

Liman Workshop Rationing Access to Justice: Fines, Fees, and Bail

February 19, 2018 Bail, Detention, and Bonds

This is the first of two segments focused on the role played by money in deciding whether to detain individuals charged with crimes. We begin with an overview of the history of bail in the United States: the excerpts from Daniel Freed and Patricia Wald, who were at the forefront of creating the 1966 Bail Reform Act. As you read, reflect on how the concerns they were raising then sound like the concerns governing the current debate on bail. Look also at the names and affiliations of the supporters of reform.

A synopsis on the 1966 Act comes from John-Michael Seibler and Jason Snead at the Heritage Foundation; they summarize the 1966 Act and the retreat from its premises that culminated in the Bail Reform Act of 1984, reflecting the politics of the “war on crime” and the rising concern with “dangerousness.” The Supreme Court’s affirmation of the 1984 Act comes in *United States v. Salerno*, 481 U.S. 739 (1987).

We then turn to the current wave of reform. One concern is the impact of not making bail, as discussed in the excerpts by Paul S. Heaton, Sandra G. Mayson, and Megan T. Stevenson and by David Arnold, Will Dobbie, and Crystal S. Yang. That work dovetails with litigation arguing the unconstitutionality of bail, as exemplified by the decision of the Honorable Lee Rosenthal who, in the spring of 2017, concluded that the Harris County bail system is unconstitutional. As you read excerpts from that opinion and watch videos of the bail hearings that were in the record (link below) consider how you would fix the problems identified. We also include an optional reading of a report by Human Rights Watch, detailing the ways in which California’s bail system discriminates against the poor.

Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (Working Paper, Nat’l Conf. on Bail and Criminal Justice, May 1964)

John-Michael Seibler & Jason Snead, *The History of Cash Bail: Legal Memorandum*, THE HERITAGE FOUNDATION (Aug. 25, 2017)

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

Paul S. Heaton, Sandra G. Mayson & Megan T. Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017)

Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (Working Paper, University of Pennsylvania, Nov. 2016)

David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions* (Nat’l Bureau of Econ. Research, Working Paper No. 23421, May 2017)

ODonnell v. Harris County, 251 F. Supp. 3d 1052 (S.D. Tex. Apr. 28, 2017), *appeal filed*, No. 17-20333 (5th Cir.)

What It's Like To Be Poor at a Harris County Bail Hearing (Video of the Bail hearing of Andrew Goodsend), TEX. OBSERVER, YOUTUBE (Oct. 5, 2017), <https://yale.box.com/s/gfqfrdkmfwfy8s004b330ru5ete61dh3>

Optional

"Not in it for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People, HUMAN RIGHTS WATCH (Apr. 2017)