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"MAKING BAIL": LIMITING THE USE OF BAIL SCHEDULES AND DEFINING THE ELUSIVE MEANING OF "EXCESSIVE" BAIL

*James A. Allen**

Every day in the United States, thousands of people are waiting in jail postarrest prior to any trial or conviction. Once arrested, these individuals frequently face harsh conditions while they are held for their first appearance to be assigned bail. Thousands of individuals wait more than forty-eight hours to first appear in front of a judicial officer who determines their bail conditions. Innocent people—people who have committed no offense except that of being underprivileged—are pressured into accepting plea bargains because they cannot pay bail. Thousands remain in jail unwilling to accept plea bargains or admit guilt but are detained nevertheless because they are unable to afford their excessive bail amounts. These people are often the country's most vulnerable, most poor, and most undereducated—and often minorities. These individuals are often arrested for crimes of vice, such as being intoxicated in public, or for petty crimes, such as driving with a suspended license.

Bail is assigned through algebraic expressions that are hard to understand and in amounts even harder to pay. In an attempt at judicial efficiency and standardization, courts have overly relied on bail schedules while making those assignments. This frequently arbitrary reliance on bail schedules has resulted in a failure to make individualized bail determinations and has caused a rise in pretrial detention. Overreliance on these schedules coupled with a lack of guiding precedent from the Supreme Court has resulted in an excessive bail epidemic. Arbitrary bail procedures in the United States are now so perverse that they have vitiated due process and a presumption of innocence and have defeated the purpose of having an excessive bail clause in the U.S. Constitution. The Supreme Court should take clear action to restore this fundamental right and help end the United States' excessive bail epidemic.

INTRODUCTION

In 2009, Kalief Browder was charged with grand larceny for allegedly stealing a delivery person's car, which was crashed during a joyride in the Bronx.[1] Browder told a reporter from *The New Yorker* that he had watched his friends take and crash the car, but claimed to have pleaded guilty because he thought he had no defense.[2] The judge placed Browder under probation but avoided admonishing Browder with a criminal record by classifying him under New York's "youthful offender" status.[3] Browder was arrested again eight months later, just before his seventeenth birthday, this time on questionable allegations of assault and robbery.[4] Browder's judge set his bail at $3,000—an amount his family could not pay—and Browder was sent to jail on Riker's Island.[5]

Seventy-four days after arriving on Riker's Island, Browder appeared before a judge and pleaded not guilty.[6] The judge found Browder to be in violation of his probation and detained him without

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* Note, J.D. Candidate, 2018. This Note is dedicated to Judge James L. Watson and Judge "Turn 'em Loose" Bruce Wright. Also to Andrew McCarron, Jacob Levine, Kenneth Gayle, Bill Lynch and the Lynch family as well as my family—all of whom have bailed me out more often than I deserve; I thank them for their inspiration in writing. Thanks also to the Brooklyn Law School *Journal of Law and Policy* for their scrupulous editing and invaluable feedback.

[1] Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), http://www.newyorker.com/magazine/2014/10/06/before-the-law.

[2] *Id.*

[3] *Id.*; *see generally* N.Y. CRIM. PROC. LAW § 720.10 (McKinney 2006) (defining under youthful offender procedure: youth, eligible youth, youthful offender finding, sentence and adjudication).

[4] Gonnerman, *supra* note 1. Gonnerman provides an in-depth look at Browder's multi-year confinement on Riker's Island. Browder was held for three years and then released without being tried for the alleged theft of a backpack. *Id.*

[5] D. Marvin Jones, *A Bronx Tale: Disposable People, The Legacy of Slavery, and the Social Death of Kalief Browder*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 31, 32 (2016).

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

the opportunity for bail.[7] Browder remained on Riker's Island for three years, spending more than 400 days in solitary confinement.[8] Browder's case was eventually dismissed and the charges were dropped, but at age twenty-two, suffering from depression following his release, Browder committed suicide.[9]

While Browder's story has been widely shared as a cautionary tale depicting a tenuous U.S. criminal justice system, his story is often told with a focus on the tribulations of solitary confinement.[10] While solitary confinement is a serious issue which needs reform, the root of the problem—what placed Browder in Riker's in the first place—was an excessive bail amount. Browder's story is indicative of a class of similarly situated inmates who deserve a reasonable

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[7] Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, MARSHALL PROJECT (June 9, 2017) https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder#.Rp3NfGfw8; *see* N.Y. CRIM. PROC. § 510.30(a)(v) (McKinney 2012) (stating "the court must, on the basis of available information, consider and take into account [among other considerations, the arrestees'] record of previous adjudication as a juvenile delinquent.").

[8] Eyder Peralta, *Kalief Browder, Jailed For Years Without Trial, Kills Himself*, NPR (June 8, 2015), http://www.npr.org/sections/thetwo-way/2015/06/08/412842780/kalief-browder-jailed-for-years-at-rikers-island-without-trial-commits-suicide.

[9] Dana Ford, *Man Jailed as Teen Without Conviction Commits Suicide*, CNN (June 15, 2015), http://www.cnn.com/2015/06/07/us/kalief-browder-dead/; *see* Peralta, *supra* note 8.

[10] *See, e.g.*, Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2015), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html (discussing solitary confinement and calling for criminal justice reform); Judith Resnick et al., *Time-in-Cell: Isolation and Incarceration*, 125 YALE L.J. 212, 215–16 n.25 (2016) (discussing an upcoming documentary about Browder, the inhumanity of solitary confinement and the need to move our culture forward); Kory Grow, *Jay Z Talks Kalief Browder Doc, Inhumanity of Solitary Confinement*, ROLLINGSTONE (Oct. 16, 2016), http://www.rollingstone.com/movies/news/jay-z-talks-kalief-browder-doc-solitary-confinement-w443715 (discussing the inhumanity of solitary confinement and the Kalief Browder story); *Cf.*, Shawn Carter, *Jay-Z: For Father's Day, I'm Taking on the Exploitative Bail Industry*, TIME (June 16, 2017), http://time.com/4821547/jay-z-racism-bail-bonds/ (writing an open-letter discussing the impact of bail in Browder's case and how it impacts indigent arrestees' presumption of innocence).

interpretation of the Eighth Amendment's excessive bail clause,[11] in addition to significant bail reform.[12] While numbers vary, it is estimated that over 450,000 people in the United States are detained while awaiting their trial solely due to their inability to afford bail.[13]

Importantly, a majority of pretrial detainees are held at the municipal or county level.[14] While the federal government has passed legislation to decrease pretrial detention numbers,[15] municipal and county jails continue to overflow with defendants who are held simply because they cannot make bail.[16] Further compounding the problem is the disparity across various counties

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[11] The Eighth Amendment states: "*Excessive bail shall not be required*, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).

[12] *See generally* Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html?_r=0 (discussing the long-term damage bail inflicts on vulnerable defendants and the need for reform).

[13] *Id.*

[14] *Id.*; *see also* VERA INST. JUST., L.A. COUNTY JAIL OVERCROWDING REDUCTION PROJECT i, iv (Sept. 2011) https://storage.googleapis.com/vera-web-assets/downloads/Publications/los-angeles-county-jail-overcrowding-reduction-project-final-report/legacy_downloads/LA_County_Jail_Overcrowding_-_Executive_Summary.pdf [hereinafter VERA INST. JUST.] (finding overpopulation partially caused by low pretrial release); MARIE VANNOSTRAND, N.J. JAIL POPULATION ANALYSIS: IDENTIFYING WAY TO SAFELY AND RESPONSIBLY REDUCE JAIL POPULATION 11, 13 (Luminosity in Partnership with the Drug Policy Alliance, 2013), https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf (finding 73.3 percent of the New Jersey jail population to be detained pretrial and about 38.5 percent of the total population to be held because they could not make bail).

[15] Establishment of Pretrial Services, 18 U.S.C. § 3152 (2008).

[16] Pinto states as follows:

> [Of the 2.2 million people currently locked up in this country, fewer than one in 10 is being held in a federal prison. Far more are serving time in state prisons, and nearly three-quarters of a million aren't in prison at all but in local city and county jails. Of those in jails, 60 percent haven't been convicted of anything. They're innocent in the eyes of the law, awaiting resolution in their cases. Some of these inmates are being held because they're considered dangerous or unlikely to return to court for their hearings. But many of them simply cannot afford to pay the bail that has been set]. Pinto, *supra* note 12.

and states in how judicial officers determine bail amounts.[17] This disparity has been exacerbated by the Supreme Court's lack of uniformity and guiding precedent.[18]

Legislatively enacted bail policies, particularly "bail schedules," have also contributed to the wide discrepancy in how pretrial bail is assigned.[19] Also referred to as "bail schemes," these schedules

> are procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the characteristics of an individual defendant. These schedules might formally be promulgated through state law, or informally employed by local officials. They may be mandatory or merely advisory, and may provide minimum sums, maximum sums, or a range of sums to be imposed for each crime.[20]

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[17] MATRIX OF STATE BAIL LAWS, PRETRIAL JUSTICE INSTITUTE (April 2010), https://www.pretrial.org/download/law-policy/Matrix%20of%20State%20Bail%20Laws%20April%202010.pdf. For further discussion, see *infra* Part II.

[18] *See* United States v. Salerno, 481 U.S. 739 (1987); Carlson v. Landon, 342 U.S. 524 (1952); Stack v. Boyle, 342 U.S. 1, 5 (1951). In the 225-year history of the Court, they have granted certiorari for only these three challenges pertaining to the excessive bail clause, all resulting in a split decision. *See Salerno*, 481 U.S. 739; *Carlson*, 342 U.S. 524; *Boyle*, 342 U.S. 1. While the *Boyle* court issued a unified holding, Justice Jackson (joined by Justice Frankfurter) wrote separately to express distinct opinions concerning the clause. *See Boyle*, 342 U.S. 1. The opinions of *Carlson* and *Salerno* issued a five-to-four and six-to-three split respectively. *See Salerno*, 481 U.S. 739; *Carlson*, 342 U.S. 524.

[19] *See, e.g.*,17 N.J. PRAC., § 13:5 (2005) (implementing a statewide bail schedule in place of varying municipal bail schedules and replacing a practice of automatically imposing bail in the amount owed for a practice of assigning monetary bail in a "reasonable amount" and "tak[ing] into consideration the defendant's individual circumstances."); GLENN A. GRANT, ADMIN. OFFICE OF THE COURT, REVISED STATEWIDE BAIL SCHEDULES/PERMISSIBLE USE OF MONETARY BAIL SCHEDULES (Dec. 30, 2016), https://www.judiciary.state.nj.us/notices/2017/n170111e.pdf (reforming New Jersey state bail schedules because of gross discrepancies across counties); MICHAEL R. JONES ET AL., A PROPOSAL TO IMPROVE THE ADMINISTRATION OF BAIL AND THE PRETRIAL PROCESS IN COLORADO'S FIRST JUDICIAL DISTRICT 69–75 (Feb. 2009), http://www.clebp.org/images/2009-02-19_Jeffco_Bail_Proposal. pdf (discussing the variations between bail schedules in several states).

[20] Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 12, 13 (2011).

Even in jurisdictions with bail schemes that give explicit discretion to judicial officers and pretrial service agencies (PSAs), arrestees have alleged that arbitrary bail procedures have replaced the courts' obligation to make case-by-case bail assignments and has resulted in a "wealth-based detention system."[21]

This Note argues that courts have strayed from their duty to make individualized bail determinations and consequently, frequently impose excessive bail amounts. This Note suggests that the current excessive bail epidemic in the United States stems from a lack of Supreme Court guidance regarding the Eighth Amendment's excessive bail clause[22] and also suggests that lower courts have misapplied what little precedent the Supreme Court has set on this matter.[23] Circuit courts and legal commentators have acknowledged the lack of clarity and confusion that the Supreme Court's interpretation has provided.[24] This opacity has caused a split among courts and has left a gray area for legal practitioners in understanding how much discretion legislatures and judicial officers have in assigning bail.[25] Therefore, the Supreme Court should

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[21] *See, e.g.*, Odonnell v. Harris Cty., No. H-16-1414, 2016 WL 7337549, at *1–4 (S.D. Tex. 2016) (discussing how indigent arrestees "allege that the Harris County Police fail or refuse to comply with the *Roberson* order or the provisions of the Texas Code requiring them to consider an arrestee's inability to pay bail or eligibility for release on terms other than the scheduled bail amounts at the first hearing").

[22] *See* EDWARD S. CORWIN ET AL., THE CONSTITUTION AND WHAT IT MEANS TODAY 233 (12th ed. 1958) ("The Supreme Court has had little to say with reference to excessive fines or bail.").

[23] *Compare* People v. Mohammed, 653 N.Y.S.2d 492, 502 (1996) (showing how a New York court relied on *Stack* to hold that the "CPL does not require that the court take the defendant's resources into account"), *with* Martin v. State 517 P.2d 1389, 1394–98 (1974) (noting a court in Alaska reading no such limitation from *Stack v. Boyle* and allowing indigence to be considered in factoring the amount for bail).

[24] *See* United States v. Gardner, 523 F.Supp.2d 1025, 1029 (2007) (expressing a lack of guidance pertaining to pretrial release conditions); Broussard v. Parish of Orleans 318 F.3d 644, 650 (2003) (stating, "[t]he Supreme Court has not frequently considered the contours of the Eighth Amendment's proscription of excessive bail. In fact, its application to the States has occurred only indirectly."); *see also* CORWIN, *supra* note 22, at 233.

[25] *Compare* Zina Makar, *Bail Reform Begins with the Bench*, N.Y. TIMES (Nov. 16, 2016), http://www.nytimes.com/2016/11/17/opinion/bail-reform-

exercise its supervisory power and establish definitive precedent prohibiting procedures which lead to the assignment of excessive bail.

This Note proceeds in three parts. Part I provides a brief history and overview of bail practices in the United States. Part II discusses current bail policies in the United States and compares various state bail practices. Part III explores recent innovations from jurisdictions across the States. Part III discusses the importance of a Supreme Court determination on the Eighth Amendment's excessive bail clause, identifies crucial steps local governments have taken to help alleviate the excessive bail epidemic in the United States, and provides recommendations to reform municipal and county bail practices.

I. A Brief History of the Excessive Bail Clause

A. Origins of "Excessive Bail"

The Excessive Bail Clause of the Eighth Amendment has its origins in the English Bill of Rights.[26] The phrase the English used in 1689 read, "*[t]hat excessive bail ought not to be required*, nor excessive fines imposed; nor cruel and unusual punishments inflicted."[27] The right was included in English law after excessive bails were imposed by King James II as a method of indefinitely imprisoning "politically disfavored individuals."[28] Monetary bail originated as a surety that the accused would stand trial and as a

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begins-with-the-bench.html?_r=0 (setting $550,000 bail for a nineteen-year-old Baltimore juvenile held in adult jail although his GPS tracking records showed the defendant was not in the vicinity of the crime when committed), *with The Jinx: The Life and Deaths of Robert Durst: Chapter 4: The State of Texas v. Robert Durst* (HBO television broadcast 2015) (depicting a credulous Texas court that held multi-millionaire Robert Durst on a $250,000 bail for alleged murder which he did not pay).

[26] Carlson v. Landon, 342 U.S. 524, 536–37 (1952).

[27] *See* Bill of Rights 1 W. & M., Sess. 2, c. 2 (1689), http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss1.html (emphasis added).

[28] Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 Harv. J. L. & Pub. Pol'y 35, 37 (2008).

means to prevent flight.[29] If a person fled, they were presumed guilty and would forfeit their bail or property.[30]

B. Bail Traditions in the United States

The ambiguity of the English clause was imported into U.S. law at the time of the country's founding.[31] Prior to the enactment of the Eighth Amendment, various colonial charters instituted "right to bail" and "excessive bail" clauses.[32] Colonial founders incorporated the English excessive bail clause into colonial constitutions as an inalienable right.[33] The Framers codified the federal right to be free from excessive bail in the Judiciary Act of 1789 and in the Eighth Amendment of the Bill of Rights later that year.[34] The Supreme Court did not interpret the clause until 1951 in the landmark case of *Stack v. Boyle*.[35] Since *Boyle*, the excessive bail clause has

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[29] *See* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 519–21 (1983).

[30] *Id.* at 520–21 (explaining further that "those too poor to pay the 'bot' were given over to the victim for execution or enslavement" (citing J. GOEBEL, FELONY AND MISDEMEANOR 86–87, 92 n.89 (1976)).

[31] Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 956 n.180 (discussing the ambiguity in the plain language meaning of the clause).

[32] Donald B. Verrilli, Jr., Note, *The Eighth Amendment and The Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 337 (1982). Verrilli went on to become the Solicitor General of the United States under President Obama's administration (2011-2016); Nick Gass, *White House Announces Solicitor General Donald Verrilli Stepping Down*, POLITICO (June 2, 2016), http://www.politico.com/story/2016/06/donald-verrilli-resigns-solicitor-general-223820.

[33] Hegreness, *supra* note 31, at 912 ("In state constitutions, from the Founding through the Nixon era, the right to bail was automatic and inalienable for all crimes not punishable by death.").

[34] *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91. ("And upon all arrests in criminal cases, bail shall be admitted except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law."); U.S. CONST. amend. VIII.

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

continually confounded the Court, lower courts, and state legislatures.

1. *Stack v. Boyle*

Boyle remains the only Supreme Court case questioning an excessive bail amount and arrestees' bail assignment procedures. The petitioners in *Boyle* were charged as Communists in violation of the Smith Act.[36] They argued that they were subjected to excessive bail in violation of their Eighth Amendment rights.[37] The District Court for the Southern District of California denied the petitioners' motion to reduce bail and the United States Court of Appeals for the Ninth Circuit affirmed.[38] The petitioners then filed applications for habeas corpus and an alternative determination of their bail with the Supreme Court.[39] They argued that the procedure used to assign their bail was unconstitutional because it did not consider the defendants' individual circumstances.[40]

In holding that the defendants' bail was unconstitutional, the Supreme Court noted that the bail amounts were exponentially higher than those usually imposed for similar offenses.[41] The Court recognized that, "[s]ince 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 [at trial]. The traditional standards . . . are to be applied in each case to each defendant."[42] The bulk of the eighteen-page *Boyle* opinion was a concurrence by Justice Jackson who was joined by Justice Frankfurter.[43] In his concurrence, Justice Jackson stated that the use

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[36] *Id.* at 3.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 4.

[40] *Id.* at 9.

[41] *Id.* at 5 ("[B]ail [amounts] for each petitioner [had] been fixed in a sum much higher than that usually imposed for offenses with like penalties and yet there [had] been no factual showing to justify such action.").

[42] *Id.*

[43] *Id.* at 7–18 (Jackson, J. and Frankfurter, F.). Not only is *Boyle* the only Supreme Court case analyzing an excessive bail amount and arrestees' bail assignment procedures, it is also the oldest and shortest. *See* Carlson v. Landon,

of blanket bail determinations was a violation of Federal Rule of Civil Procedure ("FRCP") 46(c) and agreed that each of the accused were entitled to bail determinations based on their particular circumstance.[44] At the time, *Boyle* was considered a significant case for arrestees' pretrial rights, however subsequent decisions have eroded this foundation.[45]

2. *Carlson v. Landon*

One year after declaring individual-by-individual bail determinations to be the standard, the Court distorted its interpretation of the Eighth Amendment's excessive bail clause, issuing a split decision in *Carlson v. Landon*.[46] In *Carlson*, the majority determined that the Attorney General could *refuse* bail to a group of alien communists because of their potential threat to society.[47] The Supreme Court issued a divisive five-four decision holding that the Eighth Amendment did not require that bail should always be available.[48] *Carlson* provided a blueprint of the popular elements now considered by judges and debated by policymakers when adjudicating or legislating bail including issues such as due process, equal protection, and judicial discretion.[49]

This closely contested decision created confusion regarding the correct interpretation of the excessive bail clause, shifting the discussion to focus on whether the clause provided a "right to bail" for crimes other than capital punishment.[50] The decision also raised questions regarding how much discretion nonjudicial bodies had in

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342 U.S. 524 (1952) (forty-three pages); United States v. Salerno, 481 U.S. 739 (1987) (twenty-eight pages).

[44] *Id.* at 9 (Jackson, J.).

[45] Hegreness, *supra* note 31, at 960–69 (describing the Court's complicity in unconstitutional bail practices by upholding the Bail Reform Act of 1984 as constitutional).

[46] Carlson v. Landon, 342 U.S. 524 (1952).

[47] *Id.* at 541–47.

[48] *Id.* at 545–46.

[49] *See generally id.* at 534–36, 542 (discussing the principles of legislative discretion and due process).

[50] *See id.* at 534, 540 (discussing whether a provision under the Internal Security Act could allow the Attorney General to deny bail).

legislating bail.[51] However, it is important to distinguish the facts of *Carlson* from the common facts of current cases which have led to our excessive bail epidemic. Crucially, the *Carlson* plaintiffs challenged the constitutionality of the ability to be "continued in custody"[52] without being afforded the opportunity of bail,[53] a different claim than challenging an excessive monetary amount. Additionally, the crimes that the *Carlson* and *Boyle* plaintiffs allegedly conducted were far more egregious than those characterized by most current excessive bail cases.[54] Due to these distinctions, *Carlson* is not analogous to the current cases causing the excessive bail epidemic—cases frequently involving crimes of poverty or low-level misdemeanor offenses. While Carlson is not analogous to many bail cases causing the bail epidemic, courts

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[51] *See id.* at 543 (discussing the legislative scheme, which gave the Attorney General, *not a judicial officer*, the discretion to deny bail in the context of immigration).

[52] *Carlson*, 342 U.S. at 533–34. Because the plaintiffs in *Carlson* were non-U.S. citizens their bail determination fell under the discretion of the Attorney General through Section 23 of the Internal Security Act, which provides in pertinent part:

> [[p]ending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole]. Internal Security Act of 1950 § 23, 8 U.S.C. § 156 (repealed 1952).

[53] Brief for Respondent at 5, Carlson v. Landon, 342 U.S. 524 (1952) (No. 35), 1951 WL 81962, at *5.

[54] *See e.g.*, Walker v. City of Calhoun, No. 4:15-CV-0170, 2016 WL 361612, at *1 (N.D. Ga. Jan. 28, 2016) (showing that the defendant was detained six days before a bail hearing for being under the influence in public). *Compare* Odonnell v. Harris Cty, No. H-16-1414, 2016 WL 7337549, at *8 (S.D. Tex. Dec. 16, 2016) ("According to a 2012 report, 81 percent of misdemeanor arrestees in Harris County could not post bail at booking and were jailed. Most of the other 19 percent could pay and were released on bond before or at booking."), *with Carlson*, 342 U.S. at 528 ("The four petitioners . . . were arrested under warrants, issued after the enactment of the Internal Security Act of 1950, charging each with being an alien who was a member of the Communist Party of the United States."), *and* Stack v. Boyle, 342 U.S. 1, 6 (1951) (showing that plaintiffs were also arrested for alleged affiliations with the Communist Party).

continue to rely on it as precedent in assigning bail.[55] To end the bail epidemic, courts should lessen their reliance on *Carlson* when assigning bail.

3. Bail Reform Acts of 1966 & 1984

The lack of cohesion from the Supreme Court and from local courts across the country ultimately led to an attempt by Congress to provide guidelines on setting bail via the Bail Reform Act ("BRA") of 1966.[56] The BRA established that, when making a bail determination, judicial officers should consider:

> the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.[57]

The BRA was met with immediate resistance as critics viewed it as limiting a court's ability to detain potentially dangerous individuals before trial.[58] Although it was only imposed on the federal courts, some states followed suit with similar statutes, while

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[55] *See, e.g.*, Rendel v. Mummert, 474 P.2d 824, 826 (Ariz. 1970) (holding there is no constitutional right to bail in all cases); *In re* Underwood, 508 P.2d 721, 725 (Cal. 1973) ("Our constitutional language expressly providing that all persons shall be bailable except for a capital offense was consciously *added* to the 'no excessive bail' language adopted from the Eight Amendment in order to make clear that, unlike the federal rule, all except the one class of defendants were to be bailable."); Aime v. Commonwealth, 611 N.E.2d 204, 211–12 (Mass. 1993) ("Similarly, the government may detain a potentially dangerous alien if it makes a particularized showing that the alien creates a threat to society."); People v. Melville, 308 N.Y.S.2d 671, 677 (N.Y. Crim. Ct. 1970) (finding that there is no absolute right to bail).

[56] Bail Reform Act of 1966, Pub. L. 89-465 § 3146, 80 Stat. 214 (amended 1984).

[57] *Id.*

[58] *See* Warren L. Miller, *The Bail Reform Act of 1966: Need for Reform in 1969*, 19 CATH. U. L. REV. 24, 48 (1970) (arguing that the Bail Reform Act should be amended to more easily allow preventative detention).

others decided to craft statutes with a greater explicit focus on dangerousness of the accused in the name of public safety.[59]

This disunity eventually led to the Bail Reform Act of 1984 ("1984 Act" T).[60] The 1984 Act revised the BRA to allow courts to impose conditions of release to ensure community safety.[61] The 1984 Act provided:

> the defendant must be released on their own personal recognizance or unsecured personal bond unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or *will endanger the safety of any other person or the community.*[62]

Prior to this revision, denial of bail was only permitted for the most heinous crimes, such as capital offenses.[63] Since the 1984 Act, courts have been able to deny bail as a preventative measure.[64]

4. *United States v. Salerno*

The 1984 Act was swiftly challenged in 1986 in *United States v. Salerno*.[65] The *Salerno* petitioners challenged the revised clause in the 1984 Act which added "potential dangerousness" as a consideration for bail, claiming it was a violation of their Due Process rights and their Eighth Amendment right to be free from the denial of bail based on considerations other than the possibility of flight.[66] The U.S. Court of Appeals for the Second Circuit agreed

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[59] *Compare* CONN. GEN. STAT. ANN. § 54-63b (West 2012) (mirroring the federal Act, detailing broad circumstances that a court should consider), *with* GA. CODE ANN., § 17-6-1 (West 2014) (deviating from the federal Act, introducing circumstances geared toward detention pending trial).

[60] Bail Reform Act of 1984, Pub. L. No. 98-473 § 202 (codified as 18 U.S.C. §§ 3141-3150 (1988)).

[61] *Id.*

[62] *Id.* (emphasis added).

[63] Verrilli, *supra* note 32, at 361.

[64] Ann M. Overbeck, *Detention for the Dangerous: The Bail Reform Act of 1984*, 55 U. CIN. L. REV. 153, 166–72 (1986).

[65] United States v. Salerno, 481 U.S. 739, 741 (1987).

[66] *See* Brief for Respondent at 1–3, United States v. Salerno, 481 U.S. 739 (1987) (No. 86-87). The topic of the Eighth Amendment right to bail as an inalienable right, incorporating the right into the states, is an interesting one on its

with the petitioners and struck down the provision, declaring it to be facially unconstitutional as a violation of substantive due process.[67] The Supreme Court granted certiorari to resolve a circuit split on whether the 1984 Act was constitutional.[68]

In another split decision, the Court determined that the petitioners failed to meet the "heavy burden" of demonstrating that the "potential dangerousness" clause in the 1984 Act was facially unconstitutional.[69] The majority opinion, implying that there was no genuine conflict among the Courts of Appeals,[70] solidified a court's ability to refuse bail if the government establishes that the arrestee "pose[s] a threat to the safety of individuals or to the community which no condition of release can dispel."[71] Considered a threat to the community, the *Salerno* petitioners were denied bail.[72] Writing for the majority, Justice Rehnquist claimed,

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own. For alternate views, compare Verrilli, *supra* note 32, at 354 (examining incorporated rights through the "fundamental principle" analysis used by the Supreme Court); with Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (arguing that the historical intention of the Fourteenth Amendment was not meant to incorporate the Bill of Rights). Most recently, the Supreme Court has expressed it as an incorporated right, but only then through a footnote. *See* McDonald v. Chicago, 130 S. Ct. 3020, 3034–35, n.12 (2010); Samuel Wiseman, *McDonald's Other Right*, 97 VA. L. REV. IN BRIEF 23, 24 (2011). It is important to note that recent challenges making their way through the courts mainly argue due process and equal protection claims surrounding bail procedures, not an Eighth Amendment implied right argument. *See, e.g.*, Odonnell v. Harris Cty, No. H-16-1414, 2017 WL 1735456, at *73–74 (S.D. Tex. Apr. 28, 2017) (stating, "the court concludes that this is not an Eighth Amendment case" (citing Odonnell v. Harris Cty., No. H-16-1414, 2016 WL 7337549, at *13 (S.D. Tex. Dec. 16, 2016))).

[67] United States v. Salerno, 794 F.2d 64, 71–74 (2d Cir. 1986), rev'd 481 U.S. 739 (1987).

[68] United States v. Salerno, 481 U.S. 739, 741 n.1 (1987) ("We granted certiorari because of a conflict among the Courts of Appeals regarding the validity of the Act.").

[69] *Id.* at 745.

[70] *See id.* at 741 n.1 (stating, "[e]very other Court of Appeals to have considered the validity of the Bail Reform Act of 1984 has rejected the facial constitutional challenge").

[71] *Id.* at 755.

[72] United States v. Salerno, 631 F.Supp. 1364, 1375 (S.D.N.Y. 1986), rev'd, 794 F.2d 64 (2d Cir. 1986), rev'd, 481 U.S. 739 (1987).

> [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 . . . [and] to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response.[73]

Justice Marshall, joined by Justice Brennan in his dissent, agreed with Justice Rehnquist's characterization of the prohibition of excessive bail,[74] but denounced the majority's overall reasoning.[75] Justice Marshall's dissent accused the majority of denying recognition of the important role that "the Bail Clause and the Due Process Clause [have] in protecting the invaluable guarantee afforded by the presumption of innocence."[76] The dissent's argument is more aligned with the historical connotations of the excessive bail clause and with overall due process in the United States judicial machinery. The majority's argument imposes a presumption of guilt, while the dissent's opinion upholds a true presumption of innocence.

Similar to *Carlson v. Landon*, it is important to distinguish *United States v. Salerno* from the current rise in excessive bail determinations. First, like *Carlson*, the petitioners were challenging their right to bail, not challenging an excessive bail determination.[77] Second, like the serious crimes alleged in *Carlson* and *Boyle*, the petitioners in *Salerno* were accused of being high-ranking members of the notorious Genovese mob family and key proponents of organized crime.[78] This is distinguishable from the petty crimes characteristic of those being held on excessive bail across the

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[73] *Salerno*, 481 U.S. at 754.

[74] *Id.* at 762.

[75] *Id.* at 760–61 (declaring the majority holding to be "an exercise of obfuscation" and a practice of "mere sophistry").

[76] *Id.* at 763, 66–68. Justice Stevens did not join Justice Marshall's dissent, but agreed with his conclusion that "the provision of the Bail Reform Act allowing pretrial detention on the basis of future dangerousness is unconstitutional." *Id.* at 768.

[77] *Id.* at 744.

[78] *Id.* at 743.

country today.[79] Third, the *Salerno* opinion specifically refused to address when pretrial detention may be so excessively long that it would be "punitive in relation to Congress' regulatory goal."[80] Challenges today pertaining to excessive bail frequently consider how long arrestees are detained pretrial because of an inability to pay bail.[81] The *Salerno* opinion is also distinguishable because it came at a time when crime rates had been on the rise, whereas today crime rates are decreasing.[82] This officially ended a period of an implied right to pretrial release pending trial and spawned the current culture of pretrial detention as states adopted bail provisions

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[79] *See e.g.*, Walker v. City of Calhoun, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *1 (N.D. Ga. Jan. 28, 2016) (noting a case where defendant was charged with being a pedestrian under the influence and detained for inability to pay $160 cash bond); Odonnell v. Harris Cty., No. H-16-1414, 2016 WL 7337549, at *7 (S.D. Tex. 2016) (noting case where defendant was charged with driving with a suspended license and detained for inability to pay $2,500 bail amount). The Sandra Bland case presents another example. In 2015, Bland was arrested for a DUI. Bland was unable to pay $515 or 10 percent (plus a $15 filing-fee) of her $5,000 bond, which had been set at such a high amount due to delinquent parking tickets. Bland had just secured employment and intended to pay back the delinquent parking tickets. Three days into her detention following her DUI arrest, Bland was found to have committed suicide in a Texas jail. *See* Leon Neyfakh, *Why Was Sandra Bland Still in Jail?*, SLATE (July 23, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/07/sandra_bland_is_the_bail_system_that_kept_her_in_prison_unconstitutional.html (last visited on May 26, 2017); Debbie Nathan, *What Happened to Sandra Bland?*, THE NATION (Apr. 21, 2016), https://www.thenation.com/article/what-happened-to-sandra-bland/ (last visited May 26, 2017).

[80] United States v. Salerno, 481 U.S. 739, 769 n.4 (1987).

[81] Walker v. City of Calhoun, No. 4:15-CV-0170, 2016 WL 361612, at *4 (N.D. Ga. Jan. 28, 2016) (detailing delayed process in arrestees' first appearance); Odonnell v. Harris Cty., Texas, No. H-16-1414, 2016 WL 7337549, at *8 (S.D. Tex. Dec. 16, 2016) (detailing arrestees held solely because they could not pay).

[82] *See* John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969); *Elliot Currie Interview*, PBS, http://www.pbs.org/fmc/interviews/currie.htm (last visited May 26, 2017); Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, ATLANTIC (Apr. 15, 2016), https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408/.

that do not require judges to impose the least restrictive bail conditions on arrestees.[83]

II. CURRENT BAIL PRACTICES IN THE UNITED STATES

After *Salerno*, states were apt to amend their bail statutes to mirror the federal policy established by the Supreme Court and detailed by the 1984 Act, allowing more arrestees to be detained because of potential dangerousness.[84] These statutory changes were ushered in during an era that saw a rise in tough-on-crime laws and legislators.[85] The use of pretrial detention grew[86] and judges felt

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[83] Overbeck, *supra* note 66; Chalmous G. Reemes, Case Note, *United States v. Salerno: The Validation of Preventative Detention and the Denial of a Presumed Constitutional Right to Bail*, 41 Ark. L. Rev. 697 (detailing how the decision eroded previous liberties to be detained pretrial).

[84] *See generally* BARBARA GOTTLIEB, PUBLIC DANGER AS A FACTOR IN PRETRIAL RELEASE: A COMPARATIVE ANALYSIS OF STATE LAWS 17–20 (1985) (exploring the various state responses to awarding bail based on pretrial danger); Hegreness, *supra* note 31, at 916, 964 (declaring, "[t]he frequency of the clause falls from 80% of state constitutions in 1978 to 48% in 1998." Also noting that from 1776 to 1976, "[m]ore than 41 states protected this right by constitution (48 by constitution or statute), far more than the three quarters required for a constitutional amendment.").

[85] *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ (showing that "in response "to rising crime rates," New York passed the "Rockefeller Laws" in 1973 that "dictated a mandatory minimum sentence of fifteen years' imprisonment for selling just two ounces (or possessing four ounces) of heroin, cocaine, or marijuana"); *see also* Ta-Nehisi Coates, *Moynihan, Mass Incarceration, and Responsibility*, ATLANTIC (Sept. 24, 2015), http://www.theatlantic.com/politics/archive/2015/09/moynihan-mass-incarceration-and-responsibility/407131/ ("In 1994, Congress passed the Violent Crime and Law Enforcement Act, the largest crime bill passed in American history. The 1994 Crime Bill, as it has come to be known, is also arguably the federal government's greatest contribution to the moral catastrophe of mass incarceration. It literally funded it. The law funneled money into states that built more prisons and took up 'truth in sentencing' laws that lengthened time served. It had the perverse effect of encouraging the growth of prisons.").

[86] *See* RAM SUBRAMANIAN ET AL., INCARCERATION'S FRONT DOOR: MISUSE OF JAILS IN AMERICA, VERA INST. JUST. (Feb. 2015) (describing jails as "massive warehouses primarily for those too poor to post even low bail or too sick for existing community resources to manage.").

public pressure to use their bail setting discretion in a manner that would deter crime and keep alleged criminals off the street.[87] With increasing frequency, the elements a judge would use to set bail[88]

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[87] *See, e.g.*, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges From Office for Unpopular Decisions?* 72 N.Y.U. L. REV. 308, 320 (1997) ("New York politicians have frequently castigated judges for their decisions on bail."); United Press Int'l, *An Ex-Convict Held in Slaying Is Freed by Judge Wright*, N.Y. TIMES (Dec. 23, 1973), https://timesmachine.nytimes.com/timesmachine/1973/12/23/91063508.html?pageNumber=25; Robert D. McFadden, *Bruce McM. Wright, Erudite Judge Whose Bail Rulings Caused an Uproar, Dies at 86*, N.Y. TIMES (Mar. 26, 2005) http://www.nytimes.com/2005/03/26/nyregion/bruce-mcm-wright-erudite-judge-whose-bail-rulings-caused-an-uproar.html?_r=0 (eulogizing a New York judge who was nicknamed "Turn 'em Loose Bruce" because he would traditionally assign what he believed was reasonable bail). Despite the criticism, Judge Wright remained adamant about his bail assignment practices, claiming just before he retired,

> I have never changed my mind about the Eighth Amendment . . . [t]o say that I would've done things differently means to me I would have been a good boy, kept my mouth shut and availed myself of the benefits of the system. I don't think I can do that. I don't think I could ever do that. *Id.*

[88] Common-law bail considerations for judges are largely subjective. *See* FED. R. CRIM. P. (46)(c) (noting judge's discretion and setting forth subjective balancing considerations). In 1951, the Supreme Court referred to these elements as broadly as, "having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law." Stack v. Boyle, 342 U.S. 1, 9 (1951). In 1987, after the BRA was revised to include the considerations of dangerousness, courts shifted their analysis. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 754 (1987) ("To determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response."); Galen v. Cty. of Los Angeles, 477 F.3d 652, 660 (9th Cir. 2007) ("To determine whether the Excessive Bail Clause has been violated, we look to the valid state interests bail is intended to serve for a particular individual and judge whether bail conditions are excessive for the purpose of achieving those interests."). The *Galin* court also clarified that, "[t]he state may not set bail to achieve invalid interests . . . nor in an amount that is excessive in relation to the valid interests it seeks to achieve." *Galen*, 477 F.3d at 660.

were replaced with procedural, formalistic state bail schedules.[89] Bail schedules and other bail schemes are now used in various criminal proceedings across the United States in an attempt at uniformity and a streamlined method of pretrial release.[90] Though valiant in their attempt to unify courts and provide an expedited manner of release, bail schedules have had an adverse result on poor, often minority arrestees, and have been characterized as an arrest fine or tax.[91]

Additionally, these procedural schemes are now executed in starkly different manners across states, and their varying results have raised several policy concerns. First, mandatory bail statutes—particularly those which are legislatively enacted—have been criticized for possibly interfering with a judicial officer's discretion in assigning accurate bail amounts.[92] Second, an inability to pay bail assigned by mandatory or strictly followed schedules has led to more pretrial detention.[93] Furthermore, it has been argued that these

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[89] Carlson, *supra* note 20, at 13–14 ("Despite the clear legal emphasis on the importance of individualized bail determinations, many U.S. jurisdictions have nevertheless adopted a particular device that represents the antithesis of bail fixed according to the personal characteristics and circumstances of each defendant: the bail schedule.").

[90] *Id.* at 15; *see also* Assemb. B. 1118, 2015 Leg., Reg Sess. (Cal. 2015); *Oklahoma County Bail Procedures More Strict*, OKLAHOMAN (1982), http://newsok.com/article/1998190 (claiming the neighboring county had an absurd policy because they would release those who could not afford bail).

[91] Carlson, *supra* note 20, at 14.

[92] *Id.* at 15

[93] *Compare* VERA INST. JUST., *supra* note 14, at iv. (finding low pretrial release numbers), *and* VANNOSTRAND, *supra* note 14, at 13 (finding gross overpopulation in N.J. jails due to bail procedures), *with* 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 (detailing the procedures in D.C. courts aimed at progressing pretrial release). *But see* Simon Ford, Haines Borough Police Dep't Report (Feb. 23, 2014), *in* HAINES BOROUGH ASSEMBLY MEETING #265 AGENDA 202, 203 (Mar. 11, 2014), http://www.hainesalaska.gov/sites/default/files/fileattachments/borough_assembly/meeting/1005/ba-3-11-2014.pdf (discussing an interim police chief's recommendation of blanket bail as a stream of revenue).

bail schedules are being followed arbitrarily, resulting in a greater adverse impact on indigent individuals.[94]

Pretrial detention solely due to an individual's inability to pay unreasonable monetary bail implicates equal protection and due process concerns, and potentially violates the fundamental presumption of innocence inherent in our criminal justice system.[95] States have implemented an assortment of policies attempting to mitigate these concerns, but these policies are not without accompanying legal challenges.[96]

A. Georgia Model

Georgia and the states that follow its example set mandatory minimum bail amounts for felonies and allow counties to create similar bail schedules for misdemeanors[97] to "promote uniformity and fairness, and to facilitate and ensure the early setting of bond[s]."[98] Proponents of such mandatory bail schedules often

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[94] *See e.g.*, Walker v. City of Calhoun, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *1 (N.D. Ga. Jan. 28, 2016) (noting a case where defendant was detained six days before a bail hearing for being under the influence in public); Odonnell v. Harris Cty, No. H-16-1414, 2016 WL 7337549 (2016) (noting a case where defendant detained unable to pay bail while driving on a suspended license); Carlson, *supra* note 20, at 17 (referencing the ABA as declaring bail schedules to be arbitrary and inflexible).

[95] *See generally* Stack v. Boyle, 342 U.S. 1 (1951) (stating, "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"); Carlson v. Landon, 342 U.S. 524, 554 (1952) (discussing how the discretion to jail someone without bail is a serious one, the Court declared, "[d]elegating and redelegating this dangerous power to subordinates entrusted with duties like those of deputy sheriffs and policemen raises serious procedural due process questions.").

[96] *See generally* Pelekai v. White, 861 P.2d 1205 (Haw. 1993) (citing an appeal reversing a trial court judge who believed she would not need to make a finding if she did not deviate from the bail schedule); *Walker*, 2016 WL 361612, at *1 (plaintiff alleging he was held solely because he could not pay the minimum bail schedule); *Odonnell*, 2016 WL 7337549 at *1 (declaring Harris County's post-arrest procedures create a "wealth-based detention system").

[97] *See, e.g.*, GA. CODE ANN. § 17-6-1 (West 2014); MISS. CODE ANN. § 99-35-109 (West 2014); OKLAHOMAN, *supra* note 90.

[98] MEMORANDUM FROM JEFFREY S. BAGLEY, JUDGE, STATE COURT OF FORSYTH CTY., TO ALL SHERIFFS, JAILERS, CUSTODIANS OF PRE-TRIAL

highlight the expediency they provide, arguing that by having a schedule in place, defendants do not need to wait for a trial court to rule on their bail amount.[99] Similarly, proponents argue that the uniformity of the bail schedule is fair because it provides defendants with expectations of their bail amount and assigns bail based on similar offenses.[100]

However, the Georgia model is directly at odds with the Supreme Court's guidance to make bail determinations based on individual circumstances.[101] Additionally, the expediency argument is often in contrast with bail assignments that set a minimum amount unattainable to a defendant strictly because of their disadvantaged financial situation.[102] Finally, because these bail schedules have been evoked so strictly, the Georgia model has also been criticized as a violation of judicial discretion by usurping the judicial officer's

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DETENTION FACILITIES, SOLICITORS GENERAL, MAGISTRATES AND PRE-TRIAL OFFICERS (July 9, 1998), http://www.ninthdistrict.net/Bell_Forsyth/bfiop98-28.pdf (discussing the Bond Schedule O.C.G.A. § 17-6-1(f) pursuant to the Internal Operating Procedure 98-98 in the State of Georgia).

[99] *See, e.g.*, Walker v. City of Calhoun, No. 4:15-CV-0170, 2016 WL 361612, at *4 (N.D. Ga. Jan. 28, 2016) (showing that "[t]he purpose is to permit the posting of bail without a delay associated with the 'First Appearance' within 48 hours of being confined to [jail]. It is the opinion of the Court that the employ of such a schedule, as authorized by state law, 'provides speedy and convenient release for those who have no difficulty in meeting its requirements'").

[100] *See* Reply Brief of Appellant City of Calhoun at 16, Walker v. City of Calhoun (11th Cir. 2016) (No. 16-10521), 2016 WL 929750.

[101] *See* Stack v. Boyle, 342 U.S. 1, 9 (1951) (concurring, Jackson, J. joined by Frankfurter, F.) (stating,

> It is complained that the District Court fixed a uniform blanket bail chiefly by consideration of the nature of the accusation and did not take into account the difference in circumstances between different defendants. If this occurred, it is a clear violation of Rule 46(c). Each defendant stands before the bar of justice as an individual.). *Id.*

showing that Justice Jackson believed that uniform bail requirements were contrary to federal standards in criminal justice proceedings).

[102] *See e.g.*, *Walker*, at *4 (detailing Georgia's code which requires detention if an arrestee cannot pay until their First Appearance which is supposed to be within forty-eight hours); Odonnell v. Harris Cty, Texas, No. H-16-1414, 2016 WL 7337549, at *8 (S.D. Tex. Dec. 16, 2016) (detailing arrestees held solely because they could not pay).

opportunity to assign an appropriate bail amount.[103] These types of blanket bail determinations clearly interfere with a judge's discretion to assign bail, and followed strictly, are a violation of constitutional rights to be free from excessive bail.

B. California Model

To avoid interfering with a judicial officer's bail assignment discretion, other states, such as California, provide bail schedules but are explicit in their deference to the judicial officer's assigned amount.[104] These bail schedules typically provide a maximum amount, but do not assign minimums, leaving the final assigned amount to the judicial officer's discretion.[105] In such states, similar arguments are made in favor of uniformity, expectation of expenses, and a judicially efficient process for release.[106]

Critics of these methods have focused on how the theoretical benefits provided by bail schedules have receded into a tangible disadvantage impacting traditionally vulnerable communities, resulting in an alleged "wealth-based detention system."[107] The California method has also caused confusion among administrators.

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[103] *See* Pelekai v. White, 861 P.2d 1205, 1207 (Haw. 1993) (holding that the "trial judge abused her discretion by following the [bail] schedule without considering relevant statutory criteria.").

[104] *See* CAL. PENAL CODE § 1275 (West 2016); JONES ET AL., A PROPOSAL TO IMPROVE THE ADMINISTRATION OF BAIL AND THE PRETRIAL PROCESS IN COLORADO'S FIRST JUDICIAL DISTRICT 69–75 (Feb. 2009), http://www.clebp.org/images/2009-02-19_Jeffco_Bail_Proposal.pdf.

[105] *See* FELONY BAIL SCHEDULE, SUPERIOR CT. CAL. CTY. L.A. (2017), https://www.lacourt.org/division/criminal/pdf/felony.pdf [hereinafter FELONY BAIL SCHEDULE]; UNIF. BAIL SCHEDULE (FELONY AND MISDEMEANOR), SUPERIOR CT. CAL. CTY. ORANGE (2017), http://www.occourts.org/directory/criminal/felonybailsched.pdf.

[106] For example, see legislative comments to Assemb. B. 1118, 2014 Reg. Sess. (Cal. 2014), http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1101-1150/ab_1118_cfa_20140623_104909_sen_comm.html.

[107] Odonnell v. Harris Cty, Texas 2017 WL 1735456 at *89 (declaring, "Harris County's policy is to detain indigent misdemeanor defendants before trial, violating equal protection rights against wealth-based discrimination and violating due process protections against pretrial detention without proper procedures or an opportunity to be heard"). *See infra* Section III.A.1.

For example, in 2015, the California Assembly pushed for a state-wide bail schedule because bail determinations for similar offenses varied so drastically by county.[108] Furthermore, bail reform advocates have identified counterarguments to those claiming bail schedules are positive for judicial economy, pointing to the higher monetary cost of detaining a person pretrial rather than providing pretrial surveillance.[109]

C. *Texas Model*

A third class of states have implemented bail statutes and procedures like those in Texas. In such states, there is a similar attempt to avoid interference with a judicial officer's discretion. Though prescribed in a consent decree, these bail practices fall in the category of "informally enacted by local officials."[110] For example, a recent Texas case, *Odonnell v. Harris County, Texas*, analyzed the bail procedures of Texas's largest municipal jail and county court.[111] Harris County sets and modifies bail according to a consent decree from a federal judgment in *Roberson v. Richardson*.[112] The *Roberson* order, requires judicial officers to "set the amount of bail required of the accused for release and determine the accused's eligibility for release on personal bond or alternatives

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[108] Assemb. B. 1118, 2014 S. Comm. on Pub. Safety, Reg. Sess. (Cal. 2014) ("[W]hen one county raises the bail amounts the counties near them often feel pressure to follow suit.").

[109] *See* VERA INST. JUST., *supra* note 14. *See generally*, Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 N.W. J. L. & SOC. POL'Y 42, 80 (2012) (discussing how monitoring and other efforts can lower pretrial detention numbers); *Supervision Costs Significantly Less than Incarceration in Federal System*, USCOURTS.GOV (2013), https://www.uscourts.gov/news/2013/07/18/supervision-costs-significantly-less-incarceration-federal-system [hereinafter *Supervision Costs*] (reflecting an extremely lower cost in pretrial monitoring).

[110] Carlson, *supra*, note 20, at 13.

[111] Odonnell v. Harris Cty, Texas 2017 WL 1735456.

[112] *Rule 9. Setting and Modifying Bail*, HARRIS COUNTY CRIMINAL COURTS at 15–16 (Sept. 6, 2012), available at http://www.ccl.hctx.net/attorneys/BailSchedule.pdf.

to prescheduled bail amounts."[113] The *Roberson* consent decree requires judges and hearing officers to consider a number of criteria and then determine bail.[114] Under the *Roberson* order, one of the criteria to be considered is "the ability to make bail,"[115] but judges have disproportionately outweighed this factor in favor of others.[116] Ultimately, Hearing Officers in Harris County followed the prescheduled bail amount in 88.9% of misdemeanor cases.[117]

These states are praised at least for their requirement to have courts enact the bail schedules and not the legislature. For example, the state of Ohio allows county courts to fix bail based on the surrounding circumstances of a case or "in accordance with a schedule previously fixed by *the judge or magistrate.*"[118] Similarly, Alabama revised its bail statute in January 2017 to allow county judges to consider an individual's financial condition.[119] This revision came after the absence of the clause in an Alabama county statute was challenged for violating the Eighth Amendment.[120] In response, an Alabama court made clear that the use of blanket schedules without regarding a defendant's indigence would be unconstitutional.[121] This is a step in the right direction, but any

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[113] Odonnell v. Harris Cty, Texas 2017 WL 1735456, at *13 (quoting Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978)). For a more in-depth discussion of the "*Roberson* order" derived from *Roberson v. Richardson*, see *id.* at *13–15.

[114] *Id.* at 13–14; *Rule 4. Initial Settings*, HARRIS COUNTY CRIMINAL COURTS at 9–10 (Sept. 6, 2012).

[115] *Odonnell* at 14.

[116] *Id.* at 35 ("The Hearing Officers testified that they cannot let one factor—the inability to pay—control their bail determination. But they frequently cite only one factor—criminal history—as controlling their decision to set secured money bail that the defendant clearly cannot pay.").

[117] *Id.* at 32.

[118] *See* OHIO REV. CODE ANN. § 2937.23 (West 2014) (emphasis added).

[119] ALA. R. CRIM. P. 7.2(B).

[120] *See* Jones v. City of Clanton, No. 2:15cv34–MHT 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015).

[121] *See id.* at 4 (The new standard the court announces is that, "[t]he use of a secured bail schedule to detain a person after arrest, without a hearing on the merits that meets the requirements of the Fourteenth Amendment regarding the person's indigence and the sufficiency of the bail setting, is unconstitutional as applied to the indigent. Without such a hearing, no person may, consistent with

dollar-amount bail schedule still detracts from a judicial officer's discretion.

D. Case-by-Case Model

Though the Texas model is a valiant effort, other states' bail procedures are more aligned with the Supreme Court's individualized bail determination standard and the essence of judicial officer discretion. These states typically do not establish bail schedules and instead use general clauses to assign bail based on a set of transcribed circumstances.[122] One such example is New York. New York's bail provision does not adopt a bail schedule, but offers a discretionary standard for a judicial officer which provides a number of criteria to assess in making bail determinations:

> With respect to [the arrestee], the court *must* consider the kind and degree of control or restriction that is necessary to secure his court attendance when required. In determining that matter, the court *must*, on the basis of available information, consider and take into account: (i) The [arrestee's] character, reputation, habits and mental condition; (ii) His employment and *financial resources*; and (iii) His family ties and the length of his residence if any in the community; and (iv) His criminal record if any; and (v) His record of previous adjudication as a juvenile delinquent . . . or, of pending cases where fingerprints are retained . . . or a youthful offender, if any; and (vi) His previous record if any in responding to court appearances when required or with respect to flight to avoid criminal prosecution . . . . [123]

These statues are typically broadly construed, allowing judges to weigh a multitude of surrounding circumstances in case-by-case determinations.[124] While providing judges with ultimate discretion,

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the Fourteenth Amendment, continue to be held in custody after an arrest because the person is too poor to deposit a monetary sum set by a bail schedule.").

[122] *See e.g.*, N.Y. CRIM. PROC. § 510.30 (McKinney 2012); CONN. GEN. STAT. ANN. § 54-63c (West 1968).

[123] N.Y. CRIM. PROC. § 510.30 (McKinney 2012) (emphasis added).

[124] Carlson, *supra* note 20, at 16-17.

these statutes have been criticized due to their absence in *requiring* judges to address an *indigent* individual's financial status.[125] Critics of such statutes often turn to jurisdictions such as Washington, D.C.—a jurisdiction which prides itself on not detaining persons solely due to their inability to afford bail[126]—or Arkansas, a jurisdiction that explicitly states that "[t]he judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court."[127]

III. DEFINING "EXCESSIVE BAIL" THROUGH STATE BAIL REFORM & SUPREME COURT INTERVENTION

Determining the legality of the adverse models and the best practices of the meretricious ones is of the utmost importance. Currently, it is estimated that 70 percent of our local jail population is being detained without a conviction.[128] Municipal and county jails are overflowing with detainees simply because they cannot post bail.[129] This is not a new phenomenon. In 1964, Attorney General Robert F. Kennedy, testifying in front of a Senate subcommittee on improvements to "judicial machinery," noted that, "[o]n a single day . . . there were 1,300 persons being held prior to trial in the Los Angeles County jail. In St. Louis, 79 percent of all defendants [were] detained because they [could not] raise bail. In Baltimore the figure [was] 75 percent."[130] More than fifty years later, Attorney General

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[125] *See* JONATHAN LIPPMAN, N.Y. ST. UNIFIED CT. SYS., THE STATE OF THE JUDICIARY 2013 at 4 (2013), https://www.nycourts.gov/ctapps/news/SOJ-2013.pdf. Jonathan Lippman, the Chief Judge of New York State discusses the "need to ensure judges have accurate and complete information" before making bail determinations, that courts must require indigence as a factor in determining bail, and that the state must reform the bail bond industry as well. *Id.*

[126] Marimow, *supra* note 93.

[127] ARK. CODE ANN. § 9.2 (West 2014).

[128] *See* PETER WAGNER & BERNADETTE RABUY, MASS INCARCERATION: THE WHOLE PIE 2017, PRISON POLICY INITIATIVE (2017) (available at https://www.prisonpolicy.org/reports/pie2017.html).

[129] *See* Katy Reckdahl, *Jailed Without Conviction: Behind Bars for Lack of Money*, CHRISTIAN SCI. MONITOR (2012), http://www.csmonitor.com/USA/Justice/2012/1216/Jailed-without-conviction-Behind-bars-for-lack-of-money.

[130] ROBERT F. KENNEDY, TESTIMONY BY ATT'Y GEN. ROBERT F. KENNEDY ON BAIL LEGIS. BEFORE SUBCOMMITTEES ON CONST. RIGHTS AND

Loretta Lynch continued to highlight this injustice. Addressing a White House convention on incarceration and poverty Lynch stated, "[w]hen bail is set unreasonably high, people are behind bars only because they are poor."[131] Combating this problem is not a one-step solution; it requires state legislatures and controlling precedent from the Supreme Court to create an equitable result.

A. Progress Through State Bail Reform

Grappling with equitable bail determinations has been a difficult issue for states.[132] Typically, to determine bail when there is no bail schedule in place, the accused—with, or often without, the assistance of counsel—will present factors including the seriousness of the charge, prior criminal history, and the health or well-being of any potential victim.[133] If the accused is bailable—which has traditionally been the case for low-level, misdemeanor offenses—the judicial officer will then consider general background information regarding the accused, whether there are supervisory methods in place if the defendant is released pending trial, and the state's interest in pretrial detention.[134] Using this information, the judicial officer is to make a reasonable bail determination or release

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IMPROVEMENTS TO JUDICIAL MACHINERY OF S. JUDICIARY COMM.1 (1964), https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

[131] LORETTA LYNCH, ATT'Y GEN. LORETTA E. LYNCH DELIVERS REMARKS AT WHITE HOUSE CONVENING ON INCARCERATION AND POVERTY (2015), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and.

[132] *See, e.g.*, BRIAN FROSH, LETTER TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 2 (2016) (describing the Attorney General of Maryland writing to the Maryland rule-making committee with concerns that their bail practices may be unconstitutional); Lippman, *supra* note 125, at 4 (discussing the "need to ensure judges have accurate and complete information" before making bail determinations).

[133] *See* CRIM. JUST. POL'Y PROGRAM HARV. L. SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 28 (2016), http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf [hereinafter CRIM. JUST.].

[134] *See* Michael S. Woodruff, Note, *The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation*, 66 RUTGERS L. REV. 241, 255 (2013) (describing the bail procedure).

the accused on their own recognizance.[135] The subjective nature of this approach has led to varying results at the local level.[136] In attempting to grapple with the issue, states have started to think about innovative alternatives for determining bail, some more praiseworthy than others. The below discussion provides a brief background of how states and communities have used innovative approaches to alleviate the assignment of excessive bail.

1. Bail Schedules

As discussed, bail schedules were originally seen as a way of standardizing the bail assignment process.[137] Proponents of such procedures argue that they provide a "speedy and convenient" method of release and a financial incentive to comply with the conditions of their release.[138] These bail schedules developed during a boom in the cash bail bond business.[139] Often imposing cash bonds, mandatory bail schedule statutes have required the accused to pay these bonds as a surety that they would stand trial.[140] Thus, although argued by some as unconstitutional *per se*,[141] bail

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[135] *See* CRIM. JUST., *supra* note 133.

[136] *See generally* Fern L. Kletter, *Excessiveness of Bail in State Criminal Cases—Amounts Over $500,000*, 7 A.L.R.6TH 487 (2005), LexisNexis (describing various factors, through case by case analysis, that the judiciary uses to determine proper bail); MATRIX OF STATE BAIL LAWS, *supra* note 17 (detailing how different bail practices are in the fifty states).

[137] *See* Assemb. B. 1118, 2014 S. Comm. on Pub. Safety, Reg. Sess. (Cal. 2014); *see also* 17 N.J. PRAC., § 13:5 (2005) and accompanying text, *supra* note 19.

[138] Odonnell v. Harris Cty., No. H-16-1414, 2017 WL 1735456, at *37 (S.D. Tex. Apr. 28, 2017).

[139] *See* JUSTICE POLICY INSTIT., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/ _for_better_or_for_profit_.pdf.

[140] *See* JUSTICE POLICY INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 9, (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf.

[141] Anthony G. Amsterdam et. al., *Arranging Bail for the Criminal Defendant*, 18 PRACTICAL LAWYER 15, 19 (1972) (arguing bail schedules are per se unconstitutional).

schedules or schemes were considered an early positive innovation in attempting to achieve equitable bail.[142]

While bail schedules may have been viewed as an early attempt at providing more equitable bail determinations, they were largely unsuccessful, resulting in an alleged "wealth-based detention system."[143] An inability to pay these often-mandatory amounts has led to several further innovations in bail reform. For example, and further indicating the monetary role bail has played in criminal justice, "bail funds" have recently been created to alleviate the burden of excessive bail amounts.[144]

2. Bail Funds

Bail funds allow individuals to pool their money together to pay for the bail of those who would otherwise be detained pretrial.[145] The governing rules of bail funds vary, but their general purpose is the same: they are created to pay for the release of low-risk defendants.[146] Once a defendant who has been sponsored by the

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[142] *See generally* OKLAHOMAN, *supra* note 90 (examining how counties in Oklahoma have different bail practices).

[143] Odonnell v. Harris Cty., No. H-16-1414, 2017 WL 1735456, at *63 (S.D. Tex. Apr. 28, 2017).

[144] *See* Alysia Santo, *Bail Reformers Aren't Waiting for Bail Reform, They're Using Charity to Set Poor Defendants Free*, MARSHALL PROJECT (Aug. 23, 2016), https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform#.Gm65qvI31.

[145] *See, e.g.*, *How The Fund Works*, BROOKLYN COMMUNITY BAIL FUND, https://brooklynbailfund.org/how-it-works/ (last visited May 26, 2017) (describing their mission to "pool money to pay bail for fellow New Yorkers").

[146] *See, e.g.*, *Our Mission*, CHICAGO COMMUNITY BAIL FUND, https://www.chicagobond.org/ (last visited May 26, 2017) (considering, among other criteria, the existing support, risk of victimization in the jail, and special health needs of a defendant); *How it works,* MASS. BAIL FUND, http://www.massbailfund.org/how-it-works.html (last visited May 26, 2017) (accepting "referrals for clients represented by court-appointed counsel whose bail is $500.00 or less"); *Community Bail Funds Reclaim Bail Decision Power*, PRETRIAL JUST. INST. (Jan. 19, 2016), http://www.pretrial.org/community-bail-funds-reclaim-bail-decision-power/ (describing the correlation between low-risk defendants paying bail funds and the increased likelihood of showing up for court appearances) [hereinafter *Community Bail Funds*]. Bail evaluations create risk assessments based on the criteria judicial officers and officers of the court

fund stands trial the money is repaid to the fund.[147] These funds are typically created by municipalities who finance them by appropriating a part of the public budget, or are funded through community groups who raise money from their peers and whose members make personal contributions to the fund.[148]

Municipal legislators claim that the use of public money is well-spent because of the typically high cost of detaining an inmate.[149] Additionally, at least one criminal justice scholar has argued that community bail funds should be seen as a means of nullification, arguing that "[e]ach time a community bail fund pays bail for a stranger, the people in control of the fund reject a judge's determination that a certain amount of the defendant's personal money was necessary for the defendant's release."[150] This type of grassroots organizing and civil auditing should be an indication to the courts that excessive bail has a substantial impact on the community at large. Though helpful, bail funds are only a solution for providing financial assistance for those low-risk defendants eligible *after* bail has already been imposed—these funds do not

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consider. *Odonnell*, 2017 WL 1735456 at *27. Low-risk assessments are for petty crimes or crimes with no malice, and indicate likelihood to attend at trial. *See, e.g.*, Jocelyn Simonson, *Bail Nullification*, 115 MICHIGAN L. REV. 585, 600–602 (2017) (providing examples of such low-level cases funds will address.) These risk-assessments are arbitrary however, when blanket bail is assigned and some are able to bail while others are not. *See, e.g.*, *Odonnell*, 2017 WL 1735456 at *28–30 (describing the arbitrary nature of the Harris County scoring system).

[147] *Community Bail Funds*, *supra* note 146.

[148] *Compare* John Surico, *New York City is Creating a Bail Fund to Help Get People Out of Jail*, VICE (June 29, 2015), http://www.vice.com/read/new-york-city-is-creating-a-bail-fund-to-help-people-get-out-of-jail-629 (depicting $1.4 million from the NYC budget allocated for the start of the fund), *with* Matt Sledge, *Community Bail Fund For Poor Defendants to Launch in Brooklyn*, HUFFINGTON POST (Mar. 17, 2015), http://www.huffingtonpost.com/2015/03/17/brooklyn-community-bail-fund_n_6886836. html (examining the start of the nonprofit fund). *But see* Erin Durkin & Reuven Blau, *New York City bail relief for low-level detainees in limbo after introduced in 2015*, N.Y. DAILYNEWS (Dec. 4, 2016), http://www.nydailynews.com/news/politics/new-york-city-bail-relief-low-level-detainees-limbo-article-1.2898723 (declaring that the NYC fund has not distributed any money to detainees a year after its creation).

[149] *See* Surico, *supra* note 148 (claiming it costs $450 per day to detain an NYC inmate and the average pretrial inmate stay is 24 days).

[150] Simonson, *supra* note 146, at 588.

address the problem of why excessive bails are so often imposed in the first place. Attempting to make more accurate bail assignments, some states have turned to bail algorithms.

3. Bail Algorithms

Bail algorithms, through computer programming, assess questions answered by an arrestee and use that analysis in conjunction with the arrestee's criminal record to recommend a risk-analysis of the arrestee.[151] Bail algorithms are geared toward more accurately determining bail amounts based on a number of factors traditionally left to judges' discretion.[152] Representatives from the Laura and John Arnold Foundation, which has created a bail algorithm used in thirty jurisdictions, have justified it as a way "to provide judges with objective, data-driven, consistent information that can inform the decisions [judicial officers] make."[153] Through machine learning, the Arnold Foundation bail algorithm is able to process data from 1.5 million case histories, as well as other information, and then provide predictive risk-assessments pertaining to a defendant's likelihood of recidivism or missing trial.[154]

Bail algorithms are a relatively new innovation, and their implementation has been slow.[155] Though sparsely used, bail

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[151] Jason Tashea, *Risk-assessment Algorithms Challenged in Bail, Sentencing and Parole Decisions*, ABA J. (Mar. 1, 2017), http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole/?.

[152] *See* Shaila Dewan, *Judges Replacing Conjecture with Formula for Bail in New York*, N.Y. TIMES (June 28, 2015), http://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html.

[153] Vivian Ho, *Seeking a Better Bail System, SF Turns to Computer Algorithm*, S.F. CHRONICLE (Aug. 1, 2016), http://www.sfchronicle.com/crime/article/Seeking-a-better-bail-system-SF-turns-to-8899654.php.

[154] *See id.*

[155] *See* Christopher I. Haugh, *The White House Has a New Data-Driven Criminal-Justice Project*, ATLANTIC (Jun. 30, 2016), http://www.theatlantic.com/politics/archive/2016/06/white-house-data-criminal-justice/489614/; *see also Of Prediction and Policy*, ECONOMIST (Aug. 20, 2016), http://www.economist.com/news/finance-and-economics/21705329-governments-have-much-gain-applying-algorithms-public-policy (noting various barriers that may affect

algorithms have already been criticized by legal commentators and practitioners.[156] It is argued that bail algorithms not only limit the discretion of the judicial officer and prescribe bail amounts that are excessive by traditional standards, but in some circumstances they have also been considered biased toward certain races.[157] These algorithms do not use race in their evaluation explicitly, but do consider factors which, in practice, impact specific races.[158] As such, these algorithms, while providing informed data, still result in inaccurate bail determinations and the assignment of excessive bail.[159] While enduring criticism, bail algorithms can at least be seen as a positive step toward case-by-case bail determinations.

4. Pretrial Services

Furthering efforts to make case-by-case determinations while simultaneously attempting to make bail attainable has been the development of Pretrial Service Agencies ("PSAs").[160] PSAs are

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nationwide implementation include, transparency, data-fetching, and ethical issues).

[156] *See* ANGÈLE CHRISTIN ET AL., COURTS AND PREDICTIVE ALGORITHMS, DATA & CIVIL RIGHTS: A NEW ERA OF POLICING AND JUSTICE (2015), http://www.law.nyu.edu/sites/default/files/upload_documents/Angele%20Christin.pdf.

[157] *See* Gretel Kauffman, *Courts Use Risk Algorithms to Set Bail: A Step Toward a More Just System?*, CHRISTIAN SCI. MONITOR (Aug. 3, 2016), http://www.csmonitor.com/USA/Justice/2016/0803/Courts-use-risk-algorithms-to-set-bail-A-step-toward-a-more-just-system; *see also* Sam Corbett-Davies et al., *A Computer Program Used for Bail and Sentencing Decisions was Labeled Biased Against Blacks. It's Actually Not That Clear.*, WASH. POST (Oct. 17, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/17/can-an-algorithm-be-racist-our-analysis-is-more-cautious-than-propublicas/ (noting that ProPublica, allege that the COMPAS algorithm is "biased against black defendants").

[158] *See* Corbett-Davies et al., *supra* note 157 ("For example, black defendants are more likely to have prior arrests, and since prior arrests predict reoffending, the algorithm flags more black defendants as high risk even though it does not use race in the classification.").

[159] Tashea, *supra* note 151.

[160] *See* Betsy Kushlan Wanger, *Limiting Preventative Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*,

governmental agencies designed to aid judicial officers, prosecutors, and defense attorneys in making more accurate bail requests and generally increasing the efficiency of pretrial procedures.[161] The general responsibilities of a PSA are the same: they provide support through mechanisms such as recommendations to the court after interviews with the defendant, risk assessments, and defendant supervision.[162] These services have been proven to lead to more accurately assigned bail amounts, have made bail more attainable for alleged defendants, and have increased trial efficiency.[163]

In addition to improving the desired effects of bail, pretrial services have lowered the cost of pretrial inmate detention.[164] A study by the U.S. courts showed that in 2012, pretrial detention cost $73.03 per day, but pretrial supervision cost the government $7.24 per day.[165] Similarly, a 2012 study issued for California County Courts showed that Santa Clara County's Pretrial Service Program saved them $32 million per year.[166] Thus, since their inception, localities have used pretrial services as a method of keeping pretrial detention inmate numbers low, lowering budget costs, and increasing trial attendance rates.[167]

Pretrial services are not a new innovation, and may be traced back to the Manhattan Bail Project and the beginning of the bail

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97 Yale L.J. 320, 321 (1987); *see also* Marimow, *supra* note 93 (detailing the procedures in D.C. courts aimed at progressing pretrial release).

[161] Woodruff, *supra* note 134 at 253.

[162] *See id.*

[163] *See* Marimow, *supra* note 93 (discussing the statistical accomplishments of Washington, D.C.'s pretrial release services program, in lieu of a monetary bail program, with respect to trial attendance of criminal defendants released on nonfinancial bail).

[164] *See generally* P'SHIP FOR CMTY. EXCELLENCE, PRETRIAL DETENTION & COMMUNITY SUPERVISION—BEST PRACTICES AND RESOURCES FOR CALIFORNIA COUNTIES (Sharon Aungst ed., 2012) (describing lowered costs in California County jails that have strong pretrial service practices); *Supervision Costs*, *supra* note 109 (detailing the sharp decrease in spending by using pretrial service techniques).

[165] *Supervision Costs*, *supra* note 109.

[166] P'SHIP FOR CMTY. EXCELLENCE*, supra* note 164, at 4.

[167] *See* VERA INST. JUST., *supra* note 14, at iv-v.

reform movement.[168] From 1960 to 1967, the Manhattan Bail Project researched the impact of pretrial services and their effect on ensuring a defendant's appearance at trial.[169] Their research clearly showed that pretrial services were more impactful than monetary bail assignments.[170] Because of their success, pretrial services are now required at the federal level,[171] but have mostly failed to trickle down to counties and municipalities.[172] States which do provide such services typically allow counties to administer them on their own, which has led to a general lack of cohesion.[173]

Additionally, even in jurisdictions that do offer pretrial services, their methods have been criticized as inadequate.[174] For example, in Harris County, Texas, bail hearings are often conducted later than their twenty-four-hour postarrest requirement, lack pertinent information such as the arrestee's financials, and are held without

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[168] PRETRIAL JUSTICE INST., RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASE TO RISK-BASED PROCESS 12 (Mar. 2012), http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/Rational-and-Transparent-Bail-Decision-Making.pdf.

[169] S. Andrew Schaffer, BAIL AND PAROLE JUMPING IN MANHATTAN IN 1967, VERA INSTITUTE OF JUSTICE (Aug. 1970) https://storage.googleapis.com/vera-web-assets/downloads/Publications/bail-and-parole-jumping-in-manhattan-in-1967/legacy_downloads/Bail_and_parole_jumping.pdf.

[170] *See id.*

[171] *See* 18 U.S.C. § 3152 (2008).

[172] *See* Woodruff, *supra* note 134, at 254–57 (discussing nonreformist states and the failure to incorporate pretrial services at the state level).

[173] *Id. See, e.g.*, P'SHIP FOR CMTY. EXCELLENCE, *supra* note 166 (advocating for California counties to institute pretrial release programs as a result of state legislation that has moved "non-serious, non-violent, and non-sex offenders formerly sentenced to state prisons" to counties jailhouses in order to avoid overcrowding); Johnson & Johnson, *supra* note 109, at 42 (discussing problems of overcrowding in the Harris County jail system due to overcrowding of pretrial detainees who cannot afford bail and advocating the County to, among other things, expand the application of nonfinancial release bonds by focusing efforts on individualized pretrial release programs).

[174] *See, e.g.*, Edie Fortuna Cimino et al., *Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process*, 45 U. BALT. L.F. 56 (2014) (depicting the shortcomings of pretrial services in Baltimore, Maryland).

an appropriate opportunity to be heard.[175] Furthermore, some criminal justice advocates have spoken out about the invasiveness of pretrial services which frequently require adherence to drug testing or GPS monitoring.[176] This has been criticized as a method of policing a population in their homes or communities rather than in jail—often at the arrestee's expense.[177]

Although criticized,[178] pretrial services are beneficial because they provide judicial officers with detailed circumstances of each defendant's case so they may make more accurate bail determinations. Thus, pretrial services go a long way in ensuring excessive bail amounts are not imposed and—when administered successfully—pretrial service administrators can pride themselves on not detaining alleged criminals simply because they cannot pay.[179] The success of PSAs has led bail reform advocates to push for such agencies in all states.[180]

B. Clarity Through Supreme Court Intervention

Alone, these innovations will not end the excessive bail epidemic. As noted above, bail reform advocates and legal commentators have declared that state bail procedures violate the

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[175] *See, e.g.*, Odonnell v. Harris Cty., No. H-16-141420, 2017 WL 1735456, at *23-53 (S.D. Tex. Apr. 28, 2017) (describing arbitrary pretrial service practices in Harris County and the defendants' refutation that this process is insufficient).

[176] *See, e.g.*, 13th (Netflix 2016) (declaring that, "What I worry about is that we fall asleep at the wheel and that we wake up and we are incarcerating people in our communities"); *13th – Reflections & Loose Transcript*, VIALOGUE (Oct. 29, 2016), https://vialogue.wordpress.com/2016/10/29/13th-reflections-loose-transcript/. *But see* Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE. L.J. 1344, 1350 (arguing that pretrial monitoring is a far greater option than pretrial detention).

[177] 13th, *supra* note 176 (declaring that, "[p]risons would be imbedded in our homes, so folks wouldn't be locked up in a cage—in a cell inside an institution—but they would have ankle bracelets on.").

[178] *See, e.g.*, Cimino et al., *supra* note 174.

[179] *See* Reckdahl, *supra* note 129.

[180] Woodruff, *supra* note 134, at 255 (examining which jurisdictions offer pretrial services).

administration of justice for a multitude of reasons.[181] These state procedural schemes have been the subject of several legal challenges, and recent rulings have suggested a positive shift towards recognizing bail reform.[182] For example, in 2015, the Department of Justice ("DOJ") issued a statement of interest ("SOI") in *Varden v. City of Clanton*.[183] The DOJ argued that the city's use of a mandatory bail scheme, without consideration for indigence, violated the Fourteenth Amendment and was contrary to public policy.[184] The plaintiffs' argument emphasized the Fourteenth Amendment's promise of equal protection, particularly as it pertains to pretrial liberty.[185] The City of Clanton reacted to Varden's claims by revising its mandatory bail schedule provision to consider indigence.[186] Alabama then revised its state statute to specifically account for defendants' financial condition when assigning bail.[187] However, as litigation and legislation moves forward, those unable to pay bail remain in wait. Reforms have been furthered by states through legislative action and legal challenges,[188]

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[181] *See, e.g.*, VERA INST. JUST., *supra* note 14, at xiii (identifying causes of case processing delays); Lippman, *supra* note 125, at 4–7 (reflecting on bail practices which adversely impact the poor); Carlson, *supra* note 20, at 12 (depicting the Supreme Court's overview of excessive bail legal issues).

[182] *See* Statement of Interest of the United States, Varden v. City of Clanton, No. 2:15-cv-00034-MHT-WC, 2015 WL 5387219 at *8 (2015) [hereinafter, Varden SOI] (addressing "bail schemes" in Alabama which require alleged criminals to pay a cash bond in a fixed dollar amount for each charge, misdemeanor or felony, or else remain incarcerated); *see also* Walker v. City of Calhoun, No. 16-10521, 2016 WL 361612, at *3 (N.D. Ga. 2016) (addressing a violation of indigent individual's Fourteenth Amendment rights and how pretrial detention can impede the fair administration of justice).

[183] *See* Varden SOI, *supra* note 182.

[184] *Id.* at *1 (stating, "any bail or bond scheme that mandates payment of pre-fixed amounts for different offenses in order to gain pretrial release, without any regard for indigence, not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy.").

[185] *Id.* at 8.

[186] *See* Jones v. City of Clanton*,* No. 2:15cv34, 2015 WL 5387219, at *4 (M.D. Ala., Sept. 14, 2015) (following an individual-by-individual standard).

[187] ALA. R. CRIM. P. 7.2(A)(13).

[188] *See, e.g.*, ASSOCIATED PRESS, *Bail Reform Bill Clears Senate, Heads to Malloy's Desk*, US NEWS (June 7, 2017) https://www.usnews.com/news/best-states/connecticut/articles/2017-06-07/bail-reform-bill-clears-senate-heads-to-

but without a Supreme Court ruling defining the prohibitions on excessive bail, courts throughout the country will continue to interpret this clause arbitrarily at worst, and inconsistently at best.

To date, the only Supreme Court case to consider an excessive bail amount is *Stack*, in which the Court ruled that the blanket procedure used to determine bail was a violation of the Excessive Bail Clause.[189] In *Stack* and the cases that followed, the Court failed to establish an appropriate test, yet mentioned in dicta that "[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act"[190] and that "[i]f bail in an amount greater than that usually fixed for serious charges is required in the case of any [arrestee], that is a matter to which evidence should be directed in a hearing so that the constitutional rights of each [arrestee] may be preserved."[191] The Court remanded the case for the lower court to fix "reasonable bail" but did not identify factors to determine such reasonableness.[192] Thus, in an effort to prevent "flood[ing] the courts with motions and appeals in bail cases,"[193] and by narrowly responding to the legal questions before them,[194] the Court failed to establish appropriate excessive bail precedent.[195]

Though excessive bail precedent is lacking, Justice Jackson was clear that the Court should not "exercise [their] certiorari power in individual cases except where they are *typical of a problem so*

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malloys-desk (describing steps Connecticut is taking to change bail procedures); Michael Kunzelman, *Lawsuit: Bail 'Scheme' Keeps Poor People Jailed for Months*, SAN FRANCISCO CHRONICLE (June 6, 2017) http://www.sfchronicle.com /news/crime/article/Lawsuit-Bail-scheme-keeps-poor-people-jailed-11199374.php (discussing a court challenge in Louisiana to a county's "wealth-based detention system").

[189] Stack v. Boyle, 342 U.S. 1, 3 (1951). The Court did not discuss the procedural process of the bail assignments save to say that the district court imposed a "uniform amount." *Id.*

[190] *Id.* at 6.

[191] *Id.*

[192] *Id.* at 7.

[193] *Id.* at 11.

[194] *See* United States v. Salerno, 481 U.S. 739, 754 (1987).

[195] *See* United States v. Gardner, 523 F.Supp.2d 1025, 1029 (N.D. Cal. 2007) (expressing a lack of guidance pertaining to pretrial release conditions). *See, e.g.*, Broussard v. Parish of Orleans, 318 F.3d 644, 650 (5th Cir. 2003) (stating the lack of frequency the Supreme Court has considered the Excessive Bail clause).

important and general as to deserve the attention of supervisory power."[196] Today, excessive bail is such a problem.[197] The Court should exercise their supervisory power[198] by granting certiorari in *Walker v. City of Calhoun* and *Odonnell v. Harris County, Texas*; in doing so, the Court should answer important questions of law pertaining to excessive bail.

1. *Walker v. City of Calhoun*

On September 3, 2015, the Calhoun Police Department arrested fifty-four-year-old Maurice Walker for "being a pedestrian under the influence."[199] Walker, who is disabled, had been living on just $540 per month in Social Security benefits.[200] Unable to afford the mandatory $160 cash bond, Maurice stayed in jail for six days prior

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[196] *Stack*, 342 U.S. at 13 (Jackson, J.) (emphasis added). Similarly, the Court granted certiorari in *Salerno* "because of a conflict among the Courts of Appeals." *Salerno*, 481 U.S. at 741. This conflict is persistent today and warrants clarity by the Court.

[197] *See Odonnell*, 2016 WL 7337549 at *8 ("According to a 2012 report, 81 percent of misdemeanor arrestees in Harris County could not post bail at booking and were jailed. Most of the other 19 percent could pay and were released on bond before or at booking."); *see also* Pinto, *supra* note 12 (describing the impact detention on bail has on the innocent and indigent).

[198] The Supreme Court will rarely remove a case before an appeals court opinion is issued. They will only do so "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination [by the] Court." SUP. CT. R. 11. However, as discussed below, *Walker* has recently been adjudicated by the 11th Circuit and the *Odonnell* case is similar and important enough to be joined as a companion case. *See discussion infra* Section III.B.1. This would not be an unprecedented reaction by the Supreme Court; coincidentally, the Court took such an action in *Roe v. Wade* when a Texas statute and a Georgia statute challenged the imperative rights of Due Process and Equal protection. *See* SUSAN REACH WINTERS & THOMAS BALDWIN, 12 N.J. PRAC., FAM. LAW PRAC. § 54.23 (last updated Nov. 2016).

[199] Walker v. City of Calhoun, Georgia, 2016 WL 361612 at *1 (N.D. Ga., 2016).

[200] *Id.*

to appearing in front of a Municipal Court judge.[201] Maurice filed a class action lawsuit and asked the U.S. District Court for the Northern District of Georgia to determine whether the city's mandatory bail schedule violated the Fourteenth Amendment.[202]

The district court granted standing to Walker's class[203] and found that the bail schedule violated the Equal Protection Clause under the Fourteenth Amendment because it did not account for indigence.[204] The court issued an injunction to cease the use of the bail schedule.[205] It also mandated that the city "implement post-arrest procedures that comply with the Constitution."[206] The court definitively stated that the City of Calhoun "may not continue to keep arrestees in its custody for any amount of time solely because the arrestees cannot afford bail."[207] A Supreme Court ruling of this nature would greatly impact and possibly end the use of bail schedules in counties across the country.

In February 2017, the Eleventh Circuit granted an appeal by the City of Calhoun and ruled in the City's favor, vacating the district court's order because it did not comport with Federal Rules of Civil Procedure rule 65 (requiring an injunction to be sufficiently specific and detailed).[208] Because the circuit court remanded the case for lack of specificity, they did not address the constitutionality of the City

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[201] *Feds Say That It's Unfair to Hold Poor Defendants If They Can't Afford Bail*, FORTUNE (2016), http://fortune.com/2016/08/20/poor-defendants-bail/ (exploring Walker's circumstance).

[202] Complaint, Walker v. City of Calhoun, No. 4:15-cv-170, 2016 WL 361612, at *9–10 (2016).

[203] *Walker*, 2016 WL 361612 at *2–3, 12 (discussing and certifying standing of the plaintiff class and finding that standing and mootness issues raised by Defendant did not affect Plaintiff's claim because there is often no injury at the time of trial in bail cases).

[204] *Id*. at 10 (ruling that City of Calhoun bail schedule and post-arrest release procedures were directly at odds with the excessive bail clause because they did not provide a means for indigent individuals to be released within a reasonable period after arrest).

[205] *Id*. at 14.

[206] *Id*.

[207] *Id*. at 14.

[208] Walker v. City of Calhoun, No. 16–10521, 2017 WL 929750 at *1 (2017) (ruling that the district court's injunction was an "obey the law" injunction and was overly vague, and therefore should not be enforced).

of Calhoun's bail schedule procedures; however, in their appeal, the City of Calhoun argued that strict scrutiny review does not apply to an indigent class and that the bail schedule in place is rationally related to a legitimate government interest.[209] The appellants also claimed that "principles of Federalism afford municipalities the flexibility to employ different pretrial procedures" and that the city's practices are within that flexible boundary.[210] Finally, the City argued that their legislature-imposed bail schedule did not interfere with the discretion of the judicial officer in setting bail amounts.[211]

The City of Calhoun was joined by "interested parties" such as neighboring municipalities in Georgia, as well as organizations like the Georgia Sherriff's Association, the American Bail Coalition, and Bail USA, Inc.[212] On the appellee's side, "interested parties" providing amicus briefs or representation were groups such as the Department of Justice, the Southern Poverty Law Center, the Cato Institute, and the Pretrial Justice Institute.[213] The sheer number of interested parties on both sides and the dire circumstances of the appellee-plaintiffs should indicate the importance of supervision by the Supreme Court.[214] The Court should answer several important questions pertaining to excessive bail, such as: (1) whether mandatory bail schedules are *per se* unconstitutional, (2) whether judicial officers must consider the financial status of a defendant when fixing bail, and (3) whether legislatively enacted bail schedules infringe upon a judicial officer's discretion.[215]

2. *Odonnell v. Harris County, Texas*

In *Odonnell*, a more recent case filed in the U.S. District Court for the Southern District of Texas, the joint plaintiffs brought a 42 U.S.C. § 1983 action after being held on bail amounts that ranged

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[209] Reply Brief of Appellant City of Calhoun at *14–17, Walker v. City of Calhoun, No. 16-10521, 2016 WL 5368508 (11th Cir. 2017).

[210] *Id.* at 9–11.

[211] *Id.* at 19.

[212] *Id.* at C-1–C-5.

[213] *Id*; *Walker*, 2017 WL 929750, at *1.

[214] *See* Stack v. Boyle, 342 U.S. 1, 3 (1951) (considering bail procedures to be an important factor in criminal justice.).

[215] *See Walker*, 2017 WL 929750 at *1–3.

from \$2,500 to \$5,000.[216] None of the plaintiffs were able to pay, and were detained between two and five days prior to their bail hearings.[217] *Odonnell* raises many analogous themes to *Walker* and *Varden*,[218] but has also raised distinct questions of law important to excessive bail jurisprudence.[219]

The arrestees in *Odonnell* argued that their bail was assigned at amounts much higher than they were able to pay, creating a "wealth-based detention system."[220] Harris County—home of one of the largest municipal jails in the United States and infamous for overcrowding—first argued for a stay until they could implement bail reforms set to begin in July 2017.[221] The district court judge dismissed Harris County's motion, and issued an early ruling in favor of the plaintiff's equal protection and due process claims.[222]

In April 2017, leaving little risk to be overruled due to a lack of specificity and detail, Judge Lee H. Rosenthal issued a 193-page opinion in favor of the *Odonnell* plaintiff class, establishing an injunction on Harris County's bail practices.[223] Judge Rosenthal's lengthy ruling attempted to answer a narrow question pertaining to the circumstances of the plaintiff's case. The ruling only addressed misdemeanor offenses committed by indigent individuals who were

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[216] Odonnell v. Harris Cty, No. H-16-1414, 2016 WL 7337549, at *7–9 (S.D. Tex. Hous. Div. 2016).

[217] After their bail hearings, each defendant's bail was either reduced or they were released with a sentence of time served. *Id.* at 7–8.

[218] *See, e.g.*, Odonnell v. Harris Cty., No. H-16-1414, 2017 WL 1735456, at *21 (S.D. Tex. Apr. 28, 2017) (discussing how lawyers in *Varden* also represented *Odonnell* plaintiff class).

[219] *See Id.* at 1–3 (raising questions like *Walker*).

[220] *Id.*

[221] Cameron Langford, *Judge Won't Buy Harris County's Defense of Bail System*, COURTHOUSENEWS.COM (Feb. 9, 2017), http://www.courthousenews.com/judge-wont-buy-harris-countys-defense-of-bail-system/.

[222] *Odonnell*, 2016 WL 7337549 at *38–39; *Odonnell*, 2017 WL 1735456 at *73–74.

[223] *Odonnell*, 2017 WL 1735456 at *85; Eli Rosenberg, *Judge in Houston Strikes Down Harris County's Bail System*, N.Y. TIMES (Apr. 29, 2017), https://www.nytimes.com/2017/04/29/us/judge-strikes-down-harris-county-bail-system.html?_r=0 ("If a judge is willing to take the time to have the hearing and put out a 193-page order, it's sort of hard to imagine her coming out the other way down the line.").

detained pretrial solely due to an inability to afford a monetary bail amount.[224] The opinion issued an injunction on the county's bail practices and ordered the release of any such person who was being held.[225] The county appealed the decision and filed a motion to stay the injunction while on appeal.[226] The county then filed an emergency review with Supreme Court Justice Clarence Thomas, who denied the request, allowing the injunction to go into effect.[227] Given the hotly contested issues in the case, it is likely the appellants may still seek Supreme Court review pending appeal, and the Court should grant *certiorari*.[228]

Intervention by the Supreme Court would allow the Justices to address questions such as: (1) the standard of review for indigent individuals bringing equal protection claims,[229] (2) the extent pretrial hearings must go to adhere to procedural due rocess standards in determining bail,[230] and (3) the federal courts' requirement to abstain from hearing challenges to bail cases.[231]

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[224] *Odonnell*, 2017 WL 1735456 at *2. The judge in *Odonnell* wrote,

> The question addressed in this Memorandum and Opinion is narrow: whether the plaintiffs have met their burden of showing a likelihood of success on the merits of their claims and the other factors necessary for a preliminary injunction against Harris County's policies and practices of imposing secured money bail on indigent misdemeanor defendants. *Id.*

[225] *See id.* at *83–90 (detailing the injunction).

[226] Memorandum and Order Denying Stay, Odonnell v. Harris Cty, Texas, No. H-16-1414, 2017 WL 1956736 at *1.

[227] Mihir Zaveri and Andrew Kragie, *Harris County Takes Bail Suit to U.S. Supreme Court*, HOUSTON CHRONICLE (June 6, 2017). http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-takes-bail-suit-to-U-S-Supreme-11200974.php (detailing the county's attempt to halt the release of inmates).

[228] *See* Ilya Shapiro and Devin Watkins, *Even Poor People Should Be Allowed to Make Bail*, CATO INSTITUTE (Aug. 10, 2017) https://www.cato.org/blog/even-poor-people-should-be-allowed-make-bail.

[229] *See Odonnell*, 2017 WL 1735456 at *83–90 (expressing a remedy).

[230] *See id.* at 32 (detailing an arbitrary pretrial process in bail determinations).

[231] *See* Odonnell v. Harris Cty, No. H-16-1414, 2016 WL 7337549, at *11, 18–21 (S.D. Tex. Hous. Div. 2016).

3. *Accurately Defining Excessive Bail*

Most importantly, the Court should take the opportunity to use both cases to provide clear guidelines regarding how to define "excessive bail." An adequate resolution of these issues would rule that mandatory bail schedules are *per se* unconstitutional under existing Supreme Court precedent. In *Stack*, Justice Jackson, in his concurrence, declared that it was a clear violation of FRCP 46(c) if a court fixes a "uniform blanket bail" based on the nature of the accusation and without considering "the difference in circumstances between different defendants."[232] Justice Jackson went on to state, "[e]ach defendant stands before the bar of justice as an individual;"[233] because mandatory bail schedules do not provide the defendant with that opportunity, they should be ruled *per se* unconstitutional.[234]

If mandatory bail schedules are ruled *per se* unconstitutional, the onus will likely shift again toward judicial discretion in assigning reasonable bail.[235] Bail schemes are justifiable in assisting judicial officers making bail determinations, but the Supreme Court should clarify that these schemes must allow the judicial officer to consider individual defendants' financial status, among other factors, and that the judicial officer—not the legislature—has the ultimate discretion

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[232] Stack v. Boyle 342 U.S. 1, 9 (1951) (Jackson, J.).

[233] *Id.*

[234] *See, e.g.*, Walker v. City of Calhoun, No. 4:15-CV-0170, 2016 WL 361612, at *10 (N.D. Ga. 2016) (echoing the DOJ's Varden SOI, the court declared, "[a]ny 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); Varden SOI, *supra* note 182; Jones v. City of Clanton, No. 2:15cv34, 2015 WL 5387219, at *2 (2015) (N.D. Ala. 2015) (finding a practice of not considering indigence unconstitutional on an equal protection basis).

[235] *See* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 1180 (who concluded that the only consistent historical interpretation of the clause was "protection from pretrial detention . . . secured against abridgment by legislation or the vagaries of judicial discretion"). Foote's opus predicted the excessive bail epidemic and is heavily praised by bail scholars. *See, e.g.*, Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 BERKELEY J. CRIM. L. 135 (2007).

in assigning bail.[236] Under this interpretation, courts would find that the City of Calhoun, Harris County, and similar jurisdictions using rigid fixed bail procedures, or informal arbitrary ones, do not provide adequate means for indigent individuals to be released within a reasonable amount of time.[237] This is a violation of Due Process and Equal Protection because an inability to pay an excessive bail causes a *de facto* detention which is a deprivation of liberty and impairs a defendant's presumption of innocence.

Defendants' impaired presumption of innocence and a deterioration of their right to be free pending trial are precisely what Chief Justice Vinson, and Justices Black and Marshall warned of in *Stack*, *Carlson*, and *Salerno*.[238] In *Stack*, Chief Justice Vinson wrote "[the] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[239] In *Carlson*, Justice Black declared, "[t]he plain purpose of our bail Amendment was to make it impossible [for any agency] to authorize keeping people imprisoned a moment longer than was necessary."[240] And in *Salerno*, Justice Marshall poignantly wrote,

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[236] *See, e.g.*, FELONY BAIL SCHEDULE, *supra* note 105 (showing a Los Angeles County bail schedule which requires certain minimum amounts but also provides "the amount of bail . . . shall lie with the sound discretion of the judicial officer before whom the defendant appeared").

[237] *See Walker*, 2016 WL 361612, at *10.

[238] *See generally* Stack v. Boyle, 342 U.S. 1, 4 (1951) ("Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."); United States v. Salerno, 481 U.S. 739, 763 (1987) (Marshall, J., dissenting) (declaring "[t]he majority's untenable conclusion that the present Act is constitutional arises from a specious denial of the role of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence."). *See also* Carlson v. Landon, 342 U.S. 524, 552 (1952) (Black, J., dissenting) ("For the bureau agent is not required to prove that a person he throws in jail is an alien, or a Communist, or 'dangerous.' The agent need only declare he has reason to believe that such is the case. The agent may be and here apparently was acting on the rankest hearsay evidence.").

[239] *Stack*, 342 U.S. at 4.

[240] *Carlson*, 342 U.S. at 557.

> [h]onoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.[241]

Even Justice Rehnquist—one of the most conservative Justices to sit on the bench—wrote that bail conditions should be balanced against "the individual's strong interest in liberty."[242] Justice Rehnquist, with whom the entire bench agreed, went on to declare that an individual's liberty may only be deprived "in circumstances where the government's interest is sufficiently weighty" as shown by clear and convincing evidence.[243] Individuals such as Kalief Browder, Maurice Walker, and Maranda Odonnell are being detained not for a "sufficiently weighty" government interest proven by clear and convincing evidence; they are detained because a failure in our judicial machinery has resulted in the imposition of excessive bail amounts. This failure warrants clarification from the Supreme Court, which should build upon the meager balancing test of the *Salerno* Court.

In *Salerno*, the Court also agreed that a substantive limitation of the Bail Clause is that a "proposed condition of release or detention not be 'excessive' in light of the perceived evil," and to determine an excessive response:

> [the Court] must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more.[244]

To more appropriately adjudicate the Excessive Bail Clause, the Supreme Court should refine this definition and declare that:

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[241] *Salerno*, 481 U.S. at 767.

[242] *Id*. at 750.

[243] *Id*.

[244] *Id.* at 754.

> Where the Government has not shown a compelling interest in pretrial detention by clear and convincing evidence, bail must be set at an amount that should ensure appearance at trial and may not be set in a manner and at an amount that is unreasonable when considering a defendant's financial status. In establishing a monetary amount, it is necessary for judicial officers to consider financial status and not impose an amount or condition which would result in an undue burden upon the defendant.[245]

Such a test would ensure that courts would account for an individual's financial condition when considering postarrest bail assignments, a requirement under the plain language of the excessive bail clause. This would also ensure arrestees are not detained simply because they cannot afford bail, preserving their presumption of innocence and not restricting their defense.

CONCLUSION

Reasonable bail policies are a key component to reform in the criminal justice system.[246] As such, the administration of bail has developed over the years through advocacy from criminal justice groups, legislative action, common law, and inadequate constitutional interpretation.[247] To appropriately address this ill, the Supreme Court should unequivocally rule that mandatory bail schedules are unconstitutional. The Court should also set a higher standard for legislatively enacted bail procedures, one that ensures judicial officers have the discretion to make accurate bail determinations.[248]

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[245] A ruling such as this is in line with other equal protection and due process standards.

[246] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (granting the petition for certiorari to review "questions important to the administration of justice").

[247] *See generally* Helanie Greenfield, *Bail*, 79 GEO. L.J. 822 (discussing statues that impose pretrial detention).

[248] To make such determinations, judicial officers will likely require as much information pertaining to the defendant as necessary. To provide such information, jurisdictions should implement or improve Pretrial Service Agencies ("PSAs"). Once bail amounts have been made more attainable, more conservative

Pretrial detention solely due to an inability to post bail tends to unjustly perpetuate criminality and poverty.[249] Pressures from pretrial detention not only have an impact because of a financial burden to pay bail amounts, but can also lead to loss of employment, housing, or even child custody.[250] Additionally burdensome is the adverse impact an individual's detention has in pursuit of their defense.[251] For the accused, pretrial detention constrains legal representation[252] and vitiates a presumption of innocence.[253] Thus, indigent detainees frequently face an uphill battle for their defense in a system that incentivizes them to admit guilt in exchange for their release.[254]

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states are likely to raise the debate regarding how much discretion states have in defining bailable and unbailable alleged offenses. Because states have traditionally had the discretion to define bailable and unbailable alleged offenses, and because federal law pertaining to bail is seen as more liberal than state law, there is likely to be a shift toward making more offenses unbailable. *See* Amsterdam et al., *supra* note 141, at 19. This change in discussion is likely to raise further policy issues regarding criminal classifications, community safety, and principles of Federalism.

[249] *See* Rabuy & Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INST. (May 10, 2016), http://www.prisonpolicy.org/reports/incomejails.html.

[250] Pinto, *supra* note 12.

[251] *See* United States v. Salerno, 481 U.S. 739, 769 (1987) (Stevens, J., dissenting) (proposing pretrial detention may contradict the presumption of innocence of the alleged criminal).

[252] Amber Baylor, *A Defense Counsel Challenge to Conditions in Pretrial Confinement*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 8 (2015); Pinto, *supra* note 12 (discussing how many clients a public defender represents); Rakoff, *supra* note 85 (discussing limited visiting hours for counsel).

[253] *See* MARY T. PHILLIPS, N.Y. CITY CRIMINAL JUSTICE AGENCY, INC., BAIL, DETENTION, AND FELONY CASE OUTCOMES, RESEARCH BRIEF NO. 18 at 7 (2008), http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=597 &doc_name=doc (examining the increased likelihood of conviction as it relates to amount of imposed bail and pretrial detention).

[254] *See* Jim Dwyer, *A Life That Frayed as Bail Reform Withered*, N.Y. TIMES (June 9, 2015), http://www.nytimes.com/2015/06/10/nyregion/after-a-shocking-death-a-renewed-plea-for-bail-reform-in-new-york-state.html?action=click&contentCollection=Magazine&module=RelatedCoverage®ion=Marginalia&pgtype=article (describing Kalief Browder's legal challenges as he refused a plea and the Chief Judge of New York State Court's call for reform); Rakoff, *supra* note 85.

State courts and legislatures have recently renewed hope that reforms are on the rise.[255] California has introduced legislation that would practically abolish monetary bail[256] and judges, while still receiving public pressure,[257] are taking a stance against the arbitrary use of bail schedules by municipal officials.[258] As advocates continue to make progress, it is important that the Supreme Court use its supervisory power to establish a clear precedent for excessive bail.

To borrow a line of reasoning from Chief Justice Roberts, the way to stop the imposition of excessive bail is to stop imposing excessive bail.[259] Until the Supreme Court administers a definitive interpretation of the excessive bail clause, this responsibility rests with judicial officers in municipal and county courts across the country. Unfortunately for many indigent defendants today, detention prior to trial or without trial is the norm, and pretrial liberty is the carefully limited exception.[260] As predicted by Justice Marshall, the *Salerno* decision truly "[went] forth without authority,

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[255] Alexei Koseff, *California Would Virtually Eliminate Money Bail Under Proposed Legislation*, SACRAMENTO BEE (Mar. 28, 2017), http://www.sacbee.com/news/politics-government/capitol-alert/article14122949 3.html.

[256] *See, e.g.*, Jon Fleishman, *Fleischman: California 'Bail Reform' Legislation Aces Out Crime Victims*, BREITBART (Apr. 20, 2017), http://www.breitbart.com/california/2017/04/20/bail-reform-legislation-aces-out-crime-victims/ (claiming the proposed California legislation is too lenient on criminals).

[257] *See e.g.*, Ryan Collingwood, *People's Court Convicts Judges*, BONNER COUNTY DAILY BEE (Mar. 18, 2017), http://www.bonnercountydailybee.com/front_page_slider/20170318/peoples_court_convicts_judges (detailing judges who received hate mail after setting a lower bond in favor of Eighth Amendment).

[258] *See* Tom Steele, *Texas Man's $4 Billion Bail Was Meant to be a Statement, Says the Woman Who Set It*, DALLAS NEWS (Feb. 10, 2017), http://www.dallasnews.com/news/texas/2017/02/09/texas-mans-4-billion-yes-billion-bail-national-record. *See also* Odonnell v. Harris Cty., No. H-16-1414, 2017 WL 1735456, at *37 (S.D. Tex. Apr. 28, 2017) (summarizing Harris County Judge Darrell Jordan's testimony as an ideal approach to determining bail).

[259] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 1, 551 U.S. 701, 748 (2007) (plurality opinion) (reasoning, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

[260] *Salerno*, 481 U.S. 754 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

and [came] back without respect."[261] The lack of authority has left courts befuddled in how to assign bail[262] and the lack of respect has tarnished the defendant's presumption of innocence and limited their right to liberty before trial.[263]

[261] *Id*. at 767.
[262] Steele, *supra* note 260.
[263] *See* Rakoff, *supra* note 85.