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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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