged and the individual's propensity for future dangerousness, whether required or permitted, requires right to bail states to grapple with their justifications for bail. A misdemeanor/non-violent carve-out makes sense if one accepts community safety as a valid purpose of bail because it calibrates the stringency of release conditions to the seriousness of the conduct alleged and the nature of the risk presented by the individual defendant if released. However, embracing, even slightly, a distinction between "deserving" and "undeserving" defendants²³³ conflicts with an understanding of bail as an individual protection against arbitrary pretrial detention by the state that is available to all noncapital defendants on equal terms. Distinctions based on culpability and moral blameworthiness may have a legitimate place in sentencing and corrections after a defendant has been adjudicated guilty. But in the pretrial context it may be hard to reconcile a universal right to bail for noncapital defendants with bail practices that extend benefits, such as affording a presumption of release on non-financial conditions, to one category of defendants, while denying it to others. Further, simply encouraging or requiring trial courts to favor

take a case to trial. With both sides largely silent, judges, for their part, have had no reason to change long-standing practice. There can also be real risks to releasing a defendant . . . 'Whether directly or subliminally,' said . . . the former chief judge of New York's highest court . . . 'the judge doesn't like to see his name on the front page of a tabloid: "Judge releases so-and-so," and they do some great damage to public safety.'"). Cf. Samuel Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 455 (2016) (identifying "judicial discretion" as a "significant factor" in the pretrial detention crisis and observing that "when judges' discretion is more constrained, it appears more defendants are released without a concomitant increase in crime or flight"). See also Walter Olson, *Maryland's Bail Reform Is a Warning for Would-Be Moralizers*, WALL ST. J. (Sep. 22, 2017), <https://www.wsj.com/articles/marylands-bail-reform-is-a-warning-for-would-be-moralizers-1506119393> [<https://perma.cc/PZQ2-7VDW>] (Reporting an increase from 7% to 15% in the share of Maryland defendants held without bail from September 2016 to May 2017 and opining that "[i]f bail is taken away, judges need other tools to do the same job. Decades ago, when Congress steered the federal criminal-justice system away from bail bonds, lawmakers provided practical replacements, including systematic help in assessing a defendant's risk of flight or re-offense, options for pretrial supervision, and methods of home and electronic detention. Several states have done the same. New Jersey now uses a mathematical algorithm to assess a person's risk of fleeing or committing another crime. But the Maryland legislature, deeply split over Mr. Frosh's destabilizing changes, has failed to set up such alternatives. Maryland's example doesn't refute the idea of bail reform. But it does suggest state leaders should work to build consensus for comprehensive changes, instead of charging ahead with moralizing experiments.").

233. See Beckett, Reosti, & Knaphus, *supra* note 201 at 241 ("many reform advocates distinguish between deserving [nonviolent offenders, juveniles, the mentally ill, and those convicted of drug offenses (especially drug possession)] and undeserving reform recipients and specify that their interest in reform extends only to those depicted as comparatively deserving. A somewhat stronger version of this narrative asserts that the resources and energies of the criminal justice system, including those resources preserved through progressive criminal justice reforms, should be used to focus on undeserving offenders.").

release on non-financial conditions for low-level offenses does not address one of the most serious criticism of money-based bail administration—that a defendant of means charged with a serious, but bailable offense can buy his way out of jail, where a defendant who can't afford cash bail and who is denied the bondsman's services cannot.

A politically challenging, but high-return strategy to eliminate some of the excesses of secured money-bail is to more effectively regulate, or even eliminate commercial, for-profit bail bonding. At a minimum, states that allow for-profit bail bonding should be actively regulating this industry through the criminal justice system, not the insurance commissioner. Giving courts direct supervision and disciplinary authority over bail bondsman could go a long way towards addressing some of the more egregious industry practices. Legislatures can also mandate the use of discounted cash bonds, credit bonds, and deposit bonds that are secured directly through the court to reduce the influence of commercial interests in bail administration.

Bail administration in the United States is exceedingly jurisdiction-specific. And those discussing, studying, or litigating contemporary bail administration issues need to be able to identify and understand the significance of the following aspects of state bail administration. First, does the state recognize an absolute constitutional right to bail for noncapital offenses? Or, like the federal system and most states today, does it permit preventive pretrial detention without bail for some noncapital offenses? Second, if the state permits preventive pretrial detention without bail, what offenses or circumstances make a defendant potentially nonbailable? Is non-bailability based on the type offense charged, consideration of the individual defendant's personal characteristics, or a combination of both? Does the state require trial courts to use a risk-assessment instrument in pretrial release and detention decisions? If so, what are its strengths and weaknesses? Third, does the state put money-bail on par with other conditions of release, or is it a release condition of last resort? Fourth, does the state permit commercial, for-profit bail bonding, and, if so, to what extent does it regulate the bail bonding industry? These are critical pieces to the bail reform equation because it is not the existence of money-bail that produces the ills bail reform seeks to address, it is the heavy reliance on secured money-bail resulting in the routine pretrial detention of poor people who pose little risk to the community that is the problem. A right to bail jurisdiction that affords trial courts wide discretion in imposing money-bail while exercising little regulatory control over the commercial bail bond industry

creates conditions in which those ills will flourish. And it is those jurisdictions that are at most risk of litigation in today's climate.

VI. CONCLUSION

The remarkable thing about bail reform in the United States is not just the degree of consensus about what is broken and how to fix it, but how long the bail reform conversation has gone on. Most of what is currently being discussed in bail reform has been said many times before over several decades—over 50 years ago Attorney General Robert Kennedy offered remarks at the National Bail Conference that are indistinguishable from comments being made today about money-bail:

For 175 years, the right to bail has not been a right to release, it has been a right merely to put up money for release, and 1964 can hardly be described as the year in which the defects in the bail system were discovered. . . . [O]ur present attitudes toward bail are not only cruel, but really completely illogical. . . . [U]sually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilty 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?²³⁴

The more interesting question today is not the pros and cons of secured money-bail, but why a discussion on a topic that policymakers and the legal profession agree on has been so prolonged and produced such uneven results nationwide. One explanation could be the Supreme Court's lack of engagement in this particular area of criminal procedure. Unlike some areas of state criminal procedure that are heavily managed by the Supreme Court, state bail law has received relatively little attention from the federal courts until recently. The answer must also include consideration of the economics of the bail bond industry, judicial resources, systemic inertia, political disincentives, and regulatory disconnect.

As one of only two countries that permits the use of commercial bail bonds, the United States, collectively speaking, is an outlier. That a system tolerates practices disallowed in most of the world, in and of itself, is neither a reflection of the entire system, nor an indictment of it. The criminal justice system in the United States is not centralized or monolithic. Being out of step with other nations sometimes says less about

234. See NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE, PROCEEDINGS AND INTERIM REPORT, at 297 (1965).

Americans' collective normative values, than about the nature and process of legal reform in a federal system that recognizes states' superior authority and expertise in administering criminal law and procedure. Such is the case with bail administration in the United States—it is a patchwork of different rules and practices across jurisdictions.

Secured money-bail is not a standard in American bail administration. Nor is it a necessary ingredient in a well-administered pretrial system. But money-bail is indispensable in states that recognize an absolute right to bail for noncapital offenses because setting unpayable bail is the only way to detain dangerous butailable defendants. Moving away from a heavy reliance on money-bail towards preventive pretrial detention is the basic blueprint for modern bail reform. But that requires universally-available pretrial supervision services, something that may be out of reach for rural jurisdictions whose population and judicial resources are not as concentrated as they are in urban, or more heavily-populated jurisdictions. And it requires giving trial courts the authority to deprive individuals of their liberty before any adjudication of guilt in a wide range of cases. Abuses of the power to detain based on an accusation alone were the inspiration for the original right to bail under English law. And this massive power may be one citizens in some states are not disposed to entrust to their government lightly.

Originally grounded in the value of individual liberty, the state right to bail has evolved into a money-based bail administration that routinely deprives indigent defendants of their pretrial liberty, often with no corresponding state interest to justify their detention. Legislatures in right to bail states that are unwilling or unable to abrogate the absolute constitutional right to bail can no longer ignore the well-documented and undeniable problems associated with modern money-based bail administration. Jailing large numbers of defendants pretrial who pose no public safety risk at taxpayer expense with no commensurate increase in safety squanders public resources and fails to protect some of a state's most vulnerable residents and their communities from the financial hardships that money-bail visits on them. In today's bail reform climate, unregulated money-based bail administration is a rich target for constitutional challenges, challenges that have to be defended at public expense. Legislatures in right to bail states that fail to rein in trial courts' discretion to order secured money-bail as a condition of release for low-risk defendants and that do not effectively regulate the commercial bail industry are knowingly perpetuating these problems. In doing so, they abdicate both their financial and moral responsibilities to their citizens.