THE EXCESSIVE BAIL CLAUSE: ACHIEVING PRETRIAL JUSTICE REFORM THROUGH INCORPORATION

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INTRODUCTION

More than half of the people sitting behind bars in our nation's jails have not been convicted of the crime charged.[1] Many of them are being held for a rather simple reason: they cannot afford bail.[2] In many cases, a judicial officer has decided that the accused could go home if he posted a refundable sum of money with the court as collateral—often as low as $1,000 or less—to ensure he appears on a later court date.[3] This amount, however, is often out of reach for the criminally accused.[4] As a result, many defendants remain in jail until the disposition of their case. Most of these cases are for relatively minor offenses that never go to trial.[5] And given the low stakes involved, many defendants choose to plead guilty to get out of jail.[6] Thus, the price of freedom for many defendants is a criminal record.[7]

The Eighth Amendment to the U.S. Constitution states:

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1. *See* TODD D. MINTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2011 – STATISTICAL TABLES 1 (2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf. As of June 30, 2011, more than sixty percent (60.6%) of the total jail population was unconvicted—a rate that has remained roughly the same since 2005. *Id.* at 7 tbl.7.

2. *See* Laura Sullivan, *Inmates Who Can't Make Bail Face Stark Options*, NPR NEWS (Jan. 22, 2010, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=122725819.

3. In New Jersey, for instance, as of October 3, 2012, "nearly three-fourths of all New Jersey jail inmates were pending trial," and "[t]welve percent of the entire jail population was held in custody solely due to an inability to pay $2500 or less to secure their release pending disposition." MARIE VANNOSTRAND, LUMINOSITY & DRUG POLICY ALLIANCE, NEW JERSEY JAIL POPULATIONS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION 8, 14 (2013), *available at* http://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf. Strikingly, this snapshot of New Jersey jail inmates, "who had been indicted but had not yet had a trial" spent, on average, a total of 314 days in custody, *id*; *see also infra* text accompanying notes 62-68 and 138-142.

4. Four out of five criminal defendants are indigent. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

5. *See* Sullivan, *supra* note 2.

6. Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L.J. 513, 545, 551 (2012) ("[M]ore than ninety-five percent of all criminal cases are resolved through guilty pleas."); *see generally* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), *available at* http://www.nacdl.org/reports/ (scroll down the webpage and follow the "Read the report" hyperlink underneath the report) (presenting evidence in support of the reformation of misdemeanor courts across the country due to present inefficiencies).

7. *See generally* JAMIE FELLNER, HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY (2010), *available at* http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (examining the failure of New York City's pretrial detention system).

"Excessive bail shall not be required."[8] In *Stack v. Boyle*, the Supreme Court first announced that "[b]ail set at a figure higher than an amount reasonably calculated to [ensure the accused's presence in court] is 'excessive' under the Eighth Amendment."[9] Since then, much of the debate surrounding the Excessive Bail Clause ("the Bail Clause" or "the Clause") has, however, largely focused on "whether the Clause binds only the courts or Congress as well, and whether it creates any substantive right to bail."[10] But, in *United States v. Salerno*, the Supreme Court subsequently held that "[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."[11] Thus, the Clause only binds the courts, leaving Congress free to determine what offenses are bailable. Since *Salerno*, however, there has been "relatively little written," on the Clause, which has been largely abandoned "as a meaningful source of law."[12]

Nonetheless, this case law has not foreclosed the possibility that the Excessive Bail Clause can remedy the bail system's inherent discrimination against the poor.[13] The Excessive Bail Clause is one of the least litigated and most ambiguous provisions in the Bill of Rights.[14] The Supreme Court has only interpreted the meaning of the Clause on three occasions, and it has never explicitly held that it is binding on the states.[15] While it has been previously argued that the only way to remedy the bail system's inherent discrimination is by "constitutional adjudication within the judicial system,"[16] a workable interpretation has never been proposed. Indeed, the indigent bail problem poses constitutional "problems of the greatest complexity," but previous suggestions have been too literal in their interpretation and have largely relied on arguments made under equal protection

8. U.S. CONST. amend. VIII.

9. 342 U.S. 1, 5 (1951).

10. Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121, 122 (2009).

11. 481 U.S. 739, 754 (1987).

12. Wiseman, *supra* note 10, at 148.

13. This Note was written, in part, with the hope of reinforcing and building upon Professor Caleb Foote's seminal two-part article. *See* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959 (1965) [hereinafter Foote, *Crisis in Bail: I*]; and Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125 (1965) [hereinafter Foote, *Crisis in Bail: II*].

14. Galen v. County of Los Angeles, 477 F.3d 652, 659 (9th Cir. 2007); Foote, *Crisis in Bail: I*, *supra* note 13, at 969.

15. *Galen*, 477 F.3d at 659; *see also Salerno*, 481 U.S. 739 (1987); Carlson v. Landon, 342 U.S. 524 (1952); Stack v. Boyle, 342 U.S. 1 (1951). *But see* McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 n.12 (2010); *see also* discussion *infra* Part II.A.

16. Foote, *Crisis in Bail: I*, *supra* note 13, at 962.

and due process considerations to achieve a solution.[17] To be sure, those arguments should be made. But should not the Clause itself provide relief?

First, poverty alters the analysis. "Bail" cannot be thought of in only monetary terms. Instead, and in light of its historical meaning, it can represent a broader concept: a range of conditions to ensure the future appearance of the accused in court.[18] In other words, a distinction must be made between the *amount* of bail (when a court sets a monetary bond) versus the *form* of bail (when a court has more options upon which to condition a defendant's pretrial release). While a particular dollar amount may not be deemed unreasonable, limiting the form of bail to a monetary sum is, by that very fact itself, excessive when you consider the indigent.

The main thrust of the Excessive Bail Clause is to ensure defendants can make bail so as "to enable them to stay out of jail until a trial has found them guilty,"[19] and it can become a meaningful source of law—one that provides a substantive right. To remedy this complicated problem, it will take a creative solution that expands on previous research and reforms, and focuses on the underlying interests of all the stakeholders involved.[20]

The Supreme Court should interpret the Eighth Amendment's prohibition against excessive bail to afford indigent defendants the right to a bail determination based on a validated risk assessment that provides sufficient alternatives to financial release where appropriate.[21] In other words, this Note argues for the creation of a

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17. *Id.* at 998; *see also, e.g.*, Foote, *Crisis in Bail: II*, *supra* note 13, at 1134-64.

18. Historically, the concept of bail developed in England as one of suretyship. William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 70 (1977). A surety is a person "who is liable for the debt or obligation of another, whether primarily or secondarily, conditionally or unconditionally." LAURENCE P. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP 6, 8-9 (1950). Moreover, this concept was adopted into early American bail jurisprudence, where in 1869, the Supreme Court held that:

> By the recognizance the principal is, in theory of the law, committed to the custody of the sureties as to jailers of his own choosing, not that he is, in point of fact, in this country at least, subjected or can be subjected by them to constant imprisonment; but he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty.

Reese v. United States, 76 U.S. 13, 21 (1869); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *294-95 (defining "bail" as "a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance").

19. *Stack*, 342 U.S. at 8 (Jackson, J., dissenting).

20. *See* FELLNER, *supra* note 7, at 54-57; *see also infra* notes 481-498 and accompanying text.

21. *See* discussion *infra* Part III.

pretrial service system in each state or local jurisdiction to help gather the information judicial officers are commonly required to assess when making bail decisions, and to provide pretrial supervision for defendants who could be effectively supervised in the community. Analogizing to the emergence of public defender systems after the Court's decision in *Gideon v. Wainwright*,[22] a workable solution to the indigent bail problem can be achieved that would uphold the main thrust of the Excessive Bail Clause, avoid case-by-case adjudication, and preserve judicial discretion.

One must first recognize that the main inhibitor to universal reform is the lack of a constitutional mandate for pretrial services programs to be established in each local jurisdiction.[23] And the approach taken here is meant to build off the current and recently reinvigorated pretrial justice reform movement.[24] Even though a solution to the indigent bail problem is being proposed, this Note will primarily focus on the procedural and substantive hurdles that such a judicial remedy would have to overcome.

Much ground must be covered to understand how such a requirement could potentially remedy the constitutional bail problem. Part I of this Note covers the ongoing bail crisis, how it is on the local level, and why previous legislative and administrative reforms have failed to remedy the problem. Unlike most bail scholarship, which primarily focuses on the federal level, this Note places emphasis on municipal courts, since this is where the vast majority of defendants are that should be afforded protection under the Excessive Bail Clause.[25] Part II examines the constitutional conundrum in three sections. Part II.A argues that despite recent citations to the contrary, the Excessive Bail Clause has not been given the full force of law binding on the states.[26] Whether the Supreme Court has made the Excessive Bail Clause applicable to the

22. 372 U.S. 335 (1963); *see also* NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 53 (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf.

23. *See* FELLNER, *supra* note 7, at 58-62.

24. In New Jersey, for example, Chief Justice Stuart Rabner recently formed a committee to, among other things, "examine the issue of bail and the predicament of defendants accused of less serious offenses who remain incarcerated because they cannot afford minimal bail." Press Release, N.J. Courts, Chief Justice Forms Joint Comm. to Examine Criminal Justice Process (June 19, 2013), *available at* http://www.judiciary.state.nj.us/pressrel/2013/pr130619a.htm; *see also* PRETRIAL JUSTICE INST., IMPLEMENTING THE RECOMMENDATIONS OF THE 2011 NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: A PROGRESS REPORT 1 (2013), *available at* http://www.pretrial.org/download/pji-reports/PJI-PJWG-ProgressReport.pdf.

25. *See* BORUCHOWITZ ET AL., *supra* note 6, at 10-11; *see also* discussion *infra* Part I.

26. *See* discussion *infra* Part II.A.

states has not yet been thoroughly examined. Part II.B considers the procedural challenges to incorporating the Excessive Bail Clause, and explains why it has not yet occurred.[27] Part II.C considers the substantive hurdle of whether the Excessive Bail Clause expresses any concern for the poor.[28] This will require a historical inquiry and examination of primary sources, which will bring to light some of the relatively unknown stories behind the Clause's origins; that is, the people and judges who gave meaning to its familiar phrase. The hope here is to reinforce current legal scholarship and strengthen the historical framework needed to properly interpret the Clause. Finally, Part III briefly considers the legal reasoning that could help implement the proposed solution.[29]

I. THE ONGOING BAIL CRISIS

Over the past two decades the number of people confined in city and county jails has nearly doubled, and the number of people held on bail has driven much of this growth.[30] In 1990, the number of unconvicted inmates—those held in jail awaiting the disposition of a current charge—accounted for about half of the total inmate population.[31] Since that time, the number of unconvicted inmates has far outpaced the growth of the total inmate population.[32] As of midyear 2011, that number had risen to the point where six out of every ten inmates was being held pending the disposition of their case.[33] The increased use of money bail is a major reason for this current trend.[34] Most criminal defendants are too poor to post bail; thus, they are unable to afford their pretrial freedom.[35] As mentioned, the current bail crisis is primarily on the local level. As

27. *See* discussion *infra* Part II.B.

28. *See* discussion *infra* Part II.C.

29. *See* discussion *infra* Part III.

30. *Compare* JAMES J. STEPHAN & LOUIS W. JANKOWSKI, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES, 1990, at 1 tbl.1 (1991), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ji90.pdf, *with* MINTON, *supra* note 1, at 4 tbl.1; *see also* PRETRIAL JUSTICE INST., RATIONAL AND TRANSPARENT BAIL DECISION MAKING: MOVING FROM A CASH-BASED TO A RISK-BASED PROCESS 1 (2012), *available at* http://www.pretrial.org/infostop/ (type the title of the report in the search field, and follow the hyperlink of the report in the search results).

31. STEPHAN & JANKOWSKI, *supra* note 30, at 1-2.

32. The total number of inmates held in local jails increased from 403,019 in 1990, *id*. at 2 tbl. 2, to 735,601 in 2011, MINTON, *supra* note 1, at 1, which represents an increase of 83%. On the other hand, during the same period, the number of unconvicted inmates increased from 207,358 in 1990, STEPHAN & JANKOWSKI, *supra* note 30, at 2, to 446,000 in 2011, MINTON, *supra* note 1, at 9 tbl.11, which represents an increase of 115%.

33. MINTON, *supra* note 1, at 1.

34. PRETRIAL JUSTICE INST., *supra* note 30, at 1.

35. *See* Backus & Marcus, *supra* note 4, at 1034; *see also* FELLNER, *supra* note 7, at 2.

such, it is important to become familiar with the local criminal justice system common in many jurisdictions and the general course a typical case travels through it.

A. Local Jails and Municipal Courts

Jails are locally run facilities that confine persons before and after the adjudication of their case.[36] Jails serve many functions, but typically they house convicted inmates sentenced to a year or less in jail, and those being held during the early stages of a criminal proceeding.[37] Jails also handle a very large volume of cases. For the year ending June 30, 2011, nearly twelve million people had been admitted to our nation's local county and city jails.[38] In addition, jails experience high turnover rates, meaning they see a large number of admissions and releases when compared to their average daily population.[39] This means many people pass through our nation's jails often for relatively short periods of time.

Most of these cases are for minor offenses.[40] States generally divide their criminal offenses into two categories: felony and misdemeanor.[41] Unlike felonies, misdemeanors are usually low-level, less serious offenses. Misdemeanors commonly include "petty theft, disorderly conduct, public drunkenness, . . . loitering, . . . driving under the influence, driving with a suspended license, resisting arrest, minor assault, under-age possession of alcohol, and minor controlled substance and paraphernalia offenses."[42] Moreover, the maximum allowable sentence for such offenses is generally less than a year in jail.[43]

Local municipal courts typically have jurisdiction over these cases.[44] States generally have four separate court levels: (1) local trial courts, (2) state trial courts, (3) intermediate appellate courts, and (4) supreme courts.[45] Thus, local municipal courts, known by a variety of other names, represent the lowest rung of a state's judicial system.[46]

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36. MINTON, *supra* note 1, at 12-13.

37. *See id.*

38. *See id.* at 3.

39. *Id.*

40. *See* BORUCHOWITZ ET AL., *supra* note 6, at 10.

41. *Id.* at 11.

42. *Id.*

43. *Id.*

44. *Id.*

45. LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 41 (Carolyn Merrill et al. eds., 6th ed. 2008).

46. BLACK'S LAW DICTIONARY 410 (9th ed. 2009) (defining "municipal court" as "[a] court having jurisdiction (usu. civil and criminal) over cases arising within the municipality in which it sits . . . [where] its criminal jurisdiction is limited to petty offenses").

They handle both minor civil and criminal cases, and in some states, the preliminary phase of felony cases as well.[47] Like county and city jails, local municipal courts also handle a large volume of cases. In fact, municipal courts handle roughly eighty to ninety percent of all criminal cases.[48] And although an exact figure is unknown, the total number of misdemeanor cases processed by municipal courts in any given year is estimated to be in excess of ten million.[49]

1. Arrest to Arraignment

Having considered the common structure of local criminal justice systems and the immense volume of cases they handle, it is now appropriate to turn our attention to the course a typical case would travel through that system. To start, it is relatively easy to break the law.[50] If you have ever been late to pay a fine or have ridden in a car without a seat belt, then you may have given the police enough reason to place you under arrest and bring you to jail.[51] A person taken into custody will usually have her first court appearance within forty-eight hours of arrest.[52] And although the criminal process varies from state to state, it can be described in general terms. Before the first court appearance, a law enforcement agency has usually written an incident report that describes the basic circumstances for the arrest; next, the incident report is forwarded to the local prosecutor, who reviews the report and then further determines what charges should be filed; the prosecutor then puts together a formal charging document (often called a "complaint" or "information") and then files it with the local court clerk.[53]

Arraignments are perfunctory.[54] Given the high volume of cases

47. BAUM, *supra* note 45, at 42-43.

48. MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 5 (1992).

49. *See* BORUCHOWITZ ET AL., *supra* note 6, at 11.

50. *See* Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1164 (2003).

51. *See* Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1514 (2012) (reporting that a bench warrant was issued for failure to pay fine); Atwater v. Lago Vista, 532 U.S. 318, 323 (2001) (holding that custodial arrests for minor offenses—e.g., seat belt violation punishable by a small fine—does not violate the Constitution).

52. *See* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (holding that a hearing conducted within forty-eight hours complies with the promptness requirement articulated in *Gerstein v. Pugh*, 420 U.S. 103, 124-25 (1975) (holding that "[w]hatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause . . . made by a judicial officer either before or promptly after arrest")).

53. BARRY MAHONEY ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, PRETRIAL SERVICE PROGRAMS: RESPONSIBILITIES AND POTENTIAL 9 (2001), *available at* https://www.ncjrs.gov/pdffiles1/nij/181939.pdf.

54. Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1726 (2001).

municipal courts handle, a defendant's initial court appearance "must [often] be done in haste—the defendant may be taken by surprise, [if] counsel [is present, he or she] has just been engaged, or for other reasons the bail is fixed without that full inquiry and consideration which the matter deserves."[55] For instance, a recent survey of twenty-one Florida counties found "that eight out of ten arraignments conclude under three minutes."[56] During this brief period, various stakeholders take part in a complex decision-making process that will have serious implications for one's pretrial freedom.[57]

2. The Pretrial Release Decision

In most jurisdictions, a prosecutor is present at the first court appearance. The prosecutor informs the court about "the charge; any prior criminal record; the existence of any other pending cases; the condition of any victims; the State's view of the strength of its case; and, finally, a recommendation concerning detention or release, which may include setting bond at a specific amount."[58] On the other hand, in many jurisdictions defendants often stand alone without legal representation[59] and they frequently choose to remain silent.[60] When defense counsel is present, however, they usually have interviewed their clients prior to their appearance, and then are able to argue for release "on the least restrictive conditions."[61]

In most jurisdictions, a judicial officer[62] will then make the initial bail determination, which generally involves two questions: First, is the defendant eligible for release; second, what conditions of release will reasonably ensure the defendant's appearance on the next court date?[63] If the answer to the first question is "no," then the inquiry ends.[64] But, if the answer is "yes," the judicial officer will

55. Stack v. Boyle, 342 U.S. 1, 11 (1951) (Jackson, J., concurring).

56. ALISA SMITH & SEAN MADDAN, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 7 (Nat'l Ass'n of Criminal Def. Lawyers ed. 2011), *available at* http://www.nacdl.org/reports/ (scroll down the webpage and follow the "Read the report" hyperlink underneath the report).

57. *See id.* at 15.

58. MAHONEY ET AL.*, supra* note 53, at 9.

59. *See* Colbert et al., *supra* note 54, at 1719.

60. *Id.* at 1726.

61. MAHONEY ET AL., *supra* note 53, at 9; *see also* Colbert et al., *supra* note 54, at 1735 ("[Defense attorneys] present[] rich, concise snapshots of a client's family, employment, and personal reliability within [a short period of time] . . . . Most judges appreciate[] the additional corroborated information . . . .").

62. The term "judicial officer" includes: "judge[s], magistrate[s], commissioner[s], or hearing officer[s]." MAHONEY ET AL., *supra* note 53, at 9.

63. Duker, *supra* note 18, at 87.

64. *See id.*

proceed to consider the second question.[65] It is important to note that once a judicial officer proceeds to the second question, the constitutional protections afforded by the Excessive Bail Clause attach.[66] In assessing either of these questions, however, judicial officers are essentially weighing two different types of risk: (1) the risk the defendant will fail to appear in court, and (2) the risk the defendant poses to public safety if released.[67] For the purposes of our inquiry—which is to explore the procedural and substantive hurdles of a judicial remedy to the indigent bail problem—one should keep in mind that most defendants are charged with minor offenses and do not pose a public safety risk.[68] Thus, in the majority of cases, it stands to reason that more weight should be given to the risk of nonappearance.

Although jurisdictions vary,[69] judicial officers are generally required to assess these risks by weighing four key factors: (1) the current charge, (2) the defendant's prior criminal history, (3) general information about the defendant, and (4) whether there are any supervisory options available to the court if the defendant is released.[70] The second factor is considered particularly relevant to assessing the public safety risk that would be posed by the defendant's pretrial release.[71] On the other hand, the third factor is considered particularly relevant to assessing the defendant's flight risk. This includes information about the defendant's "community and family ties; employment status; housing; existence and nature of any substance abuse problems; and (if the defendant had been arrested before) record of compliance with conditions of release set on previous occasions, including any failures to appear."[72] Therefore, for the purposes of our inquiry, the third factor seems particularly important because most cases involve minor offenses. Having considered the general path a typical case will take to get to the crucial step of a pretrial release decision, it is important to now turn to and understand how this complex decision-making process evolved.[73]

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65. *See id.*

66. *See* United States v. Salerno, 481 U.S. 739, 746 (1987); *see also* Duker, *supra* note 18, at 87.

67. MAHONEY ET AL., *supra* note 53, at 9.

68. SMITH & MADDAN, *supra* note 56, at 7; *see also* BORUCHOWITZ ET AL., *supra* note 6, at 10.

69. Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 24 (2005).

70. MAHONEY ET AL., *supra* note 53, at 11.

71. *Id.*

72. *Id.*

73. *See id.* at 8.

B. The Bail Reform Movement

The Bail Reform Movement began in 1961 with the launch of the Manhattan Bail Project.[74] Initiated by the Vera Institute of Justice,[75] the project tested the hypothesis that indigent defendants with strong community ties would return to court even when released on their own recognizance;[76] that is, a promise to return to court on a later date in lieu of the incentive created by the forfeiture of a money bond.[77] Project staff interviewed all qualified defendants for the study on a range of factors believed to indicate their roots to the community.[78] This information was then verified, by phone or other means,[79] and a written recommendation was made based on those findings.[80] For empirical purposes, only half of these recommendations, chosen at random, were then shared with the court.[81] The project demonstrated that participants who were released on their own recognizance were just as likely to return to court as those who posted money bond.[82] In fact, the project showed that participants were four times as likely to be released on recognizance than those whose verified information was withheld from the court.[83] In light of the study's success, many other jurisdictions soon followed suit and instituted similar administrative reforms.[84] Such projects are now called "pretrial services programs."[85]

The success of this project paved the way for national legislative reform. The first wave of reform started in 1964, when Robert F. Kennedy, who was then the U.S. Attorney General, convened a conference that showcased these innovations.[86] Soon thereafter, Congress passed the Bail Reform Act of 1966,[87] the purpose of which was "to assure that all persons, regardless of their financial status,

74. *Id.*

75. *About Us*, VERA.ORG, http://www.vera.org/about-us (last visited Jan. 25, 2014).

76. Charles E. Ares, Anne Rankin & Herbert Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-trial Parole*, 38 N.Y.U. L. REV. 67, 68 (1963) [hereinafter Ares et al.].

77. *See* BLACK'S LAW DICTIONARY 1386 (9th ed. 2009).

78. Ares et al., *supra* note 76, at 72.

79. *Id.* at 73.

80. *Id.* at 74.

81. *Id.*

82. *See id.* at 86.

83. *Id.*

84. PRETRIAL JUSTICE INST., *supra* note 30, at 12; *see generally* WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA (1976).

85. PRETRIAL JUSTICE INST., *supra* note 30, at 12.

86. *Id.*

87. Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 (1966) (originally codified at 18 U.S.C. § 3146 (1966)), *repealed by* Bail Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 1, § 203(a), 98 Stat. 1976.

shall not needlessly be detained . . . when [it] serves neither the ends of justice nor the public interest."[88] Unlike any other previous statutory scheme,[89] it created a presumption in favor of non-financial based release, and further required the federal courts to consider a range of factors when making pretrial release decisions, including: (1) the nature of the offense, (2) the weight of the evidence, (3) family ties, (4) employment, (5) financial resources, (6) character and mental condition, (7) length of residence in the community, (8) past criminal record, and (9) prior record of appearance at court proceedings.[90] After this watershed legislation, many states were motivated to, and did, revise their own bail statutes and court rules to include a similar range of factors for the courts to consider at the initial bail hearing.[91] These legislative reforms were principally aimed "at eliminating the use of inappropriate pretrial detention, especially among poor defendants held in crowded urban jails."[92]

The second wave of legislative reforms began with the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970.[93] For the first time, judicial officers were allowed to weigh the risk each defendant posed to public safety.[94] Proponents of the Act believed persons on pretrial release were committing violent crimes, and that judges were potentially violating the Constitution by setting high bail amounts to effectively deny the release of those considered dangerous.[95] Thus, the Act addressed these concerns by authorizing the pretrial detention of those believed to pose a risk to the safety of an individual person or the community.[96] Now known as "preventive detention,"[97] other jurisdictions enacted similar reforms throughout the 1970s as society became more concerned with crime prevention and public safety.[98] Subsequently, in 1984, the Supreme Court upheld a similar statute under a due process challenge in *Schall v. Martin*.[99] Specifically, the Court held that preventive detention

88. Bail Reform Act of 1966 § 2.

89. *See* PRETRIAL JUSTICE INST., *supra* note 30, at 12.

90. Bail Reform Act of 1966 § 3(a)-(b).

91. PRETRIAL JUSTICE INST., *supra* note 30, at 13; *see also* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 2-4, 59-62 tbl.2 (1985); *see generally* THOMAS, JR., *supra* note 84.

92. Goldkamp, *supra* note 91, at 2.

93. Pub. L. No. 91-358, 84 Stat. 473, 642 (1970) (codified in scattered titles and sections of D.C. CODE).

94. David J. Rabinowitz, Comment, *Preventive Detention and* United States v. Edwards*: Burdening the Innocent,* 32 AM. U. L. REV. 191, 191 n.7 (1982).

95. *See, e.g.*, H.R. REP. NO. 91-907 (1970).

96. D.C. CODE § 23-1322(b)(2) (2013).

97. Goldkamp, *supra* note 91, at 4-5.

98. *See id.* at 1, 5, 15-30.

99. 467 U.S. 253, 256-57 (1984).

served a "'legitimate and compelling state interest.'"[100] The Court's decision in *Schall* "paved the way for the justification of pretrial detention on a larger scale."[101] Soon thereafter, "an emboldened Congress"[102] enacted the Bail Reform Act of 1984,[103] the landmark federal preventive detention statute.[104] Then in 1987, the Supreme Court issued a controversial decision in *United States v. Salerno*, which upheld the Bail Reform Act of 1984 after finding that preventive detention did not violate the Excessive Bail Clause.[105] Unlike the previous generation, the second wave of reforms were "[s]haped primarily out of concern for protecting the public from potentially dangerous defendants."[106]

1. Pretrial Services Programs

Pretrial services programs are perhaps the best innovation to come out of the reform movement. Such programs help gather the information judicial officers are statutorily required to assess when making bail decisions.[107] As a result of the changes in the law, pretrial service programs have evolved to play a crucial role: "from being entities that sought only to release low [fail to appear] risk indigent defendants to becoming vital assistants to the court to help judges sort out which defendants could be safely released and which needed to be held."[108] More specifically, there are "six core functions" a pretrial service program can serve: (1) impartial screening of all defendants, (2) verification of the defendant's information and criminal history, (3) assessing their risk through objective means and presenting those recommendations to the court, (4) following up with defendants who are unable to make bail, (5) providing "[a]ccountable and appropriate supervision of those released," and (6) reporting process outcomes to criminal justice stakeholders.[109] Although local statutes and rules governing these programs vary by jurisdiction, several of their functions can be explained in terms of optimal service.

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100. *Id.* at 264 (quoting De Veau v. Braisted, 363 U.S. 144, 155 (1960)).

101. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 747 (2011).

102. *Id.*

103. 18 U.S.C. §§ 3141-3150 (1988).

104. Goldkamp, *supra* note 91, at 1.

105. 481 U.S. 739, 754-55 (1987).

106. Goldkamp, *supra* note 91, at 2.

107. PRETRIAL JUSTICE INST., PRETRIAL SERVICES PROGRAM IMPLEMENTATION: A STARTER KIT 1 (2009) [hereinafter STARTER KIT], *available at* http://www.pretrial.org/infostop/ (type the title of the report in the search field, and follow the hyperlink of the report in the search results).

108. *Id.* at 4.

109. *Id.* at 5.

First, screening consists of a structured interview, which takes place before the initial court appearance, and is designed to elicit information necessary to evaluate the defendant's flight risk, such as her community ties; second, verification consists of confirming the gathered information with the defendant's references and also checking local, state, and national criminal records; and third, a risk assessment instrument should be used that objectively "assesses the defendant's risks of failing to appear at future court hearings and posing a risk to community safety."[110] In addition, this instrument "should be the product of local research and validated through a methodologically rigorous study every five to seven years."[111] Finally, pretrial supervision, based on a scheme of graduated contacts, may reasonably ensure the future appearance for defendants who are not considered good candidates for release on recognizance.[112] For instance, if an indigent defendant has a substance abuse problem, a condition of release may be participation in a substance abuse program.[113]

2. Failings of the Reform Movement

Despite these administrative and legislative reforms, the indigent bail problem remains. There are at least two reasons why previous reform efforts have not completely resolved the pretrial detention of indigent defendants.[114] First, many jurisdictions have simply failed to implement pretrial services programs.[115] Second, even in jurisdictions that have, a substantial number of defendants who could effectively be supervised in the community are still being held on bail, often on low amounts, because they were not considered good risks for release on recognizance and the means to supervise them do not exist.[116] Thus, there are two groups of indigent defendants who have been neglected by these reforms: (1) those in non-reform jurisdictions; and, (2) those denied sufficient alternatives to financial release (e.g., pretrial supervision) in reform jurisdictions.[117]

The first issue is in non-reform jurisdictions. Despite previous legislative reforms, many statutes do not include a mechanism for "providing judicial officers with the information and options they need to make good pretrial release [and] detention decisions."[118] On

110. *Id.* at 5-13.
111. *Id.* at 8.
112. *Id.* at 11.
113. PRETRIAL JUSTICE INST., *supra* note 30, at 29.
114. *See* Foote, *Crisis in Bail: I*, *supra* note 13, at 962.
115. *Id.*
116. *Id.*
117. *Id.*
118. STARTER KIT, *supra* note 107, at 4.

the federal level, the Bail Reform Act of 1966 required judges to weigh a range of factors when making pretrial release decisions, but it remained unclear how judges would get reliable information to weigh those factors.[119] Congress eventually recognized the lack of such a mechanism and passed a provision within the Speedy Trial Act of 1974, which authorized the implementation of ten demonstration projects.[120]

The pilot programs gained widespread support among federal judges and magistrates, who "testified that neither defense lawyers nor prosecutors were able to provide them with the requisite information for an informed bail decision."[121] Congress subsequently passed the Pretrial Services Act of 1982, which established a pretrial service agency in each federal district court.[122] Some states have passed similar statutes to remedy the need for reliable information. For instance, in 1987 Illinois passed its own Pretrial Services Act, which provides that "[e]ach circuit court shall establish a pretrial services agency to provide the court with accurate background data regarding the pretrial release of persons charged with felonies and effective supervision of compliance with the terms and conditions imposed on release."[123]

Although there is widespread recognition of the need for reliable information when making a pretrial release decision, many jurisdictions have failed to implement pretrial services programs.[124] A 2009 survey identified only about 300 jurisdictions that have such programs.[125] The majority of respondents served a single jurisdiction, such as a county or city,[126] and about fifteen percent were relatively new, having been established within the past ten years of the survey.[127] In addition, nine percent of respondents reported that defendants charged with misdemeanors were excluded from their programs.[128] Moreover, the Pretrial Justice Institute does not have any record for pretrial services programs in at least eleven of the jurisdictions that are among the fifty largest jail populations in the

119. MAHONEY ET AL., *supra* note 53, at 6.

120. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, 2086 (codified as amended at 18 U.S.C. §§ 3161-3174 (2012)).

121. MAHONEY ET AL., *supra* note 53, at 6.

122. Pretrial Services Act of 1982, Pub. L. No. 97-267, § 2, 96 Stat. 1136 (codified as amended at 18 U.S.C. § 3152 (2012)).

123. 725 ILL. COMP. STAT. ANN. 185/1 (West 2012).

124. *See* Foote, *Crisis in Bail: I*, *supra* note 13, at 962-63.

125. PRETRIAL JUSTICE INST., 2009 SURVEY OF PRETRIAL SERVICES PROGRAMS 11 (2009) [hereinafter 2009 SURVEY], *available at* http://www.pretrial.org/infostop/ (type the title of the report in the search field, and follow the hyperlink of the report in the search results).

126. *Id.* at 15.

127. *Id.* at 7.

128. *Id.* at 33 tbl.18.

United States.[129] There are several reasons why pretrial services programs have failed to gain widespread implementation in local communities, but it is primarily due to the fact that their very existence is at the whim of local governments.

First, there are several significant hurdles to implementing a pretrial services program in any state or local jurisdiction.[130] Despite the bail system's inherent discrimination against the poor, local jurisdictions are unlikely to institute reforms on humanitarian grounds unless they can also accomplish other goals. For instance, beginning in the 1980s, many jurisdictions instituted such programs in response to jail overcrowding.[131] Rather than building another correctional facility, a pretrial services program may provide a local government with a relatively inexpensive short-term solution to unconstitutional jail conditions.[132] Second, and related, local jurisdictions often fail to provide the start-up funds needed to implement a program.[133] And once they have been implemented, their continued existence is threatened by the lack of financial resources they need to be maintained.[134] Third, pretrial services programs have struggled to gain popular support and the necessary

129. Those jurisdictions include: Sacramento, California; DeKalb, Georgia; Davidson, Tennessee; Hillsborough, Florida; Gwinnett, Georgia; Kern, California; Cobb, Georgia; York, Pennsylvania; Suffolk, Massachusettes; Polk, Florida; and Essex, New Jersey. E-mail from John Clark, Senior Project Associate, Pretrial Justice Institute, to author (Jan. 28, 2013, 08:35 EST) (on file with author). *But cf.* TODD D. MINTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2010 – STATISTICAL TABLES 10 tbl.9. (2011) [hereinafter MINTON, 2010], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim10st.pdf.

130. In New Jersey, for example, a bail reform package that would establish a pretrial service agency in each county, among other things, was recently reintroduced, S. 946, 216th Leg., Reg. Sess. (N.J. 2014); Assemb. 1910, 216th Leg., Reg. Sess. (N.J. 2014), but has been pending in the legislature for nearly two years, MaryAnn Spoto, *Gov. Chris Christie Disappointed N.J. Legislature Failed to try for Constitutional Amendment of Bail Reform*, THE STAR LEDGER (last updated July 22, 2012, 6:30 AM), http://www.nj.com/news/index.ssf/2012/07/gov_chris_christie_disappointe.html; *see also* Foote, *Crisis in Bail: I*, *supra* note 13, at 962; *see generally* WYES-New Orleans, *New Orleans Pretrial Services*, YOUTUBE (Nov. 6, 2012), http://www.youtube.com/watch?v=AOjsu3-ipG4&feature=relmfu (providing an in-depth look at New Orleans Pretrial Services).

131. *See* MAHONEY ET AL., *supra* note 53, at vi.

132. *See* Laura Sullivan, *Bondsman Lobby Targets Pretrial Release Programs*, NPR NEWS (Jan. 22, 2010, 2:00 PM), http://www.npr.org/templates/story/story.php?storyId=122725849.

133. It took an appropriation of $467,960 in 2010 from the federal government to develop New Orleans' first pretrial services program. Press Release, Dep't of Justice, Office of Justice Programs, Justice Department Announces More than $5.6 Million for Field-Initiated Crime Fighting Strategies (Sept. 29, 2010), *available at* http://www.ojp.usdoj.gov/newsroom/pressreleases/2010/OJP10131.htm.

134. *See* Bruce Eggler, *New Orleans Pretrial Services Program's Future in Doubt After City Council Hearing*, NOLA.COM (last updated Nov. 13, 2012, 9:51 PM), http://www.nola.com/politics/index.ssf/2012/11/post_503.html.

buy-in from various criminal justice stakeholders to be effective.[135] Lastly, pretrial services programs are pitted against the commercial bail bonding industry, which has "lobbied to cut back local pretrial programs from Texas to California, [and] pushed for legislation in four states limiting pretrial's resources."[136]

The second issue is in reform jurisdictions. Many reform jurisdictions do not provide sufficient alternatives to financial bond (e.g., pretrial supervision or other court-imposed conditions of release) where release on recognizance would be inappropriate. Thus, even in these jurisdictions, a considerable number of urban indigent defendants are still being held on relatively low bail amounts.[137] New York City, for example, does not provide a supervised release option for defendants charged with minor offenses and who are likely to have bail set.[138] As a result, of all the arrests made during 2010, money bail was set for over 26,000 non-felony defendants.[139] This figure accounts for twenty-one percent of all the non-felony defendants who had their cases continued past arraignment that year.[140] And of those who had bail set, seventy-six percent of all bail amounts were set at $1,000 or less.[141] Strikingly, eighty-two percent of the defendants who had bail set at this amount could not afford it at arraignment.[142]

C. The Pretrial Detainee's Dilemma

A judicial officer will set bail if she believes there is a risk that a defendant charged with a minor offense will fail to appear on a later court date. In non-reform jurisdictions, a judicial officer will not have reliable information to make an informed decision about whether a defendant is a low flight risk. Thus, many defendants are held on bail who could effectively be released on recognizance. In reform jurisdictions, a judicial officer will have reliable information, and may determine that a defendant presents a moderate flight risk. But, even if non-financial conditions of release would reasonably ensure

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135. *See* John Simerman, *Orleans Parish Judges Threaten to Stymie New Pre-trial Services Program*, NOLA.COM (last updated Jan. 14, 2013, 8:28 AM), http://www.nola.com/crime/index.ssf/2013/01/orleans_parish_judges_vote_to.html.

136. Sullivan, *supra* note 132.

137. *See* Foote, *Crisis in Bail: I*, *supra* note 13, at 962.

138. MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., A DECADE OF BAIL RESEARCH IN NEW YORK CITY, 32 n.19 (2012), *available at* http://www.cjareports.org/reports/DecadeBailResearch.pdf. The Queens Supervised Release program was, however, implemented in August of 2009. *Id.* But, it "is restricted to felony defendants who are charged with a nonviolent offense . . . and meet other criteria." *Id.*

139. *Id.* at 44 tbl.6(B).

140. *Id.*

141. *Id.* at 47 fig.9.

142. *See id.* at 51 tbl.7.

his presence on the next court date, money bail is set because those options are not available. Thus, many defendants that could be effectively supervised in the community are held on bail—often for low amounts. Most of those held on bail face a dilemma, and we will focus on New York City's pretrial population to examine it.[143] As we have already seen, although most defendants in New York City charged with minor offenses are released on recognizance, bail is still set in a significant number of cases, and few defendants can actually post it.[144] As one New York City judge put it, even "setting bail [at] $500 is the equivalent of . . . [ordering detention] for most people, even though [New York] law doesn't permit [this] in misdemeanor cases."[145]

1. Case Outcomes in New York City

Pretrial detention generally ends for the typical detainee in one of three ways: (1) posting bail, (2) eventual release on recognizance, or (3) case disposition. For example, of the non-felony defendants held at arraignment during one period[146]: one-third (30%) were eventually able to post bail; less than one-fifth (15%) were ultimately released on their own recognizance; yet, more than half (55%) remained in custody until the disposition of their case.[147] Most of these cases, however, reached a disposition within a relatively short period of time: the median length of detention for this group was only five days.[148] And more than half (56%) of those held for five days or less had resolved their case.[149] The release/disposition rate slows, however, after five days and defendants held on bail are "likely to

143. New York City provides an interesting case study for several reasons: (1) at midyear 2010, New York City had 12,745 inmates, which made it the second largest jail population in the United States, just behind Los Angeles County, which had 16,862 inmates, *see* MINTON, 2010, *supra* note 129, at 10 tbl.9; (2) as mentioned, New York City established the first pretrial services program, *see* MAHONEY ET AL., *supra* note 53, at 8, which is now run by the New York City Criminal Justice Agency (CJA), a private nonprofit organization, *see Who We Are: About CJA*, NEW YORK CRIMINAL JUSTICE AGENCY, http://www.nycja.org/about-cja/ (last visited Feb. 2, 2014); and (3) thanks to CJA, and unlike other local jurisdictions, New York City has a rather large amount of comprehensive data available on its pretrial jail population, which thus makes this inquiry possible, *see Our Online Reports*, CJAREPORTS.ORG, http://www.cjareports.org/ (last visited Feb. 2, 2014).

144. PHILLIPS, *supra* note 138, at 44 tbl.6 (B).

145. FELLNER, *supra* note 7, at 26.

146. This section is based on a dataset that "contains all arrests in New York City from October 1, 2003, through January 31, 2004." MARY T. PHILLIPS, N.Y.C. CRIMINAL JUSTICE AGENCY, INC., PRETRIAL DETENTION AND CASE OUTCOMES, PART 1: NONFELONY CASES 9 (2007), *available at* http://www.cjareports.org/reports/detention.pdf.

147. *See id.* at 19.

148. *Id.* at 17.

149. *Id.* at 18.

stay there for weeks or months longer."[150] This timing trait is due, in part, to the fact that a prosecutor must convert a misdemeanor complaint into an information at least five days after the arrest.[151] Otherwise, a defendant held on bail will be released pursuant to New York's Criminal Procedure Law.[152]

Overall, for non-felony defendants held on bail: more than one-fifth (22%) eventually saw their cases dismissed or end in an acquittal and nearly a quarter (24%) were convicted—that is, plead guilty—but were not sentenced to any jail time.[153] Shockingly, this means that nearly half (48%) of all the low-level criminal defendants held on bail were denied their liberty for a simple reason: they could not afford to post bail. Similarly, for about a quarter (24%) of those defendants held on bail and sentenced to a term of incarceration, the price of freedom was a plea of guilty in exchange for a sentence of time served.[154] Thus, although some defendants are eventually able to raise enough funds to post bail, the current system of pretrial detention forces many defendants charged with relatively minor offenses to make a difficult choice. The data suggests, and researchers agree, that many defendants held on bail plead guilty to simply regain their freedom[155]:

> A defendant who is facing a non-custodial sentence can be released immediately by pleading guilty, whereas holding out for acquittal [or trial] may mean spending many more days, weeks, or months behind bars. Moreover, prosecutors may be less willing to offer post-arraignment plea bargains when they already have the leverage of detention to encourage a guilty plea—resulting in conviction to more severe charges merely because the defendant could not make bail.[156]

The stakes involved for most of these defendants are relatively low—a "day or two of community service and the impact of the misdemeanor on one's record."[157] Thus, defendants must weigh the immediate impact that pretrial detention has on their lives against the future consequences of a minor criminal offense on their record.[158] Presumably, many non-felony defendants in New York City

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150. *Id.* at 15.

151. *Id.*

152. N.Y. CRIM. PROC. LAW § 170.70 (McKinney 2012).

153. PHILLIPS, *supra* note 146, at 59.

154. *Id.* at 53.

155. *See, e.g.*, VERA INST. OF JUSTICE, LOS ANGELES COUNTY JAIL OVERCROWDING REDUCTION PROJECT, at v (2011), *available at* http://www.vera.org/sites/default/files/resources/downloads/LA_County_Jail_Overcrowding_Reduction_Report.pdf.

156. PHILLIPS, *supra* note 138, at 115.

157. Weinstein, *supra* note 50, at 1172.

158. *See* BORUCHOWITZ ET AL., *supra* note 6, at 12-13 (discussing collateral

who are held on bail wait to see whether a prosecutor will be able to covert the charge before making this decision. But, as noted by the Supreme Court, "'the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter.'"[159] Defendants held in detention must deal with the unpleasant conditions of confinement, during which time "much needed income is forfeited, a job may be lost, children and other family members suffer, [and] an already fragile family may fall apart."[160]

2. Green's Dilemma

Shadu Green's story has received widespread attention for illustrating this dilemma.[161] He was arrested on June 7, 2009, after a traffic stop in the Bronx.[162] The police say he became belligerent and resisted arrest, but Green argued he was not stopped for a legitimate reason and was attacked. Facing a series of misdemeanor charges, the judge set bail at $1,000—an amount Green did not have. Even though a bondsman offered to post his bail for a $400 non-refundable fee, Green still could not afford it. The prosecutor, however, offered him an alternative: he could plead guilty, serve a sixty-day sentence, and go home. But Green believed he was innocent and wanted "a jury to decide who was right and who was wrong."[163] By the time he was interviewed, Green had already served half of the sixty days the prosecution offered, and had already lost his job and apartment.[164] Nearly two weeks later, Green was on the verge of accepting the plea; he missed his daughter, who needed his support, and he was ready to give up. Miraculously, however, as he was about to give in, the mother of his child was able to pull together the last of the $400 that she was saving to pay the bail bondsman.[165]

> [Shadu] Green may be guilty or he may be innocent. But the point, he says, is that it's no longer up to the prosecutors, the police, the jail system or even just his willingness to stay in jail. It will be [decided at trial]. And the cost of that centuries-old privilege for

consequences of a misdemeanor offense on one's record).

159. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (quoting Baldwin v. New York, 399 U.S. 66, 73 (1970)).

160. PHILLIPS, *supra* note 146, at 59.

161. *See, e.g.*, Rapping, *supra* note 6, at 546.

162. Laura Sullivan, *Inmates Who Can't Make Bail Face Stark Options*, NPR (Jan. 22, 2010, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=122725819.

163. *Id. But see* Argersinger v. Hamlin, 407 U.S. 25 (1972) (confirming that prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury).

164. Sullivan, *supra* note 162.

165. *Id.*

Shadu Green, it turns out, was $400.[166]

D. The Need for a Judicial Remedy

It has been argued that "the only foreseeable remedy lies in constitutional adjudication within the judicial system."[167] And as we have seen, despite the achievements of the Bail Reform Movement, the use of money bond is on the rise and the number of unconvicted inmates has increased. Indigent defendants, both in reform and non-reform jurisdictions, are continuing to be held on unaffordable bail. Although new pretrial services programs are being implemented, their existence will continue to be threatened by local politics. Furthermore, the constitutional problem is unresolved. The Excessive Bail Clause states: "Excessive bail shall not be required."[168] And "[t]he whole thrust of the excessive bail clause is to ensure fair access to pretrial liberty for those entitled to it by law."[169] But then why is there a bail crisis to begin with?

The "constitutional protection against pretrial imprisonment[] poses problems of the greatest complexity."[170] The Excessive Bail Clause puts forth "puzzling questions of interpretation and historical analysis,"[171] but also, any constitutional deprivation asserted under the Clause will be obfuscated by the related "due process and equal protection claims inherent in the financial discrimination and prejudice of the bail system."[172] This problem is "further complicated by the . . . uncertain status" of constitutional bail law.[173] The Supreme Court's bail jurisprudence is rather undeveloped; the Court has only addressed the meaning of the Clause on three occasions.[174] A finding that unaffordable bail *is* excessive bail seems to be a logical solution. But most federal courts have already held that "bail is not excessive merely because the defendant is unable to pay it."[175] And

166. *Id.*

167. Foote, *Crisis in Bail: I*, *supra* note 13, at 962.

168. U.S. CONST. amend. VIII.

169. Foote, *Crisis in Bail: I*, *supra* note 13, at 998-99.

170. *Id.* at 998.

171. *Id.* at 965.

172. *Id.*

173. *Id.*

174. Galen v. County of Los Angeles, 477 F.3d 652, 659 (9th Cir. 2007); *see also* United States v. Salerno, 481 U.S. 739, 752-56 (1987); Carlson v. Landon, 342 U.S. 524, 536-37 (1952); Stack v. Boyle, 342 U.S. 1, 3-5 (1951).

175. Hodgdon v. United States, 365 F.2d 679, 687 (8th Cir. 1966); *see also* Wagenmann v. Adams, 829 F.2d 196, 213 (1st Cir. 1987) ("The test for excessiveness is not whether defendant is financially capable of posting bond . . . ." (quoting United States v. Beaman, 631 F.2d 85, 86 (6th Cir. 1980))); United States v. Wright, 483 F.2d 1068, 1070 (4th Cir. 1973) (stating that the defendant's "impecunious financial status" is not "the governing criterion to test the excessiveness of bail"); United States v. McConnell, 842 F.2d 105, 107 (5th Cir. 1988) (en banc) ("[A] bail setting is not

even though the Supreme Court has never ruled explicitly on this issue, it is unlikely to decide it any differently.[176] Moreover, such a resolution would threaten the integrity of the judicial system. Thus, it remains to be seen whether the Excessive Bail Clause can provide a remedy to this crisis.

There are two readily identifiable parts to the constitutional conundrum presented by the Excessive Bail Clause: the first is procedural; the second is substantive. First, the U.S. Bill of Rights did not originally apply to the states.[177] Whether the Excessive Bail Clause could have any legal force against the states has to be answered by the Supreme Court. Although scholars have argued that the Excessive Bail Clause should "be incorporated [through] the fourteenth amendment and made applicable to the states,"[178] this question has not been thoroughly examined. Second, and perhaps more challenging, is the notion that in interpreting the Clause, it will be difficult to overcome an "impasse" that is believed to exist between its historical origins and a contemporary application of it to afford protection to indigent defendants.[179] In order to do this, some scholars have argued that "the historical motivation and underlying purposes" of the Clause would have to be built upon so that the scope of the Eighth Amendment could be expanded "to accommodate present humanitarian values."[180] Nevertheless, and however challenging these issues are, the Supreme Court could theoretically provide a remedy.[181]

II. THE CONSTITUTIONAL CONUNDRUM

As mentioned, there are two issues to the constitutional bail conundrum: the first is procedural and the second is substantive. But first we must consider the doctrine of selective incorporation, which will enable us to then examine the procedural challenges that must be faced to make the Clause applicable to the states. This should also explain why there is so little Supreme Court jurisprudence on this matter. Then we can explore what the Justices would want to know

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constitutionally excessive merely because a defendant is financially unable to satisfy the requirement."); United States ex rel. Fitzgerald v. Jordan, 747 F.2d 1120, 1134 (7th Cir. 1984) (stating that the defendant's "financial inability . . . to meet his bail . . . is neither the only nor controlling factor"); White v. Wilson, 399 F.2d 596, 598 (9th Cir. 1968) ("The mere fact that petitioner may not have been able to pay the bail does not make it excessive.").

176. *Cf. Galen*, 477 F.3d at 659.

177. *See* discussion *infra* Part II.A.

178. Foote, *Crisis in Bail: II*, *supra* note 13, at 1181.

179. Foote, *Crisis in Bail: I*, *supra* note 13, at 999.

180. *Id.*

181. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating "[i]t is emphatically the province and duty of the [Supreme Court] to say what the law is" under the Constitution).

in order to interpret the meaning of the Clause if this issue were ever to reach the Supreme Court.

A. The Doctrine of Selective Incorporation

The ratification of the Bill of Rights was a defining moment in our nation's history. It marked the delivery of those provisions designed to protect our most basic individual rights,[182] including: the freedom of speech and press;[183] the free exercise of religion;[184] the right to assemble and petition the government for a redress of grievances;[185] to be free from unreasonable searches and seizures;[186] and, for the criminally accused, to be informed of the nature and cause of the accusation;[187] the right to a public trial,[188] an attorney,[189] and, of course, the right to be free from excessive bail.[190] Those fundamental protections, however, did not originally restrain nor extend to the states; they only limited the federal government's exercise of power.[191]

This dynamic was eventually altered in the wake of the Civil War with the adoption of the Fourteenth Amendment in 1868, which provides in relevant part: "*No State shall* . . . deprive any person of life, liberty, or property, without due process of law."[192] From then on, the Supreme Court began to consider whether the Due Process Clause of the Fourteenth Amendment prohibited the states from infringing upon those rights set forth in the first eight amendments.[193] While various theories on the relationship between the Fourteenth Amendment and the Bill of Rights have been advanced over the years,[194] the Court's jurisprudence eventually settled on a process commonly referred to as "selective incorporation." That means the Court began, on a case-by-case basis, to make particular rights contained in the first eight amendments fully applicable against the states through the Due Process Clause of

182. *See* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1194-97 (1992).

183. U.S. CONST. amend. I.

184. *Id.*

185. *Id.*

186. U.S. CONST. amend. IV.

187. U.S. CONST. amend. VI.

188. *Id.*

189. *Id.*

190. U.S. CONST. amend. VIII.

191. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

192. U.S. CONST. amend. XIV (emphasis added).

193. *See* Hurtado v. California, 110 U.S. 516, 516 (1884) (finding that the Due Process Clause does not require grand jury indictment).

194. *See* Amar, *supra* note 182, at 1196.

the Fourteenth Amendment.[195] Under this doctrine, the Supreme Court will "incorporate"—that is, make applicable against the states—a particular guarantee contained in the Bill of Rights if it "is fundamental to *our* scheme of ordered liberty and system of justice."[196] As of today, the Supreme Court has incorporated nearly all of the guarantees found in the Bill of Rights[197] and has explicitly held that at least two provisions are not applicable against the states.[198] Finally, the Court has never considered whether the Third Amendment's prohibition against quartering soldiers in a home, or the Eighth Amendment's proscription against excessive fines has been made applicable.[199]

This inventory of incorporated rights accounts for all the provisions in the Bill of Rights, with one exception: the Excessive Bail Clause. During the early 1960s, the Warren Court handed down several landmark decisions under the doctrine of selective incorporation, which revolutionized the administration of criminal justice throughout the United States. For instance, in *Mapp v. Ohio*, decided in 1961, the Supreme Court made the Fourth Amendment's exclusionary rule applicable to the states.[200] Then, in 1963, the Court issued its decision in *Gideon v. Wainwright*, which incorporated the

195. *See generally* Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963) (discussing the Supreme Court's doctrine of selective incorporation).

196. McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 (2010).

197. With respect to the First Amendment, see Everson v. Board of Education, 310 U.S. 1 (1947) (establishment of religion); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise of religion); Gitlow v. New York, 268 U.S. 652 (1925) (free speech); De Jong v. Oregon, 299 U.S. 353 (1937) (freedom of assembly); and Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) (freedom of the press). With respect to the Second Amendment, see *McDonald*, 130 S. Ct. at 3020 (right to bear arms). With respect to the Fourth Amendment, see Aguilar v. Texas, 378 U.S. 108 (1964) (warrant requirement); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule); and Wolf v. Colorado, 338 U.S. 25 (1949) (freedom from unreasonable searches and seizures). With respect to the Fifth Amendment, see Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); and Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, (1897) (just compensation). With respect to the Sixth Amendment, see Duncan v. Louisiana, 391 U.S. 145 (1968) (trial by jury in criminal cases); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront adverse witness); Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel); *In re* Oliver, 333 U.S. 257 (1948) (right to public trial); and Irvin v. Dowd, 366 U.S. 717 (1961) (impartial jury). With respect to the Eighth Amendment, see Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment).

198. *See Hurtado*, 110 U.S. at 516 (Fifth Amendment's grand jury indictment); Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916) (Seventh Amendment's jury trial in civil cases).

199. *McDonald*, 130 S. Ct. at 3035 n.13.

200. 367 U.S. at 686.

Sixth Amendment's right to counsel requiring the states to provide an attorney to felony defendants who could not afford to hire their own.[201] In light of these decisions, legal scholars at that time became attracted to the possibility of incorporating the Excessive Bail Clause to address the bail system's inherent discrimination against the poor.[202] In 1965, Professor Caleb Foote wrote the seminal two-part article titled *The Coming Constitutional Crisis in Bail*.[203] Foote described the 1960s as a "current renaissance of interest in equal justice for the poor."[204] He reasonably believed that, within "the next decade[,]"[205] "it [was] a fair guess that the next major clash between [the] actual administration" of justice and the Supreme Court's recent jurisprudence would "revolve around the discrimination . . . inherent in the bail system."[206] Given these events, a waning paradigm of economic inequality before the law, and "a growing thrust towards equal protection[,]"[207] Foote justifiably predicted that a resolution to the constitutional bail problem faced by most pretrial detainees was on the horizon.[208] But this, however, never came to pass. Foote wrote his article nearly fifty years ago, and the Supreme Court has never expressly held that the Excessive Bail Clause applies to the states;[209] rather, it has only been presumed.[210]

1. *McDonald v. City of Chicago*

The constitutional limbo of the Excessive Bail Clause was recently revived by a rather subdued sense of excitement, particularly among bail scholars, with the first case of incorporation in over forty years.[211] Oddly enough, that case had absolutely nothing

201. 372 U.S. 335, 345 (1963).

202. Wiseman, *supra* note 10, at 135.

203. *See supra* note 13.

204. Foote, *Crisis in Bail: I*, *supra* note 13, at 965.

205. *Id.*

206. *Id.* at 962.

207. Foote, *Crisis in Bail: II*, *supra* note 13, at 1126.

208. *Id.*

209. Galen v. County of Los Angeles, 477 F.3d 652, 659 (9th Cir. 2007).

210. *See generally* Samuel Wiseman, *McDonald's Other Right*, 97 VA. L. REV. IN BRIEF 23, 24-25 n.6 (2011) (collecting sources); *see infra* notes 211-243 and accompanying text.

211. *Compare* Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (dictum) ("[T]he Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment."), *with* Martin v. Diguglielmo, 644 F. Supp. 2d 612, 618 (W.D. Pa. 2008) ("To the best of this Court's knowledge, the Supreme Court of the United States has never held that the Eighth Amendment prohibition on excessive bail applies to the States . . . ."); *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 n.12 (2010) (dictum) (citing *Schilb v. Kuebel* as having incorporated the "prohibition against excessive bail"); Wiseman, *supra* note 214, at 23-24 (expressing scholarly interest in *McDonald*'s questionable citation to *Schilb v. Kuebel* in footnote twelve).

to do with bail.[212] Instead the Court freed another formerly unincorporated right from its "dusty quarters."[213] In 2010, the Supreme Court held, for the first time, that the Second Amendment's right to keep and bear arms was binding on the states.[214] That landmark decision was, of course, *McDonald v. City of Chicago*.[215] Writing for the majority, Justice Alito discussed the history and legal framework for selective incorporation,[216] noting that nearly all of the Bill of Rights had been incorporated.[217] He then went on to provide a list—in footnote twelve—of the various incorporated provisions.[218] Among those included, Justice Alito cites a case from 1971, *Schilb v. Kuebel*, as having incorporated the "prohibition against excessive bail."[219] This footnote marked for the first time any affirmative indication by the Supreme Court that the right to be free from excessive bail, contained within the Bill of Rights, was binding on the states.[220]

2. *Schilb v. Kuebel*

Schilb, however, did not involve a question of excessive bail. In *Schilb*, the petitioner was arrested for obstructing traffic and leaving the scene of an accident.[221] In accordance with the Illinois bail statutes, the judicial officer decided to fix bail instead of releasing the petitioner on his own recognizance.[222] Bail was fixed for the total sum of $750.[223] The petitioner had two options to post bond. Under the first, he could post the full amount with the court, and once the conditions of the bond were fulfilled, the full amount would be returned. Under the second, he could deposit with the court cash in

212. *See McDonald*, 130 S. Ct. 3026-50.

213. Foote, *Crisis in Bail: I*, *supra* note 13, at 999.

214. *McDonald*, 130 S. Ct. at 3026.

215. *Id.*

216. *Id.* at 3026, 3028-36.

217. *Id.* at 3034.

218. *Id.* 3034 n.12.

219. *Id.*

220. Wiseman, *supra* note 214, at 23-24. This was, however, not the first time that the Supreme Court cited *Schilb* in conjunction with the Excessive Bail Clause; rather, the Court previously cited *Schilb* for the proposition that the Clause had only been *assumed* to apply to the states. *See* Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (dictum) ("We of course agree with the dissent's quotation of the statement from *Schilb v. Kuebel*, that 'the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.'") (citations omitted); *see also id.* at 149 n.1 (Stevens, J., dissenting) (dictum) ("[T]he Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment.") (internal quotations omitted).

221. 404 U.S. 357, 358 (1971).

222. *See id.* at 358-61.

223. *Id.* at 358.

an amount equal to ten percent of the total bond, and unlike the first option, ten percent of the deposited amount (one percent of the total bail) would be withheld by the Court "as bail bond costs" upon the bond's return. [224]

The petitioner opted for the second choice and deposited $75 with the court.[225] After the disposition of his case, his cash bond was returned to him minus $7.50 for the applicable bail bond costs as per the statute.[226] The petitioner, through a state class action, challenged the one percent charge as a violation of the Fourteenth Amendment on equal protection and due process grounds.[227] The petitioner argued, among other things, that the one percent retention cost was discriminatory because it was only "imposed on the poor and nonaffluent," since those who could afford to deposit the full bond amount would do so and not be charged.[228]

In *Schilb*, the Supreme Court exercised probable jurisdiction and affirmed the Illinois Supreme Court's decision to uphold the statute and dismiss the complaint.[229] The Court first described the petitioner's "attack on the Illinois bail statutes" as "paradoxical," and then held that the statutes could not "be described as lacking in rationality to the point where equal protection considerations require that they be struck down."[230] The Court reasoned that it was "by no means clear" that depositing the full amount was more attractive to the affluent because given high interest rates, they could, for instance, easily offset the one percent retention cost by investing the available funds after only depositing ten percent of a money bond with the court.[231]

On its face, *Schilb* does not explain whether the Excessive Bail Clause applies to the states.[232] The *Schilb* opinion only mentions the Clause briefly, stating that "[b]ail, of course, is basic to our system of law, and the Eighth Amendment's proscription of excessive bail *has been assumed* to have application to the states through the Fourteenth Amendment."[233] At first glance, this sentence appears to be referring to the Supreme Court—as in, the Clause "*has been assumed*" by the Court to be incorporated.[234] On further inspection,

224. *Id.* at 359-62.
225. *Id.* at 358.
226. *Id.*
227. *Id.* at 358-59.
228. *Id.* at 365-66.
229. *Id.* at 372.
230. *Id.* at 366-68.
231. *Id.* at 369-70.
232. *See* Suja A. Thomas, *Nonincorporation: The Bill of Rights After* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 197-98 (2012).
233. *Schilb*, 404 U.S. at 365 (emphasis added) (citations omitted).
234. *Id.* (emphasis added).

however, it becomes clear that such a reading would be inaccurate. This textual proposition is supported by two separate cases; however, neither provides support for the contention that the Supreme Court has made this assumption.[235] The first citation is to a decision by an inferior federal court.[236] And while the second citation is to a Supreme Court decision, it concerns the applicability of the Eighth Amendment's ban on cruel and unusual punishments, not excessive bail.[237]

Based on this review of the cited authority in *Schilb*, it is more likely the case that the Court was referring to *other courts*—that is, the "Eighth Amendment's proscription of excessive bail has been assumed [by *other courts*] to have application to the States through the Fourteenth Amendment."[238] If this is what the Court meant, the only cited authority that came close did not even support this proposition; that case affirmatively held, rather than assumed, that the Clause was binding on the states.[239] Furthermore, the very next sentence in *Schilb* dismissed the issue altogether: "[W]e are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness. Our concern, instead, is with the [one percent] cost-retention provision."[240] As further proof, even after the Court issued its decision in *Schilb*, legal bail scholars continued to believe that the clause was unincorporated.[241] Based on this analysis, *McDonald*'s citation to *Schilb* within its list of incorporated rights is, at best,[242] dicta without the full force of law.[243]

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235. *Id.*; *see infra* notes 240-43.

236. Pilkinton v. Circuit Court of Howell Cnty. Mo., 324 F.2d 45, 46 (8th Cir. 1963) ("[T]he prohibition in the Eighth Amendment against requiring excessive bail must now be regarded as applying to the States, under the Fourteenth Amendment.").

237. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (holding that a law that makes the status of a narcotic addiction a criminal offense violates the proscription of cruel and unusual punishments under the Eighth Amendment); *see also id.* at 675 (Douglas, J., concurring) ("The command of the Eighth Amendment, banning 'cruel and unusual punishments,' . . . is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." (citations omitted)).

238. *Schilb*, 404 U.S. at 365.

239. *Pilkinton*, 324 F.2d at 46.

240. *Schilb*, 404 U.S. at 484-85.

241. *See* Duker, *supra* note 18, at 93 ("The Court has not decided if the 'excessive bail' clause of the eighth amendment applies to the states . . . .").

242. *See* Wiseman, *supra* note 214, at 24-26 & n.5. Professor Wiseman provides two possible explanations for why the Supreme Court included the Excessive Bail Clause in *McDonald*'s list of incorporated rights. First, the Court perhaps felt that it was obvious and thus "unnecessary to wait for the issue to be presented." *Id.* at 26. Second, the Clause has little legal significance under the Court's current jurisprudence, and thus "it simply does not matter very much whether it applies to the states or not." *Id.* at 26-27.

243. *See generally* Pierre N. Leval, *Judging under the Constitution: Dicta About*

Finally, it should be clear that the Supreme Court would likely incorporate the Clause if it were ever presented with the issue. The Court would generally answer this question by considering whether the right to be free from excessive bail "is fundamental to our scheme of ordered liberty or . . . whether [it] is 'deeply rooted in this Nation's history and tradition.'"[244] In fact, for all intents and purposes, the Supreme Court would likely hold that it is. First, at the time of the Fourteenth Amendment's ratification in 1868, every state constitution—"every last one"—had a provision prohibiting excessive bail.[245] Second, the citation to *Schilb* in *McDonald* indicates a "willingness to incorporate this right against the states."[246] Third, the Supreme Court has declined to review the decisions of several lower federal courts that have held that the Clause does apply to the states.[247] Instead, what is being argued here is that the Supreme Court has never confronted this question head-on. But why hasn't the Supreme Court ruled on this issue? Similarly, why is there so little constitutional bail jurisprudence to begin with? And, even if the Clause were incorporated, the indigent bail problem would likely remain under the Court's current bail jurisprudence.

B. The Procedural Challenge

A confluence of unique factors may explain why the Excessive Bail Clause has not been incorporated. Perhaps the main reason is that each state has some sort of bail provision in its constitution.[248] Unlike the Federal Constitution, forty-one states provide some form of an absolute right to bail.[249] The remaining nine states simply

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Dicta, 81 N.Y.U. L. REV. 1249, 1250 (2006) (arguing that when a court accepts a prior court's dictum as binding law, it has failed to uphold its constitutional obligation to rule on the issue before it and thus has surpassed its authority to determine what the law is under the Constitution). Judge Leval further defines "dictum" as "an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner." *Id.* at 1256.

244. McDonald v. City of Chicago, 130 S. Ct. at 3036 (2010) (emphasis removed) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

245. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?* 87 TEX. L. REV. 7, 81-82 (2008).

246. *Id.* at 82.

247. Hunt v. Roth, 648 F.2d 1148, 1156 (8th Cir. 1981), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam); *see also* Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir. 1964), *cert. denied*, 376 U.S. 965 (1964).

248. *See generally* Ariana Lindermayer, Note, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267, 283-84 nn.110-11 (2009) (providing an in-depth account of state constitutional bail provisions and analyzing competing interpretations of those phrased: "[A]ll persons shall be bailable by sufficient sureties unless for [certain offenses] when the proof of guilt is evident or the presumption great.").

249. *Id.* at 283-84 n.111 (listing each of the forty-one state constitution bail

prohibit excessive bail, just like their federal counterpart.[250] Thus, there has never been a state case that would obviously lead to incorporation. Despite these constitutional provisions, the current bail system is universal in its discriminatory impact on the poor in both reform and non-reform jurisdictions throughout the country.[251] Therefore, the Supreme Court is in a unique position to provide a remedy.

The widespread lack of representation at the initial bail hearing is another likely and significant reason why the Excessive Bail Clause may not have been incorporated.[252] A 2008-2009 survey showed that jurisdictions vary as to whether indigent defendants have the right to counsel at such hearings.[253] Only ten jurisdictions provide statewide indigent representation at the initial appearance.[254] In ten other states, indigent defendants across the state stand alone before the judicial officer who sets bail.[255] In the remaining thirty states, whether there is appointed counsel "at the initial bail hearing depends on the county where the arrest occurred."[256] Thus, the delayed appearance of an indigent defendant's appointed counsel reduces the likelihood of there being an attorney available to a client at the early stages of a criminal proceeding who could submit a bail application. In addition, public defenders are overburdened by large caseloads and will likely concentrate their limited resources on something other than drafting and submitting a bail reduction motion,[257] which, in any case, will likely fail.[258]

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provisions).

250. *Id.* at 283 n.110 ("These states include . . . Georgia, Hawaii, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Virginia, and West Virginia.").

251. *See* discussion *supra* Part I.

252. *See generally* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333 (2011) (discussing the widespread lack of representation for indigent defendants at the initial bail hearing of a state criminal proceeding); *see also* Rothgery v. Gillespie Cnty., Tex., 554 U.S. 191, 212-13 (2008) (holding that indigent defendants must be appointed counsel "within a reasonable time" after their initial court appearance, while leaving open the question as to what is actually a "reasonable" amount of time).

253. Colbert, *supra* note 252, at 384-410.

254. *Id.* at 389. These jurisdictions include: California, Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, North Dakota, Vermont, Wisconsin, and the District of Columbia. *Id.*

255. *Id.* at 396. These states include: Alabama, Kansas, Maryland, Michigan, Mississippi, New Hampshire, Oklahoma, South Carolina, Tennessee, and Texas. *Id.*

256. *Id.* at 400. These states include: Alaska, Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, Washington, West Virginia, and Wyoming. *See id.* at 401-09.

257. NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, *supra* note 22,

Moreover, the typical defendant may simply want to plead guilty, regain their freedom, and move on with his or her life.[259]

Although legal scholars have noted there is a lack of Supreme Court bail jurisprudence,[260] there has never been an express analysis on what factors may have contributed to the fact that the Excessive Bail Clause has not yet been made applicable against the states. In order to understand those contributors, the limitations to each respective legal device that could potentially bring this issue before the Supreme Court must be analyzed. There are three readily identifiable "vehicles" for incorporation: (1) the writ of habeas corpus,[261] (2) the motion to reduce bail,[262] and (3) a civil rights claim filed under 42 U.S.C. § 1983.[263] This section will explore each vehicle and its respective procedural limitations, but will only focus on one or two features particular to each mode of judicial review. Moreover, a failing discussed in one context may also be a factor in another. For instance, timing is a common weakness among these legal mechanisms. Since "[r]elief . . . must be speedy if it is to be effective,"[264] many claims become moot long before they would even reach the Supreme Court.[265] After this discussion, it will become clear that the best chance for making the Excessive Bail Clause applicable against the states lies in a civil rights action filed under § 1983.[266]

1. The Writ of Habeas Corpus

The writ of habeas corpus has been the traditional remedy for unlawful deprivations of individual liberty[267] and its history is closely linked to the evolution of bail law.[268] Latin for "you have the body,"[269] the writ has a singular purpose: "to allow a judge to review the legality of a prisoner's detention."[270] Known as the "great writ of

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at 65-70 (discussing current shortfalls of state criminal indigent defense systems).

258. *See* discussion *infra* Part II.B.2.

259. *See* FELLNER, *supra* note 7, at 32.

260. Lester, *supra* note 69, at 14.

261. *See* discussion *infra* Part II.B.1.

262. *See* discussion *infra* Part II.B.2.

263. *See* discussion *infra* Part II.B.3.

264. Stack v. Boyle, 342 U.S. 1, 4 (1951).

265. Lester, *supra* note 69, at 13-14.

266. *See infra* Part II.B.3.

267. *See generally* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 319-33 (2010) (chronicling the development of the writ of habeas corpus throughout English history).

268. Foote, *Crisis in Bail: I*, supra note 13, at 973 n.70.

269. BLACK'S LAW DICTIONARY 728 (9th ed. 2009).

270. Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 58 (2012).

liberty,"[271] its common-law origins predate the enactment of the Magna Carta as "a shifting set of mundane writs that courts" used to bring prisoners before them to hold "sheriffs and other custodians accountable."[272] Habeas corpus procedure was eventually codified, and later reinforced, to address abusive judicial practices. For instance, the Habeas Corpus Act of 1679 was enacted by the English Parliament to prevent the procedural loopholes that the king's judges exploited to delay review and effectively deny bail.[273] Just over a century later, the writ of habeas corpus appeared as the sole common-law writ to be mentioned in the U.S. Constitution.[274] Given this history, the writ of habeas corpus may, at first glance, appear to be a likely candidate for incorporation. Despite its heritage, however, the writ of habeas corpus is not a promising remedy for state defendants in local municipal courts and therefore is an unlikely vehicle for incorporation.[275]

Article I, Section 9 of the U.S. Constitution restricts Congress's power to suspend the "Privilege of the Writ of Habeas Corpus."[276] Known as the Suspension Clause, it introduced the ancient common-law practice of judicial review over a person's confinement to American jurisprudence.[277] Despite the lack of attention it received at the Constitutional Convention,[278] the First Congress went further and gave the federal judiciary the explicit authority to issue the writ in Section 14 of the Judiciary Act of 1789.[279] And while habeas corpus has continued to operate on the state level, federal courts did not originally have judicial review over state petitions. In *Ex parte Bollman*, decided in 1807, the U.S. Supreme Court held that the power to grant the writ must be given by "written law,"[280] and that since state courts are "the creatures of a distinct government," state detainees could not seek relief in federal court.[281] State prisoners may now, however, file habeas petitions in federal court under certain circumstances.[282] Current federal habeas practice is governed by statute, codified under 28 U.S.C. §§ 2241-2248, which provides

271. *Id.* at 49 n.6 (internal quotations omitted).

272. *Id.* at 61.

273. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.), *reprinted in* 5 STATUTES OF THE REALM 935 (London, Cambridge Univ. 1763); *see also* HALLIDAY, *supra* note 271, at 237-46.

274. Garrett, *supra* note 274, at 64.

275. *See infra* notes 281-297 and accompanying text.

276. U.S. CONST. art. I, § 9, cl. 2.

277. Garrett, *supra* note 274, at 65.

278. *Id.*

279. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

280. 8 U.S. (4 Cranch) 75, 94 (1807).

281. *Id.* at 97.

282. *See* 28 U.S.C. §§ 2241(c)(3), 2254(a) (2006).

relief for prisoners held in violation of the U.S. Constitution.[283] Additionally, federal courts have recognized that a detention in contravention to the Eighth Amendment's prohibition against excessive bail would qualify as a "violation cognizable in federal habeas proceedings."[284]

The statutory provisions governing federal habeas corpus practice can be generally viewed as concerning two distinct categories of detainee: (1) those held in pretrial detention, who may petition for relief under § 2241,[285] and (2) those held in custody post-conviction, who may seek relief under § 2254.[286] Regardless of which path is taken, each presents substantial obstacles, making the writ of habeas corpus an unlikely vehicle for incorporation. There are several reasons for this, but only two will be discussed here: (1) all state remedies must be exhausted and (2) even if this condition is met, current federal law has created a paradoxical situation that prevents novel habeas claims from reaching federal courts.

The exhaustion requirement is the first significant procedural limitation—petitioners must first exhaust all state remedies to petition for federal habeas corpus relief.[287] The Supreme Court first announced this rule in *Ex parte Royall* in 1886.[288] This principle evolved out of "considerations of federalism," which led to the adoption of a rule of "comity" towards state judicial systems.[289] Thus, absent "special circumstances" that may require immediate attention, federal courts typically refrain from "interfering with the coordinate jurisdiction of the state courts."[290] And even though § 2241 does not have an express exhaustion requirement—unlike § 2254, which does[291]—federal courts have nevertheless held that such a requirement applies in either case.[292] This requirement is a significant challenge for the typical criminal defendant. In New York City, as we have seen, most low-level pretrial detainees do not spend enough time in custody to mount a successful constitutional challenge. In 2010, for example, those held on bail after arraignment

283. *Id.*

284. Martin v. Diguglielmo, 644 F. Supp. 2d 612, 617 (W.D. Pa. 2008).

285. § 2241(c)(3).

286. § 2254(a).

287. *See* Rose v. Lundy, 455 U.S. 509, 522 (1982) (requiring "total exhaustion" for each federal claim).

288. 117 U.S. 241 (1886).

289. Plummer v. Louisiana, 262 F. Supp. 1021, 1022-23 (E.D. La. 1967). *Black's Law Dictionary* defines "comity" as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." BLACK'S LAW DICTIONARY 284 (8th ed. 2004).

290. *Plummer*, 262 F. Supp. at 1022-23.

291. *Compare* 28 U.S.C. § 2241(c)(3), *with* 28 U.S.C. § 2254(a).

292. *See, e.g.*, United States ex rel. Hill v. Hendricks, 321 F. Supp. 300, 301 (E.D. Pa. 1970).

spent an average of eighteen days in pretrial detention.[293] Alternatively, even in a § 2254 scenario, the median sentence length was only thirty days in jail.[294] Under these circumstances, such a "time squeeze is almost certain to prevent exhaustion of the state appellate system in time to obtain review in the United States Supreme Court."[295]

Even if each federal claim is exhausted on the state level, the other significant limitation to "the great writ" as a vehicle for incorporation is the paradoxical legal reasoning that has arisen in recent federal habeas corpus jurisprudence. This conundrum is a function of the Antiterrorism and Effective Death Penalty Act of 1996[296] and the Supreme Court's subsequent interpretation of its provisions in *Williams v. Taylor*,[297] which was decided in 2000. In *Williams*, the Supreme Court found that Congress intended federal habeas relief to be granted under § 2254 in only two situations; that is, when a state court's decision was either: (1) "contrary to," or (2) "involved an unreasonable application of . . . clearly established Federal law as determined by the Supreme Court of the United States."[298] The Court further explained that this "statutory phrase refers to the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision."[299] Such reasoning has created a constitutional and procedural loop whereby novel excessive bail claims brought in habeas petitions are stuck at the threshold between state and federal jurisdiction.

A federal judge discussed this conundrum in *Martin v. Diguglielmo*, where she stated that: "If the United States Supreme Court has never held that the [Excessive Bail Clause] applies to the States then whatever the decision of the state courts with respect to bail cannot be contrary to [or an unreasonable application of] the United States Supreme Court's silence on this matter."[300] Thus, a novel constitutional argument for incorporation is impossible under this standard of review. Indeed, the Supreme Court made it clear that this is the proper standard for petitions filed under § 2254,[301] while it remains unclear whether the analysis would be any different

293. PHILLIPS, *supra* note 146, at 17.

294. *Id.* at 45.

295. Foote, *Crisis in Bail: II*, *supra* note 13, at 1131.

296. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

297. 529 U.S. 362 (2000).

298. *Id.* at 367 (internal quotations omitted).

299. *Id.* at 412.

300. 644 F. Supp. 2d 612, 618 (W.D. Pa. 2008).

301. *See Williams*, 529 U.S. at 412.

under § 2241.[302] At this point, there is no apparent reason to assume it would. The writ's constitutional and procedural limitations, taken together, make it an unlikely mechanism for incorporation, especially for the low-level detainee. Finally, the Supreme Court has explained that "[t]he proper procedure for challenging bail as unlawfully fixed is by motion for reduction of bail and appeal . . . from an order denying such motion . . . . [not in a] collateral habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted."[303]

2. The Motion to Reduce Bail

A defendant held in pretrial detention due to an inability to afford bail may generally submit an application for a reduction on the ground that the amount fixed was excessive.[304] While statutory applications for bail review vary by state, they can be discussed in general terms.[305] In some jurisdictions, appellate courts have original jurisdiction to hear bail review applications.[306] In others states, a judge with concurrent jurisdiction to the judge who set the original bail amount may rule on the motion.[307] However, unless there has been a significant change in the defendant's circumstances or the case at hand, the motion will likely be denied.[308] The proper appellate procedure following the denial of a motion to reduce bail, once again, varies by jurisdiction.[309] In some states, an order of denial is appealable as a final decision.[310] Yet in others, the proper procedure is to petition for habeas corpus relief in state court.[311]

Despite these procedural variations, the motion to reduce bail is an unlikely candidate for incorporation for several commonly shared reasons. First, unlike petitions for post-conviction relief, indigent defendants do not have a constitutional right to counsel for pretrial appeals.[312] The lack of representation at this stage certainly diminishes the opportunity for litigation that could have led to the

302. *See Martin*, 644 F. Supp. 2d at 616 n.1 ("Resolution of the question as to whether . . . [a petition is filed under] Section 2254 or Section 2241 . . . may have implications for the proper standard of review . . . .").

303. Stack v. Boyle, 342 U.S. 1, 6-7 (1951).

304. *See* 8 C.J.S. *Bail* § 118 (2006).

305. *See id.*

306. *Id.*

307. JAMES E. MORRIS ET AL., VILLAGE, TOWN AND DISTRICT COURTS IN NEW YORK § 4:77 (2012).

308. *See* C.J.S. *Bail* § 118.

309. *Id.*

310. *See id.*

311. *Id.*

312. *See* Douglas v. California, 372 U.S. 353, 356-57 (1963); Griffin v. Illinois, 351 U.S. 12, 17 (1956).

incorporation of the Excessive Bail Clause. Second, given a court's discretion in setting bail, the traditional standard of review of bail applications has been abuse of discretion.[313] Subsequently, such a "high standard is usually not met because an appellate court will often yield to the factual finding of the lower judge."[314] For this reason, even if an order denying a motion to reduce bail is appealed, it is unlikely to get past a state's intermediate appellate courts.[315] Therefore, it is a rare occasion for a state's supreme court to rule on an excessive bail claim. Consequently, in order for the U.S. Supreme Court to have jurisdiction over an appeal of an order denying a motion to reduce bail—which originated in a local municipal court—it would first have to make the improbable journey through a state's entire judicial system.[316] Given these limitations, it becomes clear why "bail as a Constitutional issue has not been heavily litigated in the Supreme Court."[317]

3. The Civil Action: Constitutional Litigation under 42 U.S.C. § 1983

A defendant held on bail because of an inability to afford it could potentially bring a civil action against a local government for the deprivation of his constitutional right to be free from excessive bail.[318] In 1871, soon after the Civil War, Congress enacted 42 U.S.C. § 1983 pursuant to Section 5 of the recently enacted Fourteenth Amendment.[319] The statute was established to provide "for the protection of certain rights 'secured by the Constitution and laws' against infringement by the states."[320] Section 1983 creates a civil cause of action for damages and injunctive relief "to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"[321] Furthermore, in 1978, the Supreme Court held in *Monell v. Department of Social Services*[322] that under § 1983 "cities, counties, and other local government entities . . . are suable as persons under certain

313. Lester, *supra* note 69, at 26.

314. *Id.* at 26-27.

315. *See id.* at 13-14.

316. *See* LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 33 (6th ed. 2008).

317. Lester, *supra* note 69, at 14.

318. *See generally* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 2.3 (4th ed. 2001 & Supp. 2012).

319. *Id.* § 1:1.

320. *Id.*

321. Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1879)).

322. 436 U.S. 658 (1978).

circumstances."[323] Unlike the writ of habeas corpus and the motion to reduce bail, an action brought under § 1983 presents itself as a potential vehicle for incorporation. Interestingly, a civil rights claim brought under § 1983—which presented the question of whether the Excessive Bail Clause applied to the states—previously reached the Supreme Court. That case was *Murphy v. Hunt*, decided in 1982.[324] But the Court never reached the merits of the case because the claim was dismissed as moot.

In *Murphy*, Eugene Hunt, the appellee, filed a complaint under § 1983 after his bail application was denied, claiming that his Eighth Amendment right to be free from excessive bail had been infringed.[325] Hunt was not bailable under the Nebraska State Constitution because he was charged with a forcible sexual offense.[326] While his federal civil rights claim was pending, Hunt's criminal case proceeded in state court, where he was eventually found guilty at trial.[327] Subsequently, the Eighth Circuit Court of Appeals held that Hunt's denial of bail violated the Excessive Bail Clause. On appeal, the Supreme Court vacated the Eight Circuit's decision and dismissed the case, finding that Hunt's claim had become moot upon his conviction.[328]

At first glance, *Murphy* did not contribute much to the Court's bail jurisprudence. But the case is instructive for at least two reasons. First, *Murphy* highlights a significant part of the constitutional conundrum for low-level pretrial detainees: the mootness doctrine.[329] There the Court explained that a pretrial bail claim becomes moot upon a case's disposition.[330] As we have seen, this is a common limitation to each vehicle for incorporation so far discussed because "[a] lengthy appeal through the court system often renders the issue moot, as the accused either goes to trial or is released."[331] Second, in *Murphy* the Court provides a possible roadmap for surmounting the mootness challenge for claims brought under the Excessive Bail Clause.

Murphy suggests that the short duration of pretrial detention is the main vulnerability a civil suit would face. The sequence of events in *Murphy* illustrates this point: Hunt filed his § 1983 claim on June

323. NAHMOD, *supra* note 318, § 1:16.

324. *See* 455 U.S. 478, 479 (1982) (per curiam).

325. *Id.* at 479-80.

326. NEB. CONST. art. I, § 9; *see also Murphy*, 455 U.S. at 479.

327. *Murphy*, 455 U.S. at 480.

328. *Id.* at 481.

329. *Id.* at 481; *see also* BLACK'S LAW DICTIONARY 1030 (8th ed. 2004) (defining the "mootness doctrine" as "[t]he principle that American courts will not decide moot cases—that is, cases in which there is no longer any actual controversy").

330. *Murphy*, 455 U.S. at 481.

331. Lester, *supra* note 69, at 13-14.

9, 1980, and he was subsequently convicted on September 10 and November 10, 1980.[332] Since Hunt's claim became moot upon his conviction, he had "a legally cognizable interest in the result" for roughly three months.[333] Additionally, the Supreme Court did not issue its decision until March 2, 1982—over a year and a half after he filed his initial claim in federal court.[334] This timeframe presents the typical detainee with a significant challenge because such cases usually reach a disposition in an even shorter period of time.[335] Unlike the disposition in *Murphy*, few misdemeanor cases actually go to trial.[336] And most non-felony cases held past arraignment reach a disposition within a matter of days, usually by way of guilty plea.[337] For instance, as discussed, the median length of detention for non-felony defendants held at arraignment in New York City during one period was only five days.[338] Likewise, any constitutional challenge brought by this group would likely become moot in less than a week. Therefore, in order to mount a successful claim, the mootness issue will have to be properly tackled.

In any event, given the nature and circumstances of the case, *Murphy* was not an ideal vehicle for incorporation to begin with. First and foremost, Hunt was charged with several counts of first-degree sexual assault, in one case involving a child.[339] With strong public support for strict sex offender policies, especially when children are involved,[340] it is not surprising that the Supreme Court vacated the Eighth Circuit's decision in *Hunt v. Roth*.[341] While it is difficult to predict what cases the Supreme Court will select for review,[342] if it is going to make the Excessive Bail Clause applicable

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332. *Murphy*, 455 U.S. at 480.

333. *See id.* at 481-82.

334. *See id.* at 478.

335. *See* discussion *supra* Part.I.C.1.

336. *See, e.g.*, LISA LINDSAY, OFFICE OF THE CHIEF CLERK OF N.Y.C. CRIMINAL COURT, CRIMINAL COURT OF THE CITY OF NEW YORK: 2011 ANNUAL REPORT 5 (Justin Barry ed., 2012), *available at* http://www.nycourts.gov/courts/nyc/criminal/AnnualReport2011.pdf.

337. *See* Rapping, *supra* note 6, at 551.

338. PHILLIPS, *supra* note 146, at 17. The median (the midpoint, with an equal amount of cases above and below) detention length is a better measure than the mean duration of stay because a few very long, outlying detention stays skewed the results. *See id.*

339. *Murphy*, 455 U.S. at 479.

340. TRACY VELÁZQUEZ, VERA INST. OF JUSTICE, THE PURSUIT OF SAFETY: SEX OFFENDER POLICY IN THE UNITED STATES 7 (2008), *available at* http://www.vera.org/sites/default/files/resources/downloads/Sex_offender_policy_with_appendices_final.pdf.

341. Hunt v. Roth, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot sub nom.* Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam).

342. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Review and the Call for the*

to the states, the case will likely be less controversial.[343] For instance, unlike the offense in *Murphy*, consider that the top three arraignment charges in New York City, in any given year, are typically low-level misdemeanor offenses,[344] including: (1) criminal possession of marijuana in the fifth degree,[345] with a maximum allowable sentence of three months jail;[346] (2) criminal possession of a controlled substance in the seventh degree;[347] and (3) assault in the third degree,[348] each of which has a maximum allowable sentence of one year in jail.[349] Second, the substantive issue in *Murphy* was not exactly on point for the purposes of our inquiry. *Murphy* concerned the *right to bail* rather than the *right to be free from excessive bail* when bail has been set. This is an important distinction because the Court subsequently ruled that the Excessive Bail Clause does not guarantee an absolute right to bail.[350] Thus, if the Court had reviewed the merits of Hunt's case, it likely would have ruled that the exclusion of forcible sex offenses from being bailable would not violate the Federal Constitution. Having considered the issues presented by *Murphy*, it is appropriate now to turn to why it may be seen as a model for incorporation.

The *Murphy* opinion is instructive because it provides a guide for developing a potentially successful litigation strategy. Specifically, it alludes to at least three ways the mootness issue could be resolved. The first way would be to qualify under a recognized exception to the mootness doctrine for cases that are "'capable of repetition, yet evading review.'"[351] In order to qualify for this exception, two elements would have to be shown: "'(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same

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Views of the Solicitor General, 16 GEO. MASON L. REV. 237, 240 (2009).

343. *Compare* Gideon v. Wainwright, 372 U.S. 335, 336-37, 342 (1963) (incorporating assistance of counsel provision in a case involving breaking and entering with intent to commit a non-violent misdemeanor), *and* Robinson v. California, 370 U.S. 660, 676-78 (1962) (incorporating the cruel and unusual punishment provision in a case involving a state statute which made it a criminal offense to be addicted to the use of narcotics, a misdemeanor), *with* Hurtado v. California, 110 U.S. 516, 518, 538 (1884) (refusing to incorporate grand jury provision involving first degree murder, a violent felony) .

344. LINDSAY, *supra* note 340, at 31.

345. N.Y. PENAL LAW § 221.10 (McKinney 2012 & Supp. 2013).

346. *Id.* § 70.15.

347. *Id.* § 220.03.

348. *Id.* § 120.00.

349. *Id.* § 70.15.

350. *See* United States v. Salerno, 481 U.S. 739, 753-55 (1987).

351. *Murphy*, 455 U.S. at 482 (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam)).

complaining party would be subjected to the same action again.'"[352] In *Murphy*, the Court held that Hunt failed to satisfy the second prong because it was not reasonable to expect his convictions to be overturned on appeal, which would have put him "in a position to demand bail before trial" once again.[353] Similarly, in our case, a potential plaintiff would likely satisfy the first prong, while the second would remain a challenge. A pretrial plaintiff could, for instance, point to recidivism statistics to show the likelihood that they will be subjected to unaffordable bail conditions in the future.[354] While this may demonstrate that there is a "reasonable expectation" or "demonstrated probability" that the same controversy involving the same party would recur, the argument is rather unpersuasive. Consider whether an appellate judge would be sympathetic to the pretrial detainee who argues that he or she should be released on bail even though they are likely to reoffend. Thus, an alternative solution should be explored because it would probably gain more traction.

The second approach to avoiding the mootness issue would be to modify the type of remedy sought. For instance, in *Murphy*, because Hunt only sought declaratory and injunctive relief, and because there was a disposition in his case, the Court held that "even a favorable decision . . . would not have entitled [him] to bail."[355] If Hunt had sought monetary damages, in addition to declaratory and injunctive relief, his claim would likely have been reviewable because he would have "had a legally cognizable interest" in the outcome.[356] He could have, for example, received monetary damages even though he was serving a prison sentence. Similarly, even though a potential pretrial plaintiff typically would have taken a plea, he or she could still theoretically receive damages for the duration of detainment post-arraignment. Such damages could, for instance, be based on lost wages due to the pretrial detention. Therefore, a pretrial plaintiff in our case should seek monetary damages to maintain a reviewable claim.

The third way to surmount the mootness issue, as suggested in *Murphy*, is to bring a federal class action lawsuit. Had Hunt "sought to represent a class of pretrial detainees," he would not have had to worry about fulfilling the requirements needed to qualify for the

352. *Id.* (quoting *Weinstein*, 423 U.S. at 149).

353. *Id.* at 484.

354. *See* PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf ("Among nearly 300,000 prisoners released in 15 States in 1994, 67.5% were rearrested within 3 years.").

355. *Murphy*, 455 U.S. at 481-82.

356. *Id.* at 482.

exception to the mootness doctrine.[357] Furthermore, many § 1983 suits are brought as class actions, and even though such actions are "highly complex," they can be spoken of in general terms.[358] A class action lawsuit could potentially be brought by two groups of former non-felony defendants who were held on bail after arraignment: (1) those who eventually saw their cases get dismissed or end in acquittal, and (2) those who were convicted but were not sentenced to any jail time, not even for time served. Based on the 2003-2004 dataset for all arrests in New York City, there were nearly 2,000 cases that fit into one of these groups.[359] These groups of pretrial detainees could serve as potential plaintiffs because it is difficult to justify the deprivation of their physical liberty; that is, these cases did not lead to "negative outcomes," which means that there was either no criminal record or no jail sentences.[360] Thus, these "detained defendants served time in jail only because they were unable to post bail," often in amounts as low as $750.[361]

These potential plaintiffs would have to meet four prerequisites for class certification, as set forth in Rule 23 of the Federal Rules of Civil Procedure.[362] Those requirements are commonly "referred to as numerosity, commonality, typicality, and adequacy."[363] Without delving too far into an analysis of the likelihood of satisfying those prerequisites, it is enough to point out that the plaintiffs in *Floyd v. City of New York* had their motion for class certification granted.[364] *Floyd* is a federal class action lawsuit filed against New York City's Police Department challenging its controversial stop-and-frisk policy as a violation of the Fourth and Fourteenth Amendments.[365] Broadly speaking, given the similarity between the plaintiffs in *Floyd* and the putative plaintiffs in our case—i.e., New York City residents victimized by the discriminatory administration of the local criminal justice system—class certification certainly appears possible.

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357. *See id.*

358. NAHMOD, *supra* note 318, § 1:49.

359. The number of cases that fit into one of these groups is approximately 1,902. *See* PHILLIPS, *supra* note 146, at 14, 59. This figure was calculated by taking the number of cases that were held on bail from arraignment to disposition (3,963) and multiplying it by the combined percentage of detained defendants who were acquitted or whose cases were dismissed (22%) and who were convicted but not sentenced to jail (24%). *Id.* at 14 tbl.2, 59.

360. *Id.* at 59.

361. *Id.*

362. FED R. CIV. P. 23(a).

363. Floyd v. City of New York, 283 F.R.D. 153, 160 (S.D.N.Y. 2012).

364. *Id.*

365. *Id.*

C. The Substantive Challenge

Having considered the procedural challenge, it appears the only feasible vehicle for incorporation is a claim filed under § 1983. To start, and to maintain a reviewable claim, we have learned that putative plaintiffs should at least seek monetary damages and also represent a class of pretrial detainees. But once the issue reaches the Supreme Court, the Justices will want to know whether the Excessive Bail Clause specifically affords protection to indigent defendants who are unable to afford money bond even when set at a relatively low amount. What is more, some scholars believe that to interpret the Clause in a way that would provide a remedy to the indigent bail problem, an "impasse" would have to be overcome between its historical origins and its proposed contemporary application.[366] To do this, it has been argued that "the historical motivation and underlying purposes" of the Clause would have to be built upon so that the scope of the Eighth Amendment could be expanded "to accommodate present humanitarian values."[367] As will be shown, that impasse may not be that difficult to overcome.

1. The U.S. Bill of Rights

The origin of the Eighth Amendment's wording is well known.[368] On December 16, 1689, the English Parliament passed the English Bill of Rights, which reads in relevant part: "That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."[369] Less than one hundred years later, in the midst of the American Revolution, that familiar phrase made its first appearance on American soil.[370] In the spring of 1776, a convention of delegates in Virginia appointed George Mason to a committee to prepare a "Declaration of Rights."[371] His proposal included a verbatim copy of Section 10 to the English Bill of Rights,[372] and on June 12, 1776, it became part of Virginia's state

366. Foote, *Crisis in Bail: I*, *supra* note 13, at 999.

367. *Id.*

368. *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 545 (1952) ("The bail clause was lifted with slight changes from the English Bill of Rights . . . ."); Harmelin v. Michigan, 501 U.S. 957, 966 (1991) ("There is no doubt that the [English Bill] of Rights is the antecedent of [the Eighth Amendment's] text.").

369. English Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.), *reprinted in* 3 STATUTES AT LARGE, FROM THE FIRST YEAR OF KING JAMES I TO THE TENTH YEAR OF THE REIGN OF KING WILLIAM III, at 417 (London 1786); *see also* LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689 at 279 (1981).

370. *See* Foote, *Crisis in Bail: I*, *supra* note 13, at 983.

371. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 839-40 (1969).

372. *See id.* at 840.

constitution.[373] Twelve years later, James Madison, another Virginian, was charged with drafting amendments to add a bill of rights to the new Federal Constitution.[374] Madison substituted the declaratory term "shall not" for "ought not to,"[375] and then, after state ratification, that now familiar phrase went into effect as part of the U.S. Bill of Rights on December 15, 1791.[376]

To this day, however, the Clause remains "some of the most ambiguous language in the Bill of Rights."[377] It was only brought up once during the Congressional debates, where Samuel Livermore, Representative from New Hampshire, said:

> The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? . . . It lies with the court to determine.[378]

With only this, there is little direct evidence to establish what significance the Framers placed on the phrase. We know at least eight other states adopted the clause,[379] and that after the Federal Constitution was ratified, several state conventions proposed making amendments that would include the language of the English Bill of Rights in unaltered form.[380] Scholars have suggested that the language "was considered constitutional 'boilerplate,'" and thus its inclusion was unlikely to incite debate.[381] Furthermore, we know George Mason was reportedly "well versed in English constitutional history,"[382] and that prior to independence the colonists "had just spent over a decade declaring at every opportunity that all they sought were the 'rights of Englishmen.'"[383] Thus, the framers likely expected the Clause to mean what it had always meant to the English.[384]

Legal scholars agree that the excessive bail provision in the English Bill of Rights arose out of the struggle for power between the Stuart monarchs and the English Parliament during the seventeenth

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373. *Id.*

374. Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 127-28 (2004).

375. *Id.* at 128.

376. Duker, *supra* note 18, at 86.

377. Foote, *Crisis in Bail: I*, *supra* note 13, at 969.

378. 1 ANNALS OF CONG. 754 (1789) (Joseph Gales ed., 1834).

379. Granucci, *supra* note 371, at 840.

380. Claus, *supra* note 374, at 127 n.28-31 and accompanying text.

381. *See* Granucci, *supra* note 371, at 840.

382. *Id.*

383. Claus, *supra* note 374, at 130.

384. *See id.*

century.[385] The origins of the Excessive Bail Clause have been narrowly traced to three pieces of legislation that were enacted during that century: (1) the Petition of Right in 1627,[386] (2) the Habeas Corpus Act of 1679,[387] and (3) the English Bill of Rights in 1689.[388] In effect, the Clause evolved out of a "tit for tat" between the judges on the King's Bench who wanted to prove their allegiance to the Crown, and the English Parliament who wanted to protect individual liberty.[389] Each successive piece of legislation was a countermove, passed in response, or made as an equivalent retaliation to, the judge's previous move. Legal scholars use oft-cited cases to illustrate these abusive judicial maneuvers. For instance, the court's reasoning in *Darnel's Case*[390] is widely recognized as giving rise to the Petition of Right,[391] and the procedural delays as exemplified in *Jenkes' Case*[392] are credited with spurring the passage of the Habeas Corpus Act of 1679.[393] But unlike the previous two

385. Duker, *supra* note 18, at 58-66; Foote, *Crisis in Bail: I*, *supra* note 13, at 966-68; Wiseman, *supra* note 10, at 124-28.

386. Petition of Right, 1627, 3 Car. 1, c. 1 (Eng.), *reprinted in* 3 STATUTES AT LARGE, FROM THE FIRST YEAR OF KING JAMES I TO THE TENTH YEAR OF THE REIGN OF KING WILLIAM III, at 121 (London 1786).

387. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.), *reprinted in* 3 STATUTES AT LARGE, FROM THE FIRST YEAR OF KING JAMES I TO THE TENTH YEAR OF THE REIGN OF KING WILLIAM III, at 375 (London 1786).

388. English Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.), *reprinted in* 3 STATUTES AT LARGE, FROM THE FIRST YEAR OF KING JAMES I TO THE TENTH YEAR OF THE REIGN OF KING WILLIAM III, at 417 (London 1786).

389. *See infra* notes 391-93.

390. Proceedings on the Habeas Corpus, Brought by Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham, and Sir Edmund Hampden, at the King's-Bench in Westminster-Hall (1607), *reprinted in* 3 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 2 (London, R. Bagshaw 1809).

391. *Darnel's Case* involved the pretrial imprisonment of five knights by Charles I in 1627. SCHWOERER, *supra* note 369, at 89. The main issue in the case was whether the King could detain a person without showing cause. *Id*. The knights, detained for refusing to pay the King's forced loan, petitioned for writs of habeas corpus. *Id.* The defense argued that the pretrial confinement of the knights, without bail, violated the laws of the land. *See id.* The King's Bench, however, confirmed its allegiance to the Crown by ruling that without cause shown, the court had no basis for judgment and thus could not grant bail. *Id.* That following year, Parliament passed the Petition of Right, which declared the court's decision to be contrary to law, and further foreclosed the Crown's ability to imprison without cause. *See id.* Thus, pretrial release on bail could no longer be denied in the absence of cause shown. *See id.*

392. Proceedings Against Mr. Francis Jenkes, for a Speech Made by Him on the Hustings, at Guildhall, in the City of London, on Midsummer-Day (1676), *reprinted in* 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1189 (London, R. Bagshaw 1810).

393. *Jenkes' Case* involved the pretrial imprisonment of Francis Jenkes by Charles II in 1676. Foote, *Crisis in Bail: I*, *supra* note 13, at 967. Jenkes was arrested and imprisoned on June 27 after giving a public speech, which evidently caused a riot by calling for Charles II to be petitioned and to assemble a new Parliament. *Id.* Unlike

exchanges between the King's Bench and Parliament, scholars only give a brief account of the judicial practices that explicitly gave rise to the excessive bail provision in the English Bill of Rights of 1689.[394] Most legal scholars only note that the provision was inspired by the king's judges who "evaded . . . [the Habeas Corpus Act] by setting bail so high that the prisoner was unable to raise the sum, in effect, denying him the right to bail."[395] Some scholars have gone a bit further by citing, without more, the appointment of a committee by the House of Commons in 1680 that was charged with examining these judicial exploits.[396] Current scholarship may leave some wondering what the specific circumstances of these cases were. Whose pretrial freedom was denied in this way? What was

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Darnel's Case, the cause for Jenkes' detention was known: he was charged with "sedition." Duker, *supra* note 18, at 65. However, despite being bailable, judges exploited procedural loopholes to delay Jenkes' pretrial release. *See id*. For instance, on one occasion his bail was denied because his "case had not been calendared." *Id*. On another, his claim was dismissed because he had petitioned the wrong court. *Id.* Unable to find redress, Jenkes' imprisonment continued for several months until a judge insisted upon his release. *See id*. 65-66. Parliament responded to cases like Jenkes' by passing the Habeas Corpus Act of 1679, which foreclosed this judicial runaround by, among other things, imposing penalties on judges for noncompliance. Foote, *Crisis in Bail: I*, *supra* note 13, at 967.

394. *See* SCHWOERER, *supra* note 369, at 90-91; 6 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 214 (1926); 9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 118-19 (1926); *see also* Claus, *supra* note 374, at 138-39; Duker, *supra* note 18, at 66; Foote, *Crisis in Bail: I*, *supra* note 13, at 967-68; Wiseman, *supra* note 10, at 127.

395. SCHWOERER, *supra* note 369, at 90.

396. Claus, *supra* note 374, at 138-39 (quoting SCHWOERER, *supra* note 369, at 90); Wiseman, *supra* note 10, at 127 (quoting same). For an excellent and thoroughly researched account of the events and circumstances surrounding the appointment of this committee, see LOIS G. SCHWOERER, THE INGENIOUS MR. HENRY CARE, RESTORATION PUBLICIST (2001) [hereinafter SCHWOERER, MR. HENRY CARE]; *see also* Proceedings Against Lord Chief Justice Scroggs, *reprinted in* 8 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 163-224 (R. Bagshaw et al. eds., 1810) [hereinafter Proceedings Against Scroggs]. The relatively unknown circumstances of the committee's investigation concerned the judicial practices, attempted impeachment, and eventual removal of Sir William Scroggs as the Lord Chief Justice of the King's Bench. SCHWOERER, MR. HENRY CARE, at 129. In short, during the first half of 1680, the Crown used the bench to prosecute persons from the press who published anti-Catholic propaganda. *Id.* at 104-05. Later that same year, members of Parliament brought articles of impeachment against Scroggs for his involvement in these cases. *Id*. at 129-33; *see also infra* note 441 and accompanying text. Specifically, Scroggs refused to accept "sufficient bail" and effectively imprisoned those who were prosecuted. Proceedings Against Scroggs, at 184-91. As a result, the committee found that "the refusing sufficient bail in theses cases, wherein persons committed were bailable by law, was illegal, and a high breach of the liberty of the subject." *Id.* at 191. Interestingly, Scroggs' practice of refusing "sufficient bail" does not clearly explain the excessive bail language that appeared in the English Bill of Rights of 1689. Thus, attributing the appointment of this committee with giving rise to that language is perhaps misplaced.

considered "excessive" bail in these cases? Who were the judges?

Indeed, much of this scholarship has looked to the Clause's English heritage to resolve the controversy between whether the Clause was meant to provide an absolute right to bail or only protection from excessive bail.[397] Thus, most of these articles have not focused on the more narrow question of what constitutes excessive bail. Though, as we have seen, the Supreme Court ended this debate with its decision in *Salerno*, which made clear that the Clause only affords protection against excessive bail, and thus left it up to Congress to determine what offenses could be bailable.[398] Since then, there has been "relatively little written" on the Clause.[399] Of what little scholarship there is most, however, has either questioned the constitutionality of preventive detention,[400] or has "abandoned the Clause as a meaningful source of law" altogether.[401] Given that the Clause's scope has been narrowed to only prohibit the type of abuse that gave rise to its particular phrasing, there is a renewed need to uncover the specific events from which it arose.

This is important to our inquiry for at least two reasons. First, as mentioned earlier, reconciling the "modern concern for equal legal rights for the poor" with the "historical heritage" of the Clause presents "problems of the greatest complexity."[402] Specifically, it is believed that an "impasse" exists between those whom the provision was originally designed to protect (i.e., the Crown's political opponents) and those "with whom the law was unconcerned in those earlier centuries" (i.e., the indigent).[403] It has been suggested that these two groups are irreconcilable, and that to afford protection to the indigent would require "build[ing] upon the historical motivation and underlying purposes of the [E]ighth [A]mendment . . . to expand its scope to accommodate present humanitarian values."[404] To determine whether the Clause's original design hinged on this distinction—that the Clause afforded pretrial protection to the Crown's political opponents to the exclusion of the poor—we must uncover the specific cases that gave rise to its familiar phrase. Once this is done, we can see whether these cases express any concern for the poor.

Second, if this issue ever reaches the Supreme Court, the

397. *Compare* Duker, *supra* note 18, at 86-87 (arguing that the Clause was never intended to create an absolute right), *with* Foote, *Crisis in Bail: I*, *supra* note 13, at 987-89 (arguing that the Clause was meant to create an absolute right to bail).

398. *See* United States v. Salerno, 481 U.S. 739, 754-55 (1987).

399. Wiseman, *supra* note 10, at 148.

400. *See id.* at 148-49.

401. *Id.* at 148.

402. Foote, *Crisis in Bail: I*, *supra* note 13, at 998-99.

403. *Id.* at 999.

404. *Id.*

Justices will want to know what the drafters of the original provision had in mind; that is, what, more specifically, did they intend to prohibit.[405] For example, the Supreme Court has referred to the trial and punishment of Titus Oates in 1685,[406] for guidance in discerning what amounts to "cruel and unusual punishments,"[407] and thus prohibited by the Constitution. Similarly, under this approach to constitutional interpretation, known as the "paradigm case method,"[408] the Justices will want to interpret the Excessive Bail Clause "in light of [its] paradigm cases,"[409] which will provide "the basic building blocks,"[410] from which the text is applied "for the construction of doctrinal frameworks."[411] Even though this interpretive approach has previously been applied in an analysis of the Excessive Bail Clause, the focus of our inquiry requires a more targeted historical approach.[412] We cannot claim to know what the law on excessive bail "was," with regard to the poor, unless we reference the "countless parchment court records and case reports surviving only in manuscript [that] lie unread in archives."[413] To understand what the drafters intended to prohibit, and whether the Clause expresses concern for the poor, we must turn our attention to its adoption.

2. The English Bill of Rights

The passage of the English Bill of Rights in 1689 was the political and intellectual conclusion to the Glorious Revolution of 1688-89;[414] that is, the events that led to the overthrow of England's last Catholic monarch, James II,[415] who ascended to power less than four years earlier with the death of his brother, Charles II, in 1685.[416] James II's short-lived reign ended when he abdicated the throne in December 1688, soon after his son-in-law, Dutchman Prince William

405. *See infra* notes 406-411 and accompanying text.

406. Harmelin v. Michigan, 501 U.S. 957, 969-75 (1991) (Scalia, J., concurring) (discussing the trial of Titus Oates as the impetus for Cruel and Unusual Punishments Clause at length); *see also* Furman v. Georgia, 408 U.S. 238, 274 n.17 (1972) (Brennan, J., concurring) (per curiam); *Furman*, 408 U.S. at 318 n.13 (Marshall, J., concurring).

407. U.S. CONST. amend. VIII, cl. 3.

408. Wiseman, *supra* note 10, at 149 n.166 ("This approach most closely resembles Professor Jed Rubenfeld's 'paradigm case method' under an 'Application Understanding' of the Constitution.").

409. JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 16 (2005).

410. *Id.* at 18.

411. *Id.* at 16.

412. *See* Wiseman, *supra* note 10, at 148-154.

413. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 3 (2010).

414. SCHWOERER, *supra* note 369, at 3.

415. *James II*, *in* 8 ENCYCLOPEDIA OF WORLD BIOGRAPHY, at 207 (2d ed. 2004).

416. *See* SCHWOERER, *supra* note 369, at 109.

of Orange, a Protestant, invaded England on an invitation by seven members of the opposing political establishment to "Restor[e] the Lawes and Liberties of England."[417] Shortly thereafter, Prince William called for a Convention to provide "an opportunity to redress the nation's grievances and declare the rights of Englishmen."[418]

The Convention assembled on January 22, 1689.[419] A week later on January 29, the Convention took up the nation's grievances and the reaffirmation of individual rights.[420] Early in debate, Sir Richard Temple presented "three heads essentially necessary" for a reformed system of government.[421] While the first two heads concerned Parliament,[422] the third focused on changes primarily within the judiciary.[423] During debate on the third head, members shouted "suggestions for further legal and administrative reforms."[424] And it was here, that one Member of Parliament called out: "Extravagant bail."[425] After two days of debate, a committee was formed by motion of the assembly to identify the grievances and rights that "were absolutely necessary for securing the laws and liberties of the nation."[426]

On February 12, 1689, the committee presented their final report, titled the Heads of Grievances, to the full House.[427] The nineteenth grievance read, in relevant part: "The requiring excessive bail of persons committed in criminal cases, and imposing excessive fines and illegal punishments to be prevented."[428] The next day, on February 13, 1689, the Declaration of Rights was presented to Prince William and Princess Mary of Orange in a ceremony at "Whitehall Palace immediately before they were proclaimed king and queen of England."[429] The first section set out thirteen charges specifically against James II, and his "evil" judges, who attempted "to subvert . . . the lawes and liberties of England."[430] The tenth article charged

417. *Id.* at 105-09.

418. *Id.* at 135.

419. *Id.* at 171.

420. *Id.* at 183-84.

421. *Id.* at 192.

422. *Id.* at 192-93. The first head concerned the need for the regular and frequent assembly of Parliament and the second head was to give Parliament control of the military during times of peace. *Id.*

423. *Id.* at 194.

424. *Id.*

425. *Id.*

426. *Id.* at 197.

427. *Id.* at 203.

428. *Id.* at 300 (emphasis omitted).

429. *Id.* at 3.

430. SCHWOERER, *supra* note 369, at 19-20, 295. Historian Lois Schwoerer, author of *The Declaration of Rights, 1689*, notes that the Declaration of Rights "was read to Prince William and Princess Mary," and that this text was taken from "the

"excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects."[431] The second section of the document goes on to "announce" thirteen ancient rights, the tenth article of which states, in pertinent part: "[T]hat excessive bail ought not to be required."[432] Over the next ten months, the Convention Parliament worked on giving statutory force to the rights and liberties asserted in the Declaration of Rights, and on December 16, 1689, those rights became the law with the passage of the English Bill of Rights, which asserted that now familiar phrase: "[T]hat excessive bail ought not to be required."[433]

3. *Devonshire's Case* (1687)

The reign of James II is the obvious first place to look for the paradigm excessive bail case. The Declaration of Rights specifically charged James II, and his "evil" judges, with setting excessive bail, and thus, it comes as no surprise that legal bail scholars have attributed this practice to his reign; however, specific examples have not yet been given.[434] One notable case from this period, which is relatively unknown, is that of Lord William Cavendish, First Duke of Devonshire.[435] This case is important because it was cited in connection to the limitations imposed upon the judiciary by the English Bill of Rights.[436] The case was extracted from a publication of arguments made by Lord Delamere, a friend of Devonshire's, which

'presentation copy' held by the House of Lords Record Office." SCHWOERER, *supra* note 369, at 295. In addition, "save a few amendments," the language of the English Bill of Rights and the Declaration of Rights is nearly identical. *See id.* at 267. A distinction, however, should be made between these two documents because the English Bill of Rights actually gave "legal authority to all the provisions in the declaration." *Id.*

431. SCHWOERER, *supra* note 369, at 20, 296.

432. *Id.* at 21, 297.

433. English Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.), *reprinted in* 3 STATUTES AT LARGE, FROM THE FIRST YEAR OF KING JAMES I TO THE TENTH YEAR OF THE REIGN OF KING WILLIAM III, at 417 (London 1786); *see also* SCHWOERER, *supra* note 369, at 267-79.

434. 9 HOLDSWORTH, *supra* note 394, at 119 ("[James II's] judges did their best to evade [the Habeas Corpus Act] by requiring prisoners, entitled to bail, to find security in such excessive sums of money that they were unable to furnish it."); *see also* Duker, *supra* note 18, at 66 n.170 ("The judges took the action of setting excessively high bail in response to James II's influence.").

435. The Case of William Earl of Devonshire, on an Information in the King's Bench, for Assaulting Colonel Culpepper in the King's Palace (1687) (K.B.), *reprinted in* 11 A COMPLETE COLLECTION OF STATE TRIALS 1353-72 (T.B. Howell ed., 1811) [hereinafter *Devonshire's Case*]. Historian Lois Schwoerer, author of *The Declaration of Rights, 1689*, briefly notes *Devonshire's Case* in a chapter discussing the House of Lords. *See* SCHWOERER, *supra* note 369, at 106, 239-40.

436. SCHWOERER, *supra* note 369, at 240.

he addressed to the House of Lords.[437]

Devonshire and Delamere were prominent political figures, revolutionaries, and major proponents of the Declaration of Rights and English Bill of Rights.[438] Both were experienced politicians;[439] before inheriting their earldoms, they first served as members in the House of Commons where they actively criticized the Crown.[440] Devonshire promoted the passage of the Habeas Corpus Act, and along with Delamere, condemned the judiciary for abuse and corruption, together "carrying up to the Lords the articles of impeachment against one of them."[441] Later on, they both were involved in the conspiracy to overthrow James II, and advocated Prince William of Orange's ascension to the throne.[442] They both were involved in an uprising in the north,[443] had been imprisoned,[444] and Devonshire was actually one of the "Immortal Seven" who signed the now famous invitation to Prince William.[445] Significantly, Devonshire and Delamere served on the rights committee of the House of Lords that helped draft the Declaration of Rights in 1689, and it is presumed they played "an active part in championing the claim of rights in the committee and the full House."[446] It was through their "persistence and parliamentary skill," that they, among others, were able to advance the English Bill of Rights along to its eventual passage.[447] These men certainly qualify as some of the original framers of the Excessive Bail Clause, and it is their ideals and underlying principles that are of our concern.

On April 24, 1687, Lord Cavendish, earl of Devonshire, was involved in an altercation with a man at the king's palace who challenged his loyalty to the throne.[448] Devonshire, supposedly, then caned the man, "str[iking] him with his stick."[449] Three days later, on April 27, Devonshire appeared on a warrant before the King's Bench, and at arraignment, the Lord Chief Justice Wright set bail at £30,000.[450] Luckily, Devonshire could afford it.[451] To come up with

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437. *Id.* at 240-41.

438. *Id.* at 286.

439. *Id.* at 238.

440. *Id.* at 238-39.

441. *Id.* at 239. This was Sir William Scroggs, the Lord Chief Justice of the King's Bench. Proceedings Against Scroggs, *supra* note 396, at 211.

442. SCHWOERER, *supra* note 369, at 128, 240.

443. *Id.* at 238.

444. *Id.* at 239-40.

445. *Id.* at 240; *see supra* note 417 and accompanying text.

446. SCHWOERER, *supra* note 369, at 239.

447. *See id.* at 279-80.

448. *Id.* at 239-40.

449. *Devonshire's Case*, *supra* note 435, at 1354.

450. *Id.* As of 2011, the worth of the bail set was estimated to be somewhere

the amount, Devonshire was able to put down £10,000 of his own money, and on his behalf, four sureties posted £5,000 each, including his friend Lord Delamere.[452] That next morning, Devonshire reported to the King's Bench, and, having his appearance recorded, was allowed to remain free pending trial.[453] On May 6, misdemeanor charges were brought against him for "striking the . . . colonel in the king's palace."[454] Devonshire refused to plea, and argued that he could not be tried for a misdemeanor because of his parliamentary privilege.[455] The court, however, found Devonshire guilty, fined him £30,000, and imprisoned him until it was paid.[456]

Lord Delamere, whether by speech or otherwise, published the statement in 1694 that he had addressed to the House of Lords, in which he condemned the judges' actions in *Devonshire's Case*.[457] While Delamere's argument primarily focused on the excessiveness of the imposed fine, his reasoning can easily apply to the amount of bail that was set in this case; they were for the same amount and could potentially have had the same impact: confinement due to inability to pay.[458] Indeed, Delamere and Devonshire were political opponents to the Crown, but significantly, Delamere's argument expresses concern for the *poor*, where he stated:

> [B]ecause liberty is so precious in the eye of the law . . . the judges cannot impose a greater fine than what the party may be capable of paying immediately into court. But if the judges may commit the party to prison till the fine be paid, and withal set so great a fine as is impossible for the party to pay into court, then it will depend upon the judges pleasure, whether he shall ever have his liberty; because the fine may be such as he shall never be able to pay; and thus every man's liberty is wrested out of the dispose of the law, and is stuck under the girdle of the judges.
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> . . . [T]he nation has an interest in the person of every particular subject; for every man, either one way or other, is useful and serviceable in his generation. But by these intolerable fines the nation will frequently lose a member, and the person that is fined shall not only be disabled from doing his part in the commonwealth, but also he and his family will become a burden to

between £4.2 million (using real price index) and £60.7 million (using average earnings). *See Five Ways to Compute the Relative Value of a UK Pound Amount, 1270 to Present*, MEASURINGWORTH.COM, http://www.measuringworth.com/ukcompare/ (last visited February 5, 2014).

451. *See Devonshire's Case*, *supra* note 435, at 1354.

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.* at 1357.

457. *Id.* at 1353.

458. *See id.* at 1353-66.

> the land; especially if he be a man of no great estate, for the excessive charge that attends a confinement will quickly consume all that he has, and then he and his family must live upon charity. And thus the poor man will be doubly punished, first, to wear out his days in perpetual imprisonment; and secondly, to see himself and family brought to a morsel of bread.[459]

This is critical. While it was presumed that "concern for equal legal rights for the poor" was a relatively modern notion,[460] Lord Delamere's statement suggests otherwise. Although Delamere and Devonshire surely responded to the grievances they personally felt as political opponents to the Crown, Delamere likely envisioned a law that provided broader protection than just to the political elite. Given the underlying principles and concern expressed by his statement, it would be fair to say that Delamere, who was on the rights committee of the House of Lords that helped draft the Declaration of Rights in 1689, believed that the excessive bail provision, which first appeared therein, and then became the law in the English Bill of Rights ten months later, would protect the liberty interests of each person, poor and political opponents alike. Therefore, the Excessive Bail Clause could likely be interpreted to provide a substantive right to indigent defendants who are unable to afford money bail when set at a reasonably low amount.

III. THE RIGHT TO A BAIL DECISION BASED ON A RISK ASSESSMENT: FORMULATING A NEW CONSTITUTIONAL STANDARD

As we have seen, many criminal defendants cannot afford to post bail even at relatively affordable amounts—often as low as $1,000 or less. Given the low stakes involved in most cases, many defendants simply choose to plead guilty to get out of jail. Pretrial service programs can, however, provide a unique remedy to the indigent bail problem. Specifically, through a validated risk assessment, judicial officers would obtain the data they need to make informed pretrial release decisions. This would allow judicial officers to properly evaluate the flight risk each defendant poses, and whether or not release on recognizance is an option. Such programs can even supervise defendants who pose a low flight risk, but who can, under certain conditions, remain at liberty. This is important because release on recognizance, in combination with other conditions, is the only feasible solution for the indigent who, by definition, cannot afford to pay their bond. Nonetheless, the use of money bail has increased and the number of unconvicted inmates has continued to rise, underscoring the need for a judicial remedy.

One of the main inhibitors to universal reform is the lack of a

459. *Devonshire's Case*, *supra* note 435, at 1363-64.

460. Foote, *Crisis in Bail: I*, *supra* note 13, at 998.

mandate establishing adequate pretrial service programs in local jurisdictions. Interestingly, the Eighth Amendment to the U.S. Constitution states: "Excessive bail shall not be required."[461] This Note has considered the procedural and substantive issues a case brought under this amendment would have to overcome in order to reach the Supreme Court. Once there, the Court could provide a remedy. The Eighth Amendment should be interpreted to afford indigent defendants with the right to a bail determination based on a risk assessment, which would provide sufficient alternatives to financial release where appropriate. In other words, such an interpretation by the Court would likely require the creation of a pretrial service program in each local jurisdiction to help gather the information judicial officers need to determine whether a particular defendant could be released on his or her own recognizance. Moreover, the Court should also interpret the Clause in such a way as to provide judicial officers with the option of pretrial supervision for defendants who are not ideal candidates for release on recognizance, but could effectively, and safely, be supervised in the community.[462] To be sure, relief would not be immediate. But over time, judicial officers would learn to trust the data and research and hopefully begin to turn to and utilize these alternatives.

The Court will first have to consider whether the Excessive Bail Clause can be interpreted in this way, and then whether that interpretation can be applied against the states. Specifically, under the doctrine of selective incorporation, the Supreme Court will consider whether such a right is "fundamental to our scheme of ordered liberty" or whether it is "'deeply rooted in this Nation's history and tradition.'"[463] Although pretrial service programs are not necessarily rooted in our Nation's history or tradition, the language of the Clause is.[464] Moreover, one could argue that pretrial service programs have, since 1961, begun to take root, and are nevertheless "fundamental to *our* scheme of ordered liberty."[465] For instance, since the passage of the Pretrial Services Act of 1982, pretrial service programs have existed in each federal district court.[466] And on the state level, there are at least 300 jurisdictions that already have

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461. U.S. CONST. amend. VIII.

462. For a comprehensive argument in favor of implementing pretrial supervision in New York City as "an alternative to the existing choice of release on recognizance or money bail," see FELLNER, *supra* note 7, at 54.

463. McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010) (emphasis removed) (citation omitted).

464. *See supra* notes 244-45 and accompanying text.

465. *McDonald*, 130 S. Ct. at 3036.

466. Pretrial Services Act of 1982, Pub. L. No. 97-267, Sect. 2, 96 Stat. 1136 (codified at 18 U.S.C. § 3152).

pretrial service programs in place.[467] There are many ways the Supreme Court could interpret the Clause to provide this remedy, and two possibilities are briefly explored below.

A. Extending Current Bail Jurisprudence

The Supreme Court could extend its current bail jurisprudence to afford such a right.

In *Stack v. Boyle*, the Supreme Court stated that "[b]ail set at a figure higher than an amount *reasonably calculated* to [ensure the accused's presence in court] is 'excessive' under the Eighth Amendment."[468] Thus, under *Stack*, a pretrial release decision must be "reasonably calculated."

And in *United States v. Salerno*, the Court held that the "proposed conditions of release or detention [can]not be 'excessive' in light of the perceived evil."[469] Thus, under *Salerno*, it is reasonable to infer that the conditions of release or detention must be *proportional* to the risks presented by each defendant. In addition, the Supreme Court recognized in *Schilb v. Kuebel*, "the poor man's real hope and avenue for relief is . . . personal recognizance."[470] Taken together, these principles can fashion a workable solution.

Under *Stack*, the requirement that bail determinations be "reasonably calculated" could be extended to require pretrial service agencies in non-reform jurisdictions. One could argue that judicial officers in non-reform jurisdictions (which do not have pretrial services) are unable to make "reasonably calculated" pretrial release decisions.[471] The pretrial release decision involves a complex process. Given the enormous volume of cases that municipal courts handle, judicial officers are forced to weigh the risks that each particular defendant poses within a very short period of time. In some jurisdictions, this is done in less than three minutes.[472] To evaluate a defendant's flight risk, a judicial officer needs reliable information on the defendant's "community and family ties; employment status; housing; existence and nature of any substance abuse problems; and (if the defendant had been arrested before) record of compliance with conditions of release set on previous occasions, including any failures to appear."[473] A pretrial services program, however, would devote the resources needed to verify a defendant's information and conduct criminal history checks prior to his or her initial court appearance.

467. 2009 SURVEY, *supra* note 125, at 7.
468. 342 U.S. 1, 5 (1951) (emphasis added).
469. 481 U.S. 739, 754 (1987).
470. 404 U.S. 357, 369 (1971).
471. *See Stack*, 342 U.S. at 5.
472. SMITH & MADDAN, *supra* note 56, at 7.
473. MAHONEY ET AL., *supra* note 53, at 11.

Thus, the Supreme Court could hold that a judicial officer could only make a "reasonably calculated" pretrial release decision—even within three minutes—when it is based on a previously prepared risk assessment.

Under *Salerno*'s proportionality concept, reform jurisdictions could be required to provide pretrial supervision. One could argue that judicial officers in jurisdictions that do not provide pretrial supervision do not have proportional options available to them in light of the perceived risks that each indigent defendant presents.[474] In jurisdictions that do not offer pretrial supervision, judicial officers have no other option than to set bail when a defendant is not a good candidate for release on recognizance. In these jurisdictions, given the defendant's low flight risk, bail is set, and the defendant's pretrial liberty is effectively denied. In this case, the effective pretrial detention of a defendant, who presents a low flight risk, is not proportional to the "perceived evil" of nonappearance. On the other hand, a pretrial services program would be able to devote the necessary resources to provide both accountable and appropriate levels of supervision of those released on conditions that a judicial officer has deemed sufficient to ensure a defendant's future court appearance and community safety. Thus, the Court could hold that when a judicial officer has the option of using pretrial supervision, the "proposed conditions of release or detention [could] not be [deemed] 'excessive' in light of the perceived evil."[475]

B. Gideon's Army: Reasoning by Analogy

Finally, the Court's decision in *Gideon v. Wainwright*, and the emergence of public defender systems that followed, provides us with an excellent model for reform.[476] The Sixth Amendment to the U.S. Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[477] In *Gideon v. Wainwright*, decided in 1963, the Supreme Court interpreted this provision to require states to provide counsel for those charged with felony offenses but who could not afford a lawyer.[478] Since *Gideon*, the Court has greatly expanded the right to counsel and "what states *must* do as a matter of federal constitutional law."[479] But, "[b]y its [express] terms, the Sixth Amendment does not require" the states to provide the criminally

474. *See, e.g.*, *Salerno*, 481 U.S. at 744.

475. *Id.* at 754.

476. Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, *supra* note 22, at 53.

477. U.S. CONST. amend. VI.

478. 372 U.S. at 341-45.

479. NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, *supra* note 22, at 24 (emphasis in original).

accused with counsel.[480] And yet, the Supreme Court held that the right to counsel was "fundamental and essential to a fair trial."[481] Significantly, *Gideon* forced the states and other local jurisdictions to devise ways to meet its constitutional mandate.[482] As a result, new systems emerged to provide the right to counsel, giving birth to the varied indigent defense systems now seen across the nation.[483]

Similarly, the express terms of the Eighth Amendment do not require that a pretrial release decision be based on a risk assessment prepared by a pretrial services program, nor that such a program provide pretrial supervision.[484] But, the ability to make bail is "fundamental and essential [for] a fair trial" to even take place.[485] Otherwise, indigent defendants held on bail will continue to be coerced into taking guilty pleas in order to regain their freedom.

Moreover, the Court's ruling in *Gideon* provides for a flexible standard that allowed states to devise unique ways to provide the right to counsel. For instance, there are three primary indigent defense models: "public defender, contract counsel . . . [and] private assigned counsel."[486] For example, in jurisdictions with large urban populations, a public defender system may be ideal, whereas the contract counsel model is arguably more appropriate for smaller jurisdictions with limited resources. Likewise, a similar holding to the one in *Gideon* would give states the same flexibility they need to devise ways to make release on recognizance a realistic option for indigent defendants in every jurisdiction.

CONCLUSION

The discrimination against the poor inherent in the bail system must come to an end. Constitutional adjudication within the judicial system is the only way to remedy the indigent bail problem.[487] The Supreme Court has never explicitly held that the Excessive Bail Clause applies to the states, and even citations to the contrary likely amount to nothing more than dicta without the binding force of law.[488] The procedural challenges to incorporation can likely be overcome through constitutional litigation under §1983.[489] And the

480. *Id.* at 18.

481. *Gideon*, 372 U.S. at 340.

482. NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, *supra* note 22, at 22-25.

483. *See id.* at 53.

484. *See* U.S. CONST. amend. VIII.

485. *See* 372 U.S. at 340.

486. NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, *supra* note 22, at 53.

487. *See* discussion *supra* Parts I.B.2, I.D.

488. *See* discussion *supra* Part II.A.

489. *See* discussion *supra* Part II.B.

original intent for the Excessive Bail Clause expresses concern for the poor.[490] Overall, the Supreme Court should interpret the Excessive Bail Clause to afford indigent defendants the right to a bail determination based on a risk assessment that provides sufficient alternatives to financial release where appropriate.[491] This interpretation would finally provide the mechanism that judicial officers across the United States, especially in municipal courts, need to make informed pretrial release decisions. The indigent have a right to potentially obtain their pretrial freedom when bail is set and such an interpretation would help make that possibility realistic.

490. *See* discussion *supra* Part II.C.

491. *See* discussion *supra* Part III.