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The History of Cash Bail

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Abstract

The Eighth Amendment's Bail Clause requires judicial officers to reasonably calculate money bail to assure the appearance of a defendant at trial and sentencing. It disallows bail that is "excessive," but not unaffordable. Fifteen centuries of legal history inform that distinction in our bail system, which helped to bring our criminal justice system from barbarity to civility. But its critics have long questioned how civil our bail system is for indigent criminal defendants who cannot afford to post bail and are therefore held in detention before trial. That issue has contributed to three waves of bail reform, the first culminating in 1966, a second in 1984, and a third now developing in several states. Today's advocates echo concerns from 1966 and 1984 as they call on legislatures to reform state bail laws, while others lodge Fourteenth Amendment arguments in courts of law and public opinion, seeking to erase the Bail Clause from the Bill of Rights and pointing to a U.S. Justice Department "Dear Colleague" letter for support. This calls for reflection on the history and purpose of money bail and the Bail Clause itself.

Bail is an ancient practice at the heart of a recurring nationwide debate: Should we hold people in jail before trial if they are unable to pay bail? Money-bail practices were well known to the Framers as they drafted the Constitution and the Bill of Rights. Its purpose, to ensure the appearance of an accused individual at trial, was a well understood and uncontroversial element of the criminal justice system in early America. The Framers' primary concern in drafting the Eighth Amendment's Bail Clause was to ensure that bail not be set unreasonably high—which was not to say that bail must be affordable, or even available, to all defendants.

This paper, in its entirety, can be found at **http://report.heritage.org/lm213**

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Key Points

- The Eighth Amendment Bail Clause prohibits bail that is excessive—without regard to whether it is unaffordable. The fundamental purpose of bail is to tie a defendant to a jurisdiction and guarantee his appearance at trial.
- While several states are considering various bail reforms, some advocates have argued that "any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment." The text and history of the Eighth Amendment, as well as U.S. Supreme Court precedent, do not support that argument.
- Money bail has been the subject of two prior waves of federal bail reform, neither of which rejected money bail as unconstitutional. Advocates in the ongoing wave of bail reform should concentrate their arguments on policy grounds rather than on calls for reinterpretations of the Constitution.

Since the founding era, America has experienced two waves of bail reform. Now, a third is developing among several states. Some reformers engage in the political process to seek policy changes through legislation. Others attack money bail as unconstitutional, ignoring the history of the Bail Clause and reinterpreting long-standing principles of due process and equal protection. In this third wave of bail reform, what is past is prologue.

Judges can and should consider a person's financial status at the time of setting bail, but the Constitution does not require that bail be available in all cases, or that it be affordable to each defendant. If advocates wish to change this, the proper venue is through the legislature, not the judiciary. Trying to persuade judges to rewrite the U.S. Constitution to achieve the objectives of bail-policy reformers threatens injury to the Constitution itself.

The Origins of Cash Bail

Modern American bail law can trace its origins through 15 centuries of history, to the ancient days of Anglo-Saxon England.[1] Then, unlike today, criminal justice was a largely private, often brutal affair.[2] Family members were expected to avenge their murdered kin. Any private citizen could kill an offender sentenced to "outlawry." Anyone caught in the act of committing a crime could be summarily executed.[3]

Gradually, however, Anglo-Saxon law turned away from blood feuds toward a system of financial compensation paid by offenders to their victims. These payments, known as "wergeld," were equal to the injured party's value, which was assigned based on, among other things, the person's social status.[4] The late seventh century brought courts of arbitration, which heard and adjudicated complaints between Englishmen.[5] This transition to a court-centered justice system presented ancient communities with a familiar problem: how to prevent the accused from fleeing to avoid punishment?

Jail facilities were impractical, so Anglo-Saxon law dealt with the problem by releasing the accused on condition that he find a surety—someone who assumed responsibility for ensuring his appearance at trial.[6] The surety had to put up a pledge equal to the amount of the potential penalty, which would be forfeited if the accused failed to appear.[7] This early system of bail killed two birds with one stone: It simultaneously provided strong incentives to sureties to ensure their charges appeared in court, and guaranteed payment to victims if they fled.

The Norman conquest of 1066 brought considerable change, as the role of the state in criminal justice grew. Under Anglo-Saxon law, all crimes were considered bailable. But by the time of the Assize of Clarendon, issued in 1166,[8] Norman custom had evolved to place certain offenses, such as murder and "forest offenses,"[9] beyond the scope of bail.[10] Most other offenses, however, remained bailable, largely due to the difficulties involved in detaining individuals for the years it sometimes took for itinerant judges riding a circuit to arrive in a given county.[11]

Medieval English law gave sheriffs discretionary power to set the amount of bail and to choose whether to jail a defendant. This system invited corruption, including unlawful detention by sheriffs looking to extort payments from arrestees, as well as bribery to secure the release of suspects who were supposed to be held without bail. Consequently, subsequent centuries saw bail law undergo a series of reforms designed to restrain the discretionary authority of sheriffs, normalize the process of bail and pre-trial release, and provide security against unlawful detention.[12]

Following the adoption of Magna Carta in 1215,[13] a long series of proclamations and acts of Parliament provided incremental steps to define and protect the legal rights of Englishmen as criminal defendants. The first Statute of Westminster commanded sheriffs to release certain individuals deemed replevisable by the law on "sufficient Surety."[14] This and subsequent statutes proceeded to define which offenses were and were not bailable. The Petition of Rights of 1628 curtailed the practice of imprisoning individuals without any accompanying charge.[15] The Habeas Corpus Act of 1679[16] expedited the process of setting bail and releasing defendants prior to trial. The Bill of Rights of 1689 responded to the practice, employed by some judges, of using exorbitant bail to restrain individuals who otherwise would have been entitled to release.[17] In language instantly recognizable to Americans today, the English Bill of Rights declared "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[18]

By the end of the 17th century, English citizens could point to centuries of statutory and common law affording a qualified right to pre-trial release. In England, this right to release was understood to be available only for certain classes of offenses and

was unrelated to the ability of the accused to meet the requirements of bail—that is, if sufficient surety could not be obtained, the accused was most often detained.[19] Thus, pre-trial release was a system designed to balance the interests of the accused with the interest of society in ensuring that wrongful acts be punished, and criminals be prevented from absconding. There was no guarantee that a suspect would be released pending trial. That general framework is still with us today.

Bail in Early America

English colonists traveling to the New World brought their conceptions of law and justice with them. Most saw themselves as Englishmen protected by English law. In Connecticut, Delaware, Georgia, Maine, Maryland, and Rhode Island, colonial charters extended the legal rights enjoyed under English law to colonial Americans without modification.[20] The inhabitants of some colonies, however, applied the mother country's laws, including bail law, with slight variation, heralding the federalism we enjoy today. Colonial Massachusetts, through its Body of Liberties of 1641, provided that "[n]o man's person shall be restrained or imprisoned by any Authority whatsoever, before the law hath sentenced him thereto, If he can put in sufficient securitie, bayle, or mainprise, for his appearance, and good behavior in the meane time," except in cases where the individual was accused of a capital crime, contempt of court, or other offenses exempted by the legislature.[21] In 1682, Pennsylvania adopted its own Frame of Government of Pennsylvania, providing that "all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great."[22] New York modeled its bail system on Pennsylvania's, providing bail in all cases save charges of treason and felony.[23]

Thus, by the dawn of the Republic, American legal custom had already developed a strong presumption favoring pre-trial release by means of a bail payment. Once released, a surety became, in essence, a defendant's jailer. Sureties were expected to assure that a defendant in their charge complied with all release conditions and appeared in court for trial, and were further responsible for apprehending and detaining a defendant if he fled.[24] As late as 1872, the U.S. Supreme Court cited English common law to explain the responsibilities and liabilities of sureties with a defendant in their charge.[25]

Calculating a reasonable sum of bail in each case was also a grave matter. The common law offense of taking insufficient bail appeared in colonial laws, whereby if a party was released on insufficient sureties and did not reappear, the officer who set bail could be fined.[26] A 1645 law in the Virginia Colony, for example, held sheriffs liable "to pay the award of the court" if he "shall neglect to take sufficient bayle of the party arrested, or otherwise consent to, or be cause of" an accused man's escape.[27] Clearly, rather than a mere *pro forma* act, bail was to be set at an amount judged to be sufficient to incentivize appearance at trial, without becoming excessive.

Bail Under the Constitution

After 1776, the former colonies adopted constitutions that retained specific prohibitions against *excessive* bail, but did not create an absolute right to bail in all cases.[28] Rather, the power was reserved to the legislatures to define which offenses were considered bailable. Capital crimes, for example, were subject to special restrictions and were not bailable at all. In America, as in England, the fact that a defendant was accused of a bailable offense did not guarantee his automatic release. Judges were empowered to consider individual factors, such as the evidence against a defendant, the probability of conviction, and his criminal history in determining what amount constituted reasonable bail. And, of course, pre-trial release was not a "get out of jail free card"—it was conditioned upon the ability of the accused to post a reasonable bail and provide adequate sureties that he would return to face judgment. Indeed, the U.S. Supreme Court clarified one century later: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment."[29]

Bail did not appear in the U.S. Constitution as it was first written and ratified.[30] Congress specified that "[e]xcessive bail shall not be required" in the language of the Eighth Amendment, which passed with broad support and virtually no debate.[31] This is hardly surprising given how closely the Eighth Amendment's language hewed to both existing state constitutions and the English Bill of Rights of 1689 from which "the bail clause was lifted, with slight changes."[32] The first Congress also included in the Judiciary Act of 1789 a provision establishing that for "all arrests in criminal cases, bail shall be admitted,

except where the punishment may be death."[33] Thus, federal law preserved the rights provided for in the various state constitutions, chiefly the strong presumption favoring pre-trial release through bail, legislative control of admittance to bail, and a bar to excessive bail based on the English Bill of Rights and state constitutions. In short, Congress did nothing novel with the Eighth Amendment's bail provisions.

Commercial Bondsmen

As rooted as the American justice system is in the common law and traditions of England, it nonetheless experienced unique challenges that produced novel legal consequences. America's expansive and unexplored frontier, for one, afforded criminal suspects far more opportunity to flee and evade justice than the English islands. Additionally, the "unrooted" and rural life of many early American settlers simply made it harder to find a surety to take responsibility for a defendant in the pre-trial period.[34] Although sureties often did step forward, "their promise to produce the accused gradually became a promise merely to pay money should the accused fail to appear."[35] Some entrepreneurial spirits saw an opportunity. By posting a bond on a defendant's behalf in exchange for a fee, underwriters could turn a profit. So long as they exercised "reasonable diligence" to prevent escapes, "courts either waived or refunded a substantial percentage of forfeitures."[36] Regardless, bondsmen retained their fee.

The exact origin of the modern commercial bail-bond industry in the United States is difficult to pin down, but most trace its lineage to late-19th-century San Francisco. Two brothers, Peter and Thomas McDonough, realized that charging a fee and working directly with defendants was a lucrative business opportunity and founded the nation's first commercial bail-bond firm from their father's saloon near San Francisco's Hall of Justice.[37] The firm lasted only five decades, and earned a degree of infamy for its ties to organized crime and corruption, but it set a precedent, and the commercial bail bond industry was born.

The average commercial bondsman's firm works as follows. A defendant, unable to afford bail or locate a family member or friend willing or able to do so, may instead turn to a commercial surety. The firm posts bail in the full court-ordered amount, and charges the defendant a percentage fee, usually 10 percent.[38] The bondsman has the responsibility to ensure that the accused appears in court and is empowered to track down, detain, and return fleeing individuals. If the firm fails to do so, it forfeits the full amount of bail; if it successfully delivers a defendant, the bail amount is returned, and the firm retains the percentage paid by the defendant. The business model has proven successful and easily replicable and has spread throughout the nation.[39] Indeed, today commercial bondsmen operate in nearly every state, although some states have outlawed the practice.[40]

Bail in the Supreme Court

Notwithstanding these unique developments, federal bail law was largely unchanged until the middle of the 20th century. In the 1950s, it became the center of several controversies that reached the U.S. Supreme Court. In 1951, 12 communists charged with violating the Smith Act challenged their bail, set at $50,000 apiece, as "excessive" under the Eighth Amendment.[41] Chief Justice Fred Vinson, writing for the majority in *Stack v. Boyle*, defended the "traditional right to freedom before conviction,"[42] but found that pre-trial freedom does not come without conditions:

> The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like the ancient practice of securing oaths of responsible persons to stand as sureties for the accused, 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 purpose is "eccessive" under the Eighth Amendment.[43]

Importantly, the Court affirmed that the role of bail is to provide an anchor holding a defendant in place pending the outcome of a trial, and held that judges must conduct individualized assessments when considering the amount of bail in each case.

A year later, in 1952, alien communists held without bail pending possible deportation challenged their detention on the grounds that the Constitution afforded them a right to release on bail.[44] Justice Stanley Reed, writing for a majority of the Court in *Carlson v. Landon*, rejected the argument that the

Eighth Amendment "compels the allowance of bail in a reasonable amount" in all cases.[45] Reed correctly pointed out:

> The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus, in criminal cases, bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable.[46]

Reed based his Eight Amendment analysis by reference to its antecedent English Bill of Rights, which "has never been 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."[47] It is instructive that "[w]hen this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept."[48]

Setting Bail When Proper

The Medieval English criminal justice system that produced money bail was quite unlike the criminal justice system that administers bail today. It functioned like an artisan's workshop, with few professional actors—typically just a sheriff and a magistrate—whose law enforcement roles often fell to members of the community.[49] Today's criminal justice system, at least in large urban cities, functions much more like a factory, with many professionals performing discrete tasks, requiring far less direct involvement from the community.[50]

Jails are no longer impractical. Judges no longer ride circuit. A host of law enforcement officials now work to identify, capture, and detain suspected criminals and track defendants who flee before trial. A sizable bureaucracy keeps the wheels turning, including pre-trial services agents who recommend how to treat criminal defendants before trial and personnel who ensure that any conditions of release are met.[51] The state has taken much of the responsibility to supervise criminal defendants before trial off the hands of kinfolk who performed that task in medieval England.

Bail played a significant role in the evolution of criminal justice, particularly regarding the pre-trial hearing known as an "arraignment," in which a defendant typically enters a plea of not guilty to the charges against him and a judge decides what to do with the defendant before trial.[52] By the 1980s, arraignments exemplified the factory model of criminal justice: brief, efficient exchanges between judge, prosecutor, defense counsel,[53] and defendant—and behind them a tremendous bureaucracy at work, "involving stacks of paperwork by police officers, deputy U.S. attorneys, defense attorneys, judges, and courthouse workers."[54]

At the arraignment, judges must impose "bail or jail,"[55] or some other release conditions,[56] before a defendant is convicted. Consequently, the presumption of innocence is pertinent.[57] Yet a judge cannot be blind to the fact that several government officials, and often a grand jury, have already drawn conclusions about the likelihood of the defendant's guilt.[58] Many critics have argued that some judges are unduly swayed by law enforcement concerns that a defendant will pose a significant risk of flight or harm to individuals or the community if released—and increase bail as a means of detaining defendants.[59] The result, they argue, contributes to a broader problem: that too many people are in jail pending trial "simply because they are poor."[60]

Although we have come far from medieval sheriffs extorting bail money, some who experience these procedures firsthand,[61] as well as academics,[62] litigators,[63] policy experts,[64] professional organizations,[65] and some judges,[66] harbor significant concerns about the pre-trial detention of defendants who cannot afford bail. That controversy has generated three waves of bail reform: the first in 1966, the second in 1984, and the third today. Some of today's advocates disregard the lessons of past reform, seeking instead to rewrite the history and text of our Constitution.

Wave I: The Bail Reform Act of 1966 and "Presumptive Release"

Bail, like the humans who administer it, was never perfect. In 1964, then–U.S. Attorney General Robert F. Kennedy gave an oft-cited critique of bail practices that existed at the time:

> Usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. The factor is simply money. How much money does the defendant have?[67]

Though it may be true in some cases, such a simplistic representation is misleading. Reform-minded legislators in the 1960s were concerned that judges focused on non-financial factors such as the nature of the crime and the character of the defendant too much, not too little. They "condemned" federal rules that "allowed judges to detain defendants" merely by "setting unaffordable bail" with only a "questionable" explanation as to the reason for doing so.[68] The unstated purpose behind the setting of unaffordable bail was usually that the defendant was too "dangerous" to release.[69] The net effect, reformers argued, was that a great many people—particularly poorer defendants in crowded city jails—were stuck, often unjustifiably, in detention, while wealthier and possibly more dangerous suspects were able to secure release.

In the face of these criticisms, Congress enacted the Bail Reform Act of 1966,[70] which declared that "the sole purpose of bail laws must be to assure the appearance of the defendant"[71] and adopted a policy that no one, "regardless of their financial status," may "needlessly be detained pending their appearance."[72] It directed judges to release all non-capital case defendants on their own recognizance unless doing so would be inadequate to assure their appearance. In such situations, it enumerated additional conditions of release that a judge could impose to meet that goal, including placing the defendant in the custody of a "designated person," placing restrictions on travel, or one of several forms of money bail, such as an appearance bond or a surety bond.[73] And the act listed factors for a judge to consider for setting conditions of release.[74] These included indicia of a defendant's flight risk, such as ties to the community, as well as his financial resources to permit the setting of a reasonable amount of bail. The law, however, did not permit judges to consider a defendant's prospective dangerousness to the community in deciding whether to detain someone—the very reason, it was suspected, why many judges were setting bail that was out of reach to many accused offenders.[75]

Wave II: The Bail Reform Act of 1984 and "Dangerousness"

The 1966 act caused problems almost immediately. In 1970, Congress authorized preventive detention in the District of Columbia at the request of local officials concerned about the release of violent offenders.[76] By the 1980s, nationwide public-safety concerns stemming from the crimes committed by defendants out on pre-trial release had trumped the liberal release agenda of the 1960s.[77] Many states changed their bail laws accordingly.[78] President Ronald Reagan and Chief Justice Warren Burger both voiced this sentiment as well.[79] The Senate Judiciary Committee decried the 1966 act's "failure to recognize the problem of crimes committed by those on pre-trial release" and determined "that federal bail laws must address" that alarming oversight.[80] In 1984, Congress rectified its earlier oversight with a new Bail Reform Act that enabled judges to detain the few "but identifiable" "particularly dangerous" defendants for whom no "stringent release conditions" or likelihood of re-arrest would "reasonably assure" public safety.[81]

The 1984 law did not throw open the door to excessive bail. In fact, Congress expressly prohibited "using inordinately high financial conditions to detain defendants,"[82] instead authorizing judges to consider a defendant's dangerousness when determining whether to hold a defendant pre-trial. Of course, Congress had to ensure that preventive detention would not cast too wide or narrow a net, so it adopted workable but "stringent safeguards to protect the rights of defendants" based in part on the 1970 preventive detention statute for the District of Columbia. Defendants were afforded "a full-blown adversary hearing," where "the Government must convince [the judge] by clear and convincing evidence," based on specific factors, "that no conditions of release can reasonably assure the safety of the community or any person."[83]

Two defendants detained without bail challenged the law soon after it was enacted. They argued that preventive detention under the act violates the Eighth Amendment and also "constitutes impermissible punishment before trial" in violation of "substantive due process."[84] The U.S. Supreme Court rejected both claims and upheld the constitutionality of the act. It found no Eighth Amendment bar to the government "pursuing compelling interests" such as public safety "through regulation of pre-trial release."[85] It also concluded that pre-trial detention under the Bail Reform Act "is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."[86]

Some advocates urged Congress to eliminate money bail entirely, but legislators considered that

"unjustified."[87] The Department of Justice recommended preserving money bail as a historical and effective method to deter flight and secure reappearance.[88] Congress appears to have adopted that position when crafting the 1984 act. Per the Senate Judiciary Committee report, "[A] financial condition of release that results in the pre-trial detention of the defendant...does not necessarily require [their] release" if the judge determines that "it is the only form of conditional release that will assure the person's future appearance."[89]

Today, courts across the country recognize that they are prohibited from "using unnecessarily high bail amounts as a replacement for the required findings necessary to order pre-trial detention."[90] Critics, however, maintain that state courts still set unaffordable money bail in unfair, irrational, and unnecessary ways.[91] This has led to the third wave of bail-reform efforts now unfolding in several states.[92]

Wave III: Familiar Policy Proposals and Novel Misinterpretations of the Constitution

In 1966 and 1984, advocates brought compelling policy concerns about money bail to their legislators, specifically alleging that too many people are jailed before trial—with devastating personal consequences—"simply because they are poor" and cannot afford bail.[93] Today's advocates direct their policy concerns not only to legislatures but to courts, staking out misleading positions supported by factually incorrect arguments that money bail is unconstitutional. Two of these arguments stand out.

Fourteenth Amendment. In 2016, the U.S. Justice Department wrote a "Dear Colleague" letter[94] to state and local "judicial actors"[95] asserting that "any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment."[96] This is incompatible with long-standing constitutional law. Just as the English jurist William Blackstone found it clear in 1765,[97] federal courts in this country have considered it clear in modern times that "bail is not excessive merely because the defendant may be financially unable to post an amount otherwise meeting the above standards."[98] A defendant's present financial inability to make bail "is certainly...a concern which must be taken into account when determining the appropriate amount of bail," however, "it is neither the only nor controlling factor to be considered by the trial court judge in setting bail."[99]

At least two state courts have also addressed the issue and reached the same conclusion. The Supreme Court of Vermont recently concluded that "[a]lthough both the U.S. and Vermont Constitutions prohibit excessive bail, neither this court nor the U.S. Supreme Court has ever held that bail is excessive solely because the defendant cannot raise the necessary funds."[100] The Supreme Court of Wyoming also determined that "it is not necessary for a court to [fix bail] at a point that it can be made by the defendant," because "the measure is adequacy to insure [sic] appearance" not "the defendant's pocketbook and his desire to be free pending possible conviction."[101]

The Justice Department concluded otherwise by interpreting too broadly a body of federal judicial precedent which holds that an indigent convicted criminal's present inability to pay certain fines or fees is generally an impermissible basis to impose or enhance a *post-conviction* sentence of incarceration or to deny a hearing.[102] The U.S. Supreme Court has distinguished post-conviction punishment from pre-trial bail and detention, for the same reasons that Blackstone did over 250 years ago: Pre-trial "imprisonment...is only for safe custody, and not for punishment."[103]

If an aspect of pre-trial detention is punitive, the remedy lies not in equal protection, but due process.[104] In 1956, the U.S. Supreme Court, led by then-Chief Justice Earl Warren, made "a significant effort to alleviate discrimination against those who are unable to meet the costs of litigation in the administration of criminal justice."[105] In Illinois, criminal defendants could obtain a trial transcript for appellate review from the state for a fee. The Court decided that the fee effectively barred indigent defendants from receiving adequate appellate review and so held that requiring them to pay the fee was unconstitutional.[106] Since then, "a few relevant Supreme Court precedents" have treated the "unequal impact of certain state activities on indigents as 'invidious discrimination' forbidden by the Fourteenth amendment."[107] But "the Court's reasoning is not explicit" in these cases. The Court simply raises "a concern that the poor not be denied access to certain privileges available to those who can pay."[108] In 1983, the U.S. Supreme Court in *Bearden v. Georgia* suggested sweeping those few cases into a due-process framework, in part because "indigency in this context is a relative term rather than a classification, [so] fitting 'the problem of this case into an equal protection

framework is a task too Procrustean to be rationally accomplished.'"[109]

Since 1956, the Court has clarified that equal protection is not the panacea for economic and social welfare concerns that some bail-reform advocates wish it to be. The Equal Protection Clause says that states cannot "deny to any person within its jurisdiction the equal protection of the laws." For laws concerning economic status, equal protection jurisprudence merely requires the government to provide a "rational basis" for its policies, and "it hardly can be said that" money-bail statutes operate "without rational relationship to the legislative objective of securing the presence of the accused upon trial."[110]

The Supreme Court has rejected arguments that heightened scrutiny is required when laws permit different outcomes based partly on differences in material circumstances.[111] To the contrary, as *Bearden* itself shows, the Court has been unwilling to wield the Equal Protection Clause to turn our capitalist society into a socialist one.[112] It "confers no substantive rights,"[113] so it cannot provide an absolute right to release on bail that the Bail Clause itself denies. Thus, equal protection challenges to money-bail statutes are "virtually certain to result in victory for the government," and naysayers have fifteen centuries of history to refute.[114]

The Supreme Court has also rejected the notion that the Due Process Clause provides a "backstop" whenever the meaning of a constitutional provision explicitly addresses a party's claim and prevents that party's desired outcome.[115] "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a specific sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.'"[116] The Court's jurisprudence thus flatly rejects the position held by the Obama Justice Department, that it is unconstitutional to set bail that indigent defendants are unable to pay. Neither the Equal Protection Clause nor the Due Process Clause offer a hidden path around the Bail Clause and its clear historical meaning.[117]

If, alternatively, the argument is that present inability to make bail prolongs pre-trial detention, and that prolonged detention may prejudice the indigent detainee's case,[118] then the argument is misdirected. The concern in such a situation cannot be an existential challenge to money bail, but rather ought to be a specific complaint directed against a party who causes delay, either the prosecutor or the judge. Although it is true that due-process violations may sometimes require a court to dismiss an indictment,[119] that would require the defendant to show much more than a mere lapse in time. He must prove that a state actor caused the delay, that the delay "caused substantial prejudice to appellees' rights to a fair trial[,] and that the delay was an intentional device to gain tactical advantage over the accused," or the official otherwise acted in bad faith.[120] In practice, only extraordinary cases pass this test.[121]

No Consensus. In spite of that clear jurisprudence, former U.S. Attorney General Eric Holder wrote to Maryland's Attorney General, Brian Frosh, "Courts across the country have invoked" U.S. Supreme Court precedent "to find that wealth-based pre-trial detention schemes are unconstitutional."[122] He supports that claim by citing three cases, one each from South Florida, South Mississippi, and Alabama[123]—hardly "across the country"—and none finding wealth-based bail to be unconstitutional.[124]

The court in the Florida case affirmed the constitutionality of Florida's money-bail scheme.[125] The Mississippi court reiterated there is no "absolute right to release on bail" under the Fourth or Eighth Amendments or "even under the strict judicial scrutiny directed at state bail procedures for Fourteenth Amendment purposes."[126] Holder writes that the third case, *Alabama v. Blake*,[127] "also [found] that a wealth-based pre-trial bail scheme 'violates an indigent defendant's equal protection rights guaranteed by the United States Constitution.'"[128] While the court in *Blake* held that a particular state rule of pre-trial procedure violated due process under the Alabama and U.S. Constitutions,[129] it explicitly noted that the scheme contained a severability clause[130] and affirmed that it is constitutional for "a judicial officer to require monetary bail as a condition of release in appropriate cases."[131]

Conclusion

Money bail has deep historical roots in Anglo-Saxon law and custom. Bail emerged to solve a problem we still grapple with today—balancing the general right of defendants to pre-trial freedom with the need of society to protect against flight and ensure punishment. In the United States, defendants have a right to reasonable bail, but Congress and state legislatures can define which crimes are, and are

not, considered bailable. With respect to individuals charged with crimes that are considered bailable, the Eighth Amendment provides protection from excessive, but not unaffordable, bail. In certain limited circumstances judges can order pre-trial detention in the name of public safety.

The Supreme Court has repeatedly rejected constitutional challenges to the use of money bail in the United States. To the extent that arguments can be made against its use today, they are ordinarily policy questions, not legal or constitutional issues. Nevertheless, reformers are taking their arguments to court, misconstruing judicial precedent and misrepresenting facts and history in a "Hail Mary" bid to see money bail declared unconstitutional. Rather than contort the text of the Constitution to achieve their policy goals, advocates for bail reform should make their arguments to legislators and the public, the proper venues for this discussion.

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Endnotes

1. William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Ala. L. Rev. 33 (1977); Note, *Bail: An Ancient Practice Reexamined*, 70 Yale L.J. 966 (1961).
2. Timothy Schnacke et al., *The History of Bail and Pretrial Release*, Pretrial Justice Institute (Sep. 24, 2010), http://bit.ly/2u5kH4D (accessed July 11, 2017).
3. *See* Paul J. Larkin Jr., *The Lost Due Process Doctrines*, 66 Cath. U. L. Rev. 293, n.171 (2017).
4. Encyclopedia Britannica, https://www.britannica.com/topic/wergild#ref31625 (accessed Mar. 2, 2017).
5. *See* Duker, *supra* note 1, at 35; Larkin, *supra* note 3, at 327–32.
6. Schnacke, *supra* note 2, at 2. The aforementioned practice of summary execution certainly winnowed the population of defendants it was necessary to detain, and certainly those who would be judged, in today's terms, a danger to the community. Duker, *supra* note 1, at 35. Surety contracts date back to at least 2750 B.C., when one Accadian farmer asked another to cultivate his land until he returned from conscripted military duty, and recorded their agreement on a tablet. Willis D. Morgan, *History and Economics of Suretyship*, 12 Cornell L. Rev. 153 (1927).
7. Yale L.J., *supra* note 1, at 966.
8. *Assize of Clarendon, 1166*, Avalon Project, Yale Law School, http://avalon.law.yale.edu/medieval/assizecl.asp (accessed Mar. 3, 2017).
9. Illegal hunting or trespassing in royal forests. As a result, Robin Hood would have been beyond bail had he been caught. Schnacke, *supra* note 2, at 2.
10. Duker, *supra* note 1, at 44. "The writ *de homine replegiando*... famous for being the first 'write of liberty,' [] actually established the first written list of nonbailable offenses."
11. Schnacke, *supra* note 2, at 3.
12. Schnacke, *supra* note 2, at 3; Note, *Eighth Amendment Excessive Bail Clause Applies to States Through Fourteenth Amendment*, 60 Wash. Univ. L. Rev. 645, 653 (1982).
13. Magna Carta, Chapter 39. "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."
14. 3 Edw. I (1275). Chapter 15 addressed bail and codified which crimes were replevisable, commanding that accused persons "shall from henceforth be let out by sufficient Surety, whereof the Sheriff will be answerable and that without giving ought of their Goods." The statute further proscribed the release of any suspects "not replevisable," penalizing any such action by removal from office.
15. 3 Charles 1 (1628). The act, among other things, prohibited imprisonment without charge.
16. 31 Charles 2 (1679), providing for speedier consideration of habeas petitions by defendants, who sometimes were subjected to extended delays by sheriffs seeking to keep them jailed in violation of their rights under the law.
17. The transition from bail being set by sheriffs, to bail set by judges, was a gradual one. Centuries of complaints leveled against sheriffs, including accusations of false arrest and imprisonment, bribery, extortion, and unauthorized release of prisoners, resulted in numerous statutes designed to curtail these injustices. Eventually, alternatives were sought for the setting of bail. A 1327 statute authorized "keepers of the peace" to take indictments, and to investigate and punish misconduct by sheriffs. These keepers—eventually renamed justices of the peace—were granted, in 1483, complete discretion in setting bail. The justices appear to have been equally willing to abuse this power as were sheriffs, resulting in a 1554 act requiring that two justices be present to set bail. Duker, *supra* note 1, at 51–56.
18. 1 Wm. & Mary 2 (1689). *Compare* U.S. Const. amend. VIII.
19. 4 Blackstone, Commentaries *244–45 (Christian et al. eds., 1841).
20. Duker, *supra* note 1, at 80.
21. Massachusetts Body of Liberties (1641), http://www.mass.gov/anf/docs/lib/body-of-liberties-1641.pdf.
22. Frame of Government of Pennsylvania (1682), *available at* http://avalon.law.yale.edu/17th_century/pa04.asp.
23. Duker, *supra* note 1, at 80.
24. *See* Taylor v. Taintor, 83 U.S. 366 (1872); Commonwealth v. Bricket, 25 Mass. (8 Pick.) 137 (1828) (upholding use of force to detain the principal); State v. Lingerfelt, 109 N.C. 775, 14 S.E. 75 (1891) (same); Nicolls v. Ingersoll, 7 Johns. (N.Y.) 145 (1810).
25. *See Taylor*, 83 U.S. at 371–72; Devine v. State, 37 Tenn. 623, 624 (1858).
26. *See* Neil H. Cogan, The Complete Bill of Rights 943 (2d ed. 2013).
27. Duker, *supra* note 1, at 78 (quoting 1 Va. Stat. 305).
28. The prohibition against excessive bail remains in force today in all state constitutions except for Illinois, *see* Frederic J. Stimson, The Law of the Federal and State Constitutions of the United States § 122, Excessive Bail 165 (2004), the constitution of which reads, "All persons shall be bailable by sufficient sureties, except for" certain enumerated offenses. IL. Const. Art. I § 9. Others are similar or identical to the federal constitution. New York's constitution, for example, provides that "[e]xcessive bail shall not be required nor excessive fines imposed." N.Y. Const. Art. I § 5. Pennsylvania's constitutional language is identical. PA Const. Art. I § 13.

29. *Taylor*, 83 U.S. at 371.
30. The original text of the Constitution did guarantee, however, the writ of habeas corpus. For a broader discussion of the "Great Writ," see Jonathan Turley, *Habeas Corpus*, *in* Heritage Guide to the Constitution (1st ed., 2005), *available at* http://www.heritage.org/constitution/#!/articles/1/essays/61/habeas-corpus.
31. David Forte, *Cruel and Unusual Punishment*, *in* Heritage Guide to the Constitution (1st ed., 2005) *available at* http://www.heritage.org/constitution#!/amendments/8/essays/161/cruel-and-unusual-punishment.
32. Carlson v. Landon, 342 U.S. 524, 545 (1952).
33. Bail in capital cases could not be set "but by the supreme or a circuit court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law." An Act to Establish the Judicial Courts of the United States, 1 Stat. 73, § 33 (1789).
34. Duker, *supra* note 1, at 95; Schnacke, *supra* note 2, at 6.
35. Yale L.J., *supra* note 1, at 967.
36. *Id.* at 968 (discussing the early legal history of the American commercial bail bond industry).
37. *The Old Lady Moves On*, Time Mag. (Aug. 18, 1941), http://www.time.com/time/printout/0,8816,802159,00.html; *see also*, Schnacke, *supra* note 2, at 7. Commercial bail bonds have been the most scrutinized conditions of pre-trial release. (*See, e.g.,* Duker, *supra* note 1, at 95–96; Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring) ("the professional bondsmen hold the keys to the jail in their pockets").) Today, they are one of several financial release conditions. *See* Nat'l Conf. of State Legislatures, *Pretrial Release Conditions* (Oct. 15, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-conditions.aspx#/; Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 239243, Pretrial Release and Misconduct in Federal District Courts, 2008-2010 (2012).
38. The fee is typically 15 percent in federal cases.
39. The commercial sureties industry is not without its detractors. Many have criticized this system for affording too much power to private actors to determine who among indigent arrestees should and should not be released from jail pending trial. The late Judge J. Skelly Wright captured the sentiment of critics of the commercial sureties industry in his concurring opinion in *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963), stating "professional bondsmen hold the keys to the jail in their pockets. . . . 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 and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail."
40. Illinois, Kentucky, Oregon, and Wisconsin, for example, have eliminated the commercial sureties industry. Thomas Cohen, Brian Reaves, *Pretrial Release of Felony Defendants in State Courts*, Bureau of Justice Statistics (Nov 2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf (accessed Mar. 17, 2017).
41. Stack v. Boyle, 342 U.S. 1 (1951).
42. *Id*. at 4. Vinson expressed concern that bail "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.*
43. *Id*. at 4–5.
44. *Carlson*, 342 U.S. 524. Because *Carlson* was a civil immigration matter, courts have treated it as "an area of substantive concern clearly within the exclusive province of the federal government." United States v. Perry, 788 F.2d 100, 110 (3d Cir. 1986).
45. *Carlson*, 342 U.S. at 544.
46. *Id.* at 545–46.
47. *Id.* at 545 (internal citations omitted). In fact, "[in] England, there was a series of crimes and situations where the arrested person could 'have no other sureties but the four walls of the prison.'" *Id.* at 569 (citing 4 Blackstone, Commentaries *298).
48. *Id.* at 545.
49. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 620–24 (1999).
50. *See generally* William J. Stuntz, The Collapse of American Criminal Justice (2011).
51. *See, e.g.,* Pretrial Services Agency for the District of Columbia, https://www.psa.gov/ (last visited Mar. 20, 2017); U.S. Courts, *Probation and Pretrial Officers and Officer Assistants*, http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer (last visited Mar. 21, 2017).
52. *See, e.g.,* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 973 n. 70 (1965) (stating that "the evolution of habeas corpus was closely tied to abuses of bail law. The bail legislation of 1486 was part of the tightening up on judicial administration which included the creation of the Star Chamber, and an act touching bailment of persons, 1554, 12 Phil. & M., c. 13, a statute designed to guard against collusion in granting bail, for the first time made provision for what became the preliminary hearing.").
53. "But in many places in this country, either no counsel is present when bail is set or counsel first meets the defendant when the case is called by the court clerk at the arraignment." Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, *in* The Champion (June 2012).

54. *See, e.g.,* Tom Ricks, *A Typical Day at the Justice Factory*, Wash. Post (Jan. 1, 1982), http://wapo.st/2oaaXj2 (providing a glimpse of an average arraignment); *see also* Debbie Hines, *Maryland's Assembly-Line Justice*, Wash. Post (Oct. 2, 2015), http://wapo.st/2n48wPM.
55. Herbert Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1, 38 (1964) (the pre-trial option in 1964).
56. *E.g.,* detention, supervised release, employment, or rehab. For common financial and non-financial conditions of release, *see* Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 243777, Felony Defendants in Large Urban Counties, 2009 35 (2013), *available at* https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.
57. Federal bail law, 18 U.S.C. § 3142(j) now reads, "Nothing in this section shall be construed as modifying or limiting the presumption of innocence." But the U.S. Supreme Court has sent mixed signals on the presumption's pre-trial significance. *Compare Stack*, 342 U.S. at 4 ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."), *with* Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials … it has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun.").
58. A police officer identified probable cause that the defendant was factually guilty of a crime and detained him or her. Gerstein v. Pugh, 420 U.S. 103 (1975). A neutral magistrate approved. Cty. of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991). A prosecutor also saw "probable cause to believe that the accused committed an offense defined by statute." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). Of course it is not always so simple. *See, e.g.,* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Cath. U. L. Rev. 63 (2012).
59. *See* John V. Ryan, *The Last Days of Bail*, 58 J. Crim. L., Criminology, & Police Sci. 542, 548 (1967) (footnote omitted); Herman Goldstein, *The Use of Bail for Preventive Detention*, *in* Proceedings of the Attorney General's Conference on Bail and Criminal Justice, 151–160 (1964); Shalia Dewan, *When Bail Is Out of Defendant's Reach, Other Costs Mount*, N.Y. Times (June 10, 2015), http://nyti.ms/2oVqmYV (Fresno County, CA, Superior Court Judge W. Kent Hamlin said, "[B]ail is really being set to keep the person in custody. You have to kind of concede that. It's not supposed to be that; it's supposed to guarantee their appearance in court. They're innocent until proven guilty, but the bail system assumes they're guilty.").
60. Jason Flom & Inimai Chettiar, *Jailing the Poor and Releasing the Rich*, U.S. News (Oct. 19, 2016), http://bit.ly/2mMjxYa.
61. *See, e.g.,* Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. Pa. L. Rev. 1031 (1954); Nick Pinto, *The Bail Trap*, N.Y. Times (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html; Ovetta Wiggins, *She Spent Five Days in Jail Because She Couldn't Come up With $1,000. Bail Overhaul Advocates Say Her Story is Not Uncommon.*, Wa. Post (Dec. 27, 2016), http://wapo.st/2n7c9WI.
62. Caleb Foote was a leading scholar who was highly critical of money bail in the 1960s in a series of articles including *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 973 (1965) and *II*, 113 U. Pa. L. Rev. 1125 (1965).
63. *See, e.g,* Equal Justice Under Law, *Ending the American Money Bail System*, http://bit.ly/1TXOgJv (last visited Mar. 20, 2017).
64. *See, e.g.,* Pre-Trial Justice Institute, http://www.pretrial.org/endcashbail/ (last visited Mar. 20, 2017).
65. *See, e.g.,* Am. Bar Ass'n, Standards for Criminal Justice: Pretrial Release, Standard 10-1.4(e)–(f) (3d ed. 2007); Am. Council of Chief Defenders, Policy Statement on Fair and Effective Pretrial Justice Practices, 14 (2011) ("when financial conditions are to be used, bail should be set at the lowest level necessary to ensure the individual's appearance and with regard to a person's financial ability to post bond").
66. *See, e.g.,* Conference Of Chief Justices, Resolution (Jan. 30, 2013), http://www.pretrial.org/wp-content/uploads/2013/05/CCJ-Resolution-on-Pretrial.pdf.; Dewan, *supra* note 62.
67. *Hearing on S. 2838, S. 2839, and S. 2840 Before the Subcomm. on Constitutional Rights and Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. (1964) (statement of Robert F. Kennedy, Attorney General).
68. John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. Crim. L. & Criminology 1, 3–4 (1985) (discussing objections "to preventive detention based on public safety concerns").
69. *Id.*
70. Bail Reform Act of 1966, Pub. L. No. 89–465, 80 Stat. 214 (1966) (repealed 1984).
71. S. Rep. No. 98–225, 3, 1984 U.S.C.C.A.N. 3182, 3186 (1984).
72. Bail Reform Act of 1966, § 2.
73. *See* 18 U.S.C. § 1346(a)(1)–(5) (1966) (repealed 1984).
74. *See* 18 U.S.C. § 1346(b) (1966); JoAnne Levy, *Pretrial Preventive Detention Under the Bail Reform Act of 1984*, 63 Wash. U. L. Q. 523, n. 24 (1985) (discussing factors in historical context).
75. *See* 18 U.S.C. § 1346(b) (1966).
76. S. Rep. No. 98-225 at 7–8; The District of Columbia Court of Appeals upheld the constitutionality of the Act. United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981) (en banc).
77. Goldkamp, *supra* note 68, at 5–6; *see also* S. Rep. 98–225 at 3, nn. 24–26 (1984).
78. *See* Goldkamp, *supra* note 68, at 15.
79. S. Rep. No. 98–225, 6–7, (1984).
80. *Id.* at 3.

81. *Id.* at 67.
82. United States v. Orta, 760 F.2d 887, 890 (8th Cir. 1985); *see also* S. Rep. 98–225 at 11.
83. United States v. Salerno, 481 U.S. 739, 750 (1987).
84. *Id.* at 746.
85. *Id.* at 753. The Court wrote, "[T]he only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." 481 U.S. at 754.
86. *Id.* at 748; *see also* Bell v. Wolfish, 441 U.S. 520, 537 (1979).
87. S. Rep. No. 98–225, at 11.
88. *Id. See also,* Dewan, *supra* note 59 (statement of Judge Steve White, President, Alliance of California Judges, "Bail probably is the single most reliable assurance that somebody will show up.").
89. S. Rep. No. 98–225, at 16. The Committee noted that "the judicial officer may reconsider the amount of the bond. If he still concludes that the initial amount is reasonable and necessary then it would appear that there is no available condition of release that will assure the defendant's appearance":

    > This is the very finding which, under [the 1984 Act], is the basis for an order of detention, and therefore, the judge may proceed with a detention hearing [as prescribed in the Act], and order the defendant detained, if appropriate. The reasons for the judicial officer's conclusion that the bond was the only condition that could reasonably assure the appearance of the defendant, the judicial officer's finding that the amount of the bond was reasonable, and the fact that the defendant stated that he was unable to meet this condition would be set out in the detention order.... The defendant could then appeal the resulting detention.

    Id. The U.S. Supreme Court had previously decided in *Stack v. Boyle* that the "proper procedure for challenging bail as unlawfully fixed is by motion for reduction of bail and appeal to the Court of Appeals from an order denying such motion," with the possibility for relief via subsequent habeas petitions. 342 U.S. at 6–7.
90. *See* Memorandum from Eric Holder to Maryland Attorney General Bryan E. Frosh on Maryland's Wealth-Based Pretrial Detention Scheme at 7, n. 35 (Oct. 3, 2016) [hereinafter Holder memo].
91. *See generally id.*; Conference Of Chief Justices, Resolution, *supra* note 66, at 3 ("It is common in many states to have bail schedules, adopted statewide or locally, that establish a pre-set amount of money that must be deposited at the jail in order for a defendant to obtain immediate release, without any individual assessment of risk of flight or danger to the community."). At least two state bail-schedule schemes have been invalidated for, in part, eliminating the requisite individualized assessment. *See* Pelekai v. White, 861 P.2d 1205 (Haw. 1993); Clark v. Hall, 53 P.3d 416 (Okla. 2002).
92. *See, e.g.,* David Savage, *Obama Administration Challenges the Money Bail System: Can People Be Kept in Jail Just Because They Are Poor?,* L.A. Times (Aug. 25, 2016), http://lat.ms/2bZmiR1; *Here's How State Lawmakers Plan to Reform the Bail System in California*, L.A. Times (Mar. 26, 2017), http://www.latimes.com/politics/la-pol-sac-bail-reform-legislation-20170326-story.html; N.J. Chief Justice Stuart Rabner, *Bail Reform Puts N.J. at the Forefront of Fairness*, New Jersey.com (Jan. 9, 2017), http://bit.ly/2nxRH37; An-Li Herring, *States And Cities Take Steps To Reform 'Dishonest' Bail System*, NPR (Dec. 17, 2016), http://n.pr/2husyCe; U.S. Bail Reform News, *Bail Reform Impacting Municipal Courts with Increased Case Load* (Mar. 19, 2017), http://bit.ly/2njaScF; Karen Wall, *Bail Reform Has Cost $100,000 In Overtime: Howell Police Chief*, Howell Patch (Mar. 26, 2017), http://bit.ly/2ogrxyu.
93. *See* Flom & Chettiar, *supra* note 60; Holder memo, *supra* note 90. Holder argues that Maryland's money bail rules are not rationally related to compelling government interests in securing public safety and preventing flight, and impose unnecessary costs, disproportionately harm minorities, and increase recidivism, among other externalities. He directed his recommendations to Maryland's judicial branch. *See* Justin Fenton, *Maryland's Highest Court Hears Arguments from Holder, Opponents on Bail Reform*, Baltimore Sun (Jan. 6, 2017), http://bsun.md/2hZdNUx. These include adopting a judicial resolution based on the language of the Bail Reform Act of 1984 that a "judicial officer shall not impose a financial condition that results in the pre-trial detention of the defendant," and sponsoring a change to state rules of criminal procedure adopting that language. *See* Holder memo, *supra* note 90, at 19.
94. These are "allegedly informal agency guidance" documents that federal agency officials have "claimed [do] not need to follow notice-and-comment rulemaking pursuant to the Administrative Procedure Act," but nonetheless specify policies and procedures that the agency treats as binding. *See* KC Johnson, *How American College Campuses Have Become Anti–Due Process*, Heritage Foundation Backgrounder No. 3113 (Aug. 2, 2016), *available at* http://www.heritage.org/education/report/how-american-college-campuses-have-become-anti-due-process.
95. U.S. Dep't of Justice, Civil Rights Div., Office for Access to Justice, *Dear Colleague Letter Regarding Law Enforcement Fees and Fines* 2 (Mar. 14, 2016) [hereinafter Dear Colleague].
96. *See* Holder memo, *supra* note 90, at 4 (citing Dear Colleague, *supra* note 95, at 6).
97. *See* 4 Blackstone, Commentaries 242-45 (Christian et al. eds., 1841) ("[I]t is expressly declared by statute ... that excessive bail ought not to be required: though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine"; if "the party cannot find bail, he is to be committed to the county gaol ... till delivered by due course of law.").

98. United States v. Van Caester, 319 F. Supp. 1297, 1298 (S.D. Fla. 1970); *see also* ; White v. United States, 330 F.2d 811, 814 (8th Cir. 1964); see also United States v. Radford, 361 F.2d 777 (4th Cir. 1966); White v. Wilson, 399 F.2d 596, 598 (9th Cir. 1968); United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988) ("[A] bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement.").
99. U.S. ex rel. Fitzgerald v. Jordan, 747 F.2d 1120, 1134 (7th Cir. 1984); *see also*, White v. United States, 330 F.2d 811, 814 (8th Cir. 1964) (stating "mere financial inability of the defendant to post an amount otherwise meeting the aforesaid standard does not automatically indicate excessiveness. The purpose for bail cannot in all instances be served by only accommodating the defendant's pocketbook and his desire to be free pending possible conviction."); Hodgdon v. United States, 365 F.2d 679, 687 (8th Cir. 1966); Pilkinton v. Circuit Court of Howell Cty., 324 F.2d 45, 46 (8th Cir. 1963).
100. State v. Pratt, 2017 VT 9, 14 (Vt. 2017).
101. Vigil v. State, 563 P.2d 1344, 1349 (Wyo. 1977).
102. *See* Holder memo, *supra* note 90, at 8–9 (citing Griffin v. Illinois, 351 U.S. 12 (1956) (invalidating state law that deprived an indigent convict of a free trial transcript otherwise available for a fee); Williams v. Illinois, 399 U.S. 235 (1970) (concluding that a state sentencing statute that increases the aggregate imprisonment period fixed by the statute and due to involuntary nonpayment of fines or fees constitutes discrimination based on inability to pay); Tate v. Short, 401 U.S. 395 (1971) (ruling that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." *Id.* at 398); Bearden v. Georgia, 461 U.S. 660 (1983) (ruling that a sentencing court may only imprison a probationer for involuntary nonpayment of punitive fines if the failure is willful or alternative forms of punishment are inadequate); United States v. Salerno, 481 U.S. 739 (1987); Dear Colleague, *supra* note 95, at 7 (citing in turn, Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, at 8 (M.D. Ala., Feb. 13, 2015)).
103. 4 Blackstone, Commentaries *244–45 (Christian et al. eds., 1841) ("this imprisonment … is only for safe custody, and not for punishment"); *see also Salerno*, 481 U.S. at 748; *Edwards*, 430 A.2d 1321; *Salerno*, 481 U.S. 739; *Bell*, 441 U.S. 520; *Stack*, 342 U.S. 1; *White*, 330 F.2d 811; S. Rep. 98–225, at 8.
104. *See Salerno*, 481 U.S. at 748; Ingraham v. Wright, 430 U.S. 651, n. 40 (1977) (stating "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment."). It turns out that both groups of opinions may be best considered under a due-process framework, rather than an equal protection one. *See Bearden*, 461 U.S. at 674 (due process is the "more appropriate question" in these cases).
105. Williams v. Illinois, 399 U.S. 235, 241 (1970) (referencing Griffin v. Illinois, 351 U.S. 12, 76 (1956)).
106. *Griffin*, 351 U.S. 12.
107. Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv. L. Rev. 435, 453 (1967).
108. *Id.* at 436.
109. 461 U.S. at 674. *Bearden* asked "whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." *Id.* at 665.
110. Duker, *supra* note 1, at 97.
111. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (holding state welfare scheme did not violate equal protection where regulations had a reasonable basis, although "it results in some inequality"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 21–22 (1973) (rejecting a wealth-based equal protection challenge to a state school financing scheme and the notion that all fines must "be structured to reflect each person's ability to pay in order to avoid disproportionate burdens." The Court ruled that poverty is not a suspect category, and that legislation having a disparate impact due to wealth disparities is to be analyzed under the rational basis standard.); Douglas v. Cal., 372 U.S. 353, 361–62 (1963) (Harlan, J., dissenting) (arguing that "the Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.'"); *Williams*, 399 U.S. 235, 243 (1970) (it does not necessarily violate equal protection to detain a poor person longer than a wealthier person or vice versa); S. Rep. No. 98–225, at 16 (explaining why federal bail rules do not violate equal protection); Duker, *supra* note 1, at 96, 96–101 (explaining why "an equal protection challenge based on the denial of release to those unable to afford bail may not be sustainable.").
112. *See* 461 U.S. at 674; sources at *supra* note 111; Edwards v. Cal., 314 U.S. 160, 185 (1941) (Jackson, J., concurring) ("Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights.").
113. *Rodriguez*, 411 U.S. at 59 (Stewart, J., concurring).
114. *Id.*; *Lovett*, 328 U.S. at 321 (Frankfurter, J., concurring) (stating that due-process and equal-protection questions "allow a relatively wide play for individual legal judgment" but the Bail Clause "gives no such scope." It is "defined by history" and "[j]udicial enforcement of the Constitution must respect these historic limits.").
115. *See* Albright v. Oliver, 510 U.S. 266, 273 (1994); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 843 (1998); Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause* (May 28, 2014). 37 Harv. J. L. & Pub. Pol'y 1065, 1101 (2014), *available at*: https://ssrn.com/abstract=2442899.

116. *Albright*, 510 U.S. at 273.

117. *See* Lovett, 328 U.S. at 321 (Frankfurter, J., concurring).

118. Holder memo, *supra* note 90, at 7.

119. *See* United States v. Marion, 404 U.S. 307, 315 n.8 (1971) ("Some courts of appeals have stated that pre-indictment delay may be cause for dismissal, but they have seemed to treat the question primarily as one of due process … and have required a showing of actual prejudice.") (collecting cases); *see also, e.g.,* United States v. Lee, 413 F.2d 910, 912 (7th Cir. 1969) ("where the delay is unnecessary in bringing a defendant to trial, the court may dismiss. This implies a burden on the government to show necessity if the delay is questionably long. But the proof is not required unless there is some evidence of prejudice to the defendant."); Fed. R. Crim. P. 48 (listing when the government and the court may dismiss an indictment).

120. *Marion*, 404 U.S. at 324; *see also* United States v. Lovasco, 431 U.S. 783, 796 (1977).

121. *See Lovasco*, 404 U.S. at 796–97 (citing, at n. 19, Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 Stan. L. Rev. 525, 527-728 (1975), for explanation of the many possible reasons for lawful delay).

122. Holder memo, *supra* note 90, at 7.

123. *Id.* at n. 49 (citing Pugh v. Rainwater, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc); Williams v. Farrior, 626 F. Supp. 983, 985 (S.D. Miss. 1986); Alabama v. Blake, 642 So. 2d 959, 968 (Ala. 1994)).

124. The Holder memo cites a fourth case, Walker v. City of Calhoun (No. 4:15-cv-0170, Order Granting Preliminary Injunction, Dkt. No. 40 (N.D. Ga. Jan. 28, 2016), at 48–50), where the "trial court invoked the *Griffin* and *Bearden* line of cases," considered them "especially applicable 'where the individual being detained is a pre-trial detainee who has not yet been found guilty of a crime,'" and found that the city's "system violated the Equal Protection Clause since 'incarceration of an individual because of the individual's inability to pay a fine or fee is impermissible.'" Holder memo, *supra* note 90, at 9–10. The U.S. Court of Appeals for the Eleventh Circuit has since vacated that order granting Walker a preliminary injunction and remanded the case. Walker v. City of Calhoun, No. 16-10521, 2017 WL 929750, at *1 (11th Cir. Mar. 9, 2017). *Walker* does involve a pre-set bail schedule, which is argued to disallow the requisite individual considerations of financial resources in setting bail.

125. Holder cites favorable dicta although the Court says money bail is permissible and the "ultimate inquiry in each instance is what is necessary to reasonably assure defendant's presence at trial." *Pugh*, 572 F.2d at 1057.

126. Williams v. Farrior, 626 F. Supp. 983, 985–86 (S.D. Miss. 1986).

127. 642 So. 2d at 968.

128. Holder memo, *supra* note 90, at n. 49.

129. Alabama rules of criminal procedure resulted in only defendants who could not afford cash, surety, or property bail enduring a 72-hour detention period to await a judicial public bail hearing. *Blake*, 642 So. 2d at 967. The state Supreme Court, relying on *United States v. Montalvo-Murillo,* 495 U.S. 711, 716 (1990), held "that the 72-hour minimum notice requirement of article VII of Alabama's Act is unconstitutional in that it deprives an accused of the right to liberty without the due process of law guaranteed by the United States and Alabama Constitutions." *Id.* at 967.

130. *See id.* at 962 ("It should be noted that section 66 of article XI is a severability clause.").

131. *Id.* at 969 n. 4. The court does write in dicta, however, that a "system of bail based totally on some form of monetary bail, and not providing for release on a defendant's own recognizance in appropriate circumstances, would be unconstitutional." *Id.* at 968. In April of this year, Chief Judge Lee Rosenthal for the U.S. District Court for the Southern District of Texas wrote a 193-page opinion enjoining Harris County, Texas, from imposing secured money bail that defendants cannot afford. In language similar to Holder's, Rosenthal asserted that Harris County's bail policy is designed to "detain indigent misdemeanor defendants before trial, violating equal protection rights against wealth-based discrimination and violating due process protections against pre-trial detention without proper procedures or an opportunity to be heard." ODonnell v. Harris Cty., Texas, No. CV H-16-1414, 2017 WL 1735456, at *89 (S.D. Tex. Apr. 28, 2017). Some lawyers have argued that the ruling could require pre-trial release of potentially dangerous or flight-prone arrestees, altering the balance "between the rights of criminal defendants and society at large" and allowing "another judge-engineered right [to] enter the Constitution's firmament." *In Texas, Judges Waive Bail for the Indigent, Distorting the Constitution*, Nat'l Rev., May 31, 2017, http://bit.ly/2sf7iU6. Justice Clarence Thomas rejected the County's request to stay the ruling, which is now on appeal before the U.S. Court of Appeals for the Fifth Circuit. *See Houston Inmates Who Couldn't Afford Bail to Be Released after Court Rules System Unfair*, AP (June 7, 2017), http://bit.ly/2r2w9ZZ.