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Abstract

"[H]ere we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really? Come on . . . ."
– Supreme Court Justice Neil Gorsuch[1]

"[O]ur bail system—excuse the expression—is totally ass-backwards in every respect."
– New York Court of Appeals Chief Judge Jonathan Lippman[2]

The Excessive Fines Clause is one of the least developed clauses pertaining to criminal procedure in the Bill of Rights. In fact, the Supreme Court has only interpreted the Clause a few times in its entire history. Yet, on any given day, hundreds of thousands of people languish in jails without having been convicted of anything, because most of these people are unable to meet the bail amount a judge sets.

This Essay examines the surprisingly under-explored relationship between misdemeanor cash bail & pretrial detention and the Excessive Fines and Excessive Bail Clauses of the Eighth Amendment, using the Supreme Court's recent decision in Timbs v. Indiana*, 139 S. Ct. 682 (2019) as an inroad into the broader topic. The Supreme Court's recent decision in* Timbs *held that the Excessive Fines Clause applies to the states, thus*

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1. Tr. of Oral Arg. at 32, Timbs v. Indiana, 139 S.Ct. 682 (2019) (No. 17-1091).

2. Jillian Jorgensen, *New York State's Top Judge: Bail System 'Totally Ass-Backwards in Every Respect*,' OBSERVER (June 16, 2015, 8:39 PM), https://observer.com/2015/06/a-push-to-reform-backwards-bail-system-after-kalief-browders-death/.

constitutionally limiting governmental authority to impose economic sanctions. However, it may have done more than that. Since that decision, the line between a legitimate state interest and a punitive economic sanction in misdemeanor bail decisions is blurred, raising the interesting question of what makes a bail determination reasonable. This Essay sets out a few conceptions of the relationship between bail determinations and excessive fines, then shows how those conceptions flow naturally from the rationale of Timbs*. The Essay concludes that the Constitution demands more protections for the accused at bail hearings, and the current system in many states fails constitutional scrutiny*.

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I. INTRODUCTION

Imagine a prosecution in the state of Virginia for trespass, a misdemeanor.[3] The facts are as follows. John Creasy was too tired to drive home one night after work, and a friend who lived close by invited him over and instructed him to come up to the apartment when he arrived. However, on his way there, his phone lost power. He made it to the lobby of his friend's apartment shortly after midnight but was stopped by a police officer who was patrolling the area and spotted him walking into the building. The officer inquired what he was doing there so late, yet the officer did not believe the story and arrested John for criminal trespass.[4]

The only question in the case is legal: Did John Creasy, "without authority of law," go upon and remain on the "premises of [his friend's apartment building] after having been forbidden to do so."[5] After two nights in jail, he was brought before a judge. The entire hearing lasted four minutes. The prosecutor asked for release conditioned on posting of bail and, without inquiring into John's financial circumstances, the judge deemed him safe to return to the community but granted the prosecutor's request and set bail at $10,000—an amount well beyond John Creasy's ability to pay.[6]

Before remanding Mr. Creasy to jail, the judge cautioned him:

> Due to a significant backlog of cases due to the COVID-19 pandemic, your next appearance will not be for at least six weeks.

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3. Va. Code Ann. § 18.2-119 (West 2011) ("If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian, or the agent of any such person . . . shall be guilty of a Class 1 misdemeanor.").

4. *See, e.g.*, Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC Sept. 2017, https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ ("As prosecutors have accumulated power in recent decades, judges and public defenders have lost it. To induce defendants to plead, prosecutors often threaten "the trial penalty": They make it known that defendants will face more-serious charges and harsher sentences if they take their case to court and are convicted.").

5. Va. Code Ann. § 18.2-119 (2011).

6. Throughout this paper I will be referencing "cash bail," also known as "secured money bail." Cash bail is the process where a defendant pays either the full bond amount or a percentage of the bond amount into a registry of a court, which may be refunded at the end of the case if the defendant makes all appearances (whether or not found guilty). In most states, that percentage is 10%. *See* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J. F. 1098, 1114 (2019) (discussing the basic parameters of the secured money bail system). So, in this example, John would have to pay $1,000.00 to be released pending trial.

> Further, in my courtroom, defendants are not given counsel at bail hearings if they cannot afford to hire their own attorney. Moreover, I do not know when you will be appointed a lawyer, as there is serious demand for their services for cases that take precedent over misdemeanors. However, you can—and in fact, I encourage you—to work this out with the prosecutor sooner rather than later.

An hour later, the prosecutor called with a plea deal: "You can get out today, and only have to pay a fine of $150.00. However, if you take this to trial, I will seek the maximum sentence if convicted."[7] Mr. Creasy took the deal, even though his conduct could not possibly have constituted criminal trespass, as he had been invited by the owner. [8]

Putting all other possible issues to the side, did the judge violate Mr. Creasy's Eighth Amendment right to be free from punitive economic sanctions?[9]

The Supreme Court recently held that the Eighth Amendment's ban on excessive fines applies to the states.[10] In *Timbs v. Indiana*, Tyson Timbs pled guilty to two charges.[11] After he was sentenced, the State of Indiana sought to seize his Land Rover worth $42,000—a value which was roughly four times that of the $10,000 *maximum* criminal fine available.[12] The trial court held that forfeiture of the Land Rover "would be grossly disproportionate to the gravity of Timbs's offense, [and] hence unconstitutional under the Eighth Amendment's Excessive Fines Clause."[13] The Indiana Supreme Court reversed, holding that the Excessive Fines

7. *See* Yoffe *supra* note 4 (discussing the "trial penalty").

8. *See, e.g.*, Jed S. Rakoff WHY INNOCENT PEOPLE PLEAD GUILTY (explaining that prosecutorial discretion and the use of negotiation tactics often result in guilty pleas).

9. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

10. Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019). Before *Timbs*, the only rights not fully incorporated were "(1) the Third Amendment . . . ; (2) the Fifth Amendment's grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment's prohibition on excessive fines." McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010); *see also* Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989) (declining to decide whether the Excessive Fines Clause applies to the states).

11. *Timbs*, 139 S. Ct. at 686.

12. State v. Timbs, 84 N.E.3d 1179, 1181 (Ind. 2017).

13. *Timbs*, 139 S. Ct. at 686.

Clause did not apply to the states.[14] The Supreme Court granted certiorari and reversed, holding that the clause does apply to the states.[15]

Writing for the unanimous Court, Justice Ginsburg began by detailing how the Excessive Fines Clause traces its lineage to the Magna Carta, which guaranteed that an individual "shall not be [fined] for a small fault, but after the manner of the fault."[16] She proceeded to note how this protection was needed because, for centuries, authorities abused their power to impose fines.[17] The Court concluded by noting that protection from "punitive economic sanctions" by way of the Excessive Fines Clause was established to shield the people from governmental overreach.[18]

In light of the Court's recent decision in *Timbs*, this Essay explores whether and how the Excessive Fines Clause might apply to the most common misdemeanors, specifically pretrial detention for these misdemeanor offenses. This Essay argues that the system of pretrial detention in most states, as it currently operates, violates the Excessive Bail and Excessive Fines Clauses of the Eighth Amendment.[19] Rulings concerning bail and the process by which judges make such rulings have constitutional ramifications. The right to be free from punitive economic

14. *Timbs*, 84 N.E.3d at 1183–84 ("Given the lack of clear direction from the Supreme Court, we have a couple of options. One option is to ignore *McDonald* and follow the lead of some courts that have either applied the Excessive Fines Clause to challenged state action or assumed without deciding that the Clause applies. . . . A second option is to await guidance from the Supreme Court and decline to find or assume incorporation until the Supreme Court decides the issue authoritatively. We choose this latter . . . .").

15. *Timbs*, 139 S. Ct. at 687 (Timbs holding).

16. *Id.*

17. *Id.* at 688. Justice Ginsburg noted that the Excessive Fines Clause was created to "limit[] the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Id.* at 687 (quoting *United States v. Bajakaijan*, 524 U.S. 321, 327–28 (1998); *see also id.* at 694 (Thomas, J., concurring) (noting, for example, that the English Star Chamber "imposed heavy fines on the king's enemies").

18. *Id.* at 689; *see also id.* at 696 (Thomas, J., concurring) (noting that the Eighth Amendment is "an admonition" against "arbitrary reigns" by the government).

19. *See infra* Part IV. This applies both to states which use judicial discretion, where the bail is set by judges based on what they perceive to be sufficient; as well as states which use a fixed bail schedule, where a dollar amount is set for every crime ex-ante—so the only thing that matters is the nature of the offense charged. Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System*, 36–37 BUFF. PUB. INT. L.J. 29, 50–54 (2019). Additionally, eight states require cash-only bail, which means the defendant must pay the entire amount of bail in cash to be released before trial. *Id.* at 56–57.

sanctions and the prohibition against excessive bail in the pretrial detention context are coterminous—to enjoy one freedom, you must have the other. The Constitution prohibits jailing people simply because they are poor,[20] and the Supreme Court recently held that punitive economic sanctions are "excessive fines" for Eighth Amendment purposes.[21] These decisions offer important protections for misdemeanor defendants and implicate vital societal interests. So, when the state tells John Creasy "you can go home as long as you pay a lot of money," and then jails him when he cannot afford to pay—it violates both protections.[22]

In a world where nonviolent conduct—that which does not involve damage to property or injury to persons, and indeed is often trivial in nature, such as unbuckled seatbelts, a noisy muffler, or an unleashed dog—can land anyone in jail, judges abuse their discretion when they set bail so high that it constitutes a *de facto* detention order, rendering punishment before conviction.[23] And while pretrial detention is supposed to be the "carefully limited exception,"[24] pretrial detention is very much the norm, particularly for those charged with misdemeanors.[25] On any given day, nearly half a

20. Bearden v. Georgia, 461 U.S. 660, 672 (1983) (holding that courts must inquire into a person's reason for failure to pay court-mandated fines before revoking probation, so that indigent people are not unjustly incarcerated)

21. *Timbs*, 139 S. Ct. at 689.

22. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . ."). Pretrial detention not only impairs a fundamental right, but it also impairs the ability to secure numerous other fundamental rights. Stack v. Boyle, 342 U.S. 1, 4 (1951) (noting that the "traditional right to freedom before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (citation omitted)). Under the Excessive Fines Clause, a fine is excessive if it deprives an individual of his livelihood and he does not have the ability to pay it. *See* Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989) (Citing the Magna Carta in holding that fines may not be so large as to deprive a person of his livelihood). Similarly, under the Excessive Bail Clause, pretrial liberty is the norm, and bail is excessive if it arbitrarily keeps a person in jail because they have no ability to pay it. *See Stack*, 342 U.S. at 4–7 ("Bail set at a figure higher than an amount reasonably calculated to [provide adequate assurance that the accused will stand trial and submit to sentence if found guilty] is 'excessive' under the Eighth Amendment.").

23. *See* Florence v. Cnty. of Burlington, 566 U.S. 318, 346–47 (2012) (Breyer, J., dissenting); *see also* Nieves v. Bartlett, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part) (noting that "criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something.").

24. United States v. Salerno, 481 U.S. 739, 755 (1987).

25. Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of*

million people sit in jail simply because they have been *accused* of a crime and are too poor to pay bail.[26] For indigent misdemeanor offenders, bail operates as an unconstitutional excessive fine because it punishes poverty and deprives individuals of their livelihood. *Timbs* requires more procedural and substantive protections.

Part II outlines the Supreme Court's decisions involving bail. [27] Part III discusses the history of adopting the Excessive Bail and Excessive Fines Clauses.[28] Part III also outlines the influences that shaped the Framers in including these Clauses in the new constitutional framework and discusses the Clause's interpretation and application in early American History.[29] Part

Pretrial Detention, VERA INST. OF JUST. 2 (2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf. 2019 marked a 30% increase in the size of the pretrial detainee population over the last twenty years; yet over this same period, the number of convicted individuals declined, meaning that the entire net growth can be attributed to pretrial detainees. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie*, PRISON POLICY INITIATIVE n.3 (2020) (noting that the "not convicted" population of jails is the group driving jail growth), https://www.prisonpolicy.org/reports/pie2020.html; Zhen Zeng, *Jail Inmates in 2016*, U.S. DEP'T OF JUST. 4 (2018) (noting that at midyear 2000, nearly 350,000 individuals being held in jails were pretrial detainees), https://bjs.ojp.gov/content/pub/pdf/ji16.pdf; Zhen Zeng, *Jail Inmates in 2019*, U.S. DEP'T OF JUST. 5 (2021) (noting that at midyear 2019, nearly 490,000 individuals being held in jails were pretrial detainees), https://bjs.ojp.gov/content/pub/pdf/ji19.pdf; Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 501 n.15 (2012) (noting that over the last "two decades, local jails have housed more pretrial detainees than actual convicts"). Misdemeanors represent roughly 80% of all state criminal dockets. *See* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 2 (2018) [hereinafter NATAPOFF, PUNISHMENT WITHOUT CRIME].

26. Sawyer & Wagner, *supra* note 25. In the United States, there are nearly 11 million misdemeanor charges filed every year. NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 25, at 40–41;*cf.* JOHN S. GOLDKAMP, TWO CLASSES OF ACCUSED: A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE 21–22 (1979) (describing bail's impact on poor defendants); Robert Lewis, *No Bail Money Keeps Poor People Behind Bars*, WNYC NEWS (Sep. 19, 2013), https://www.wnyc.org/story/bail-keeps-poor-people-behind-bars/ (highlighting how the number of pretrial detainees hovers around 50,000 individuals in New York City alone annually); Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE 1 (2016), https://www.prisonpolicy.org/reports/DetainingThePoor.pdf. Because the right to pretrial freedom from physical restraint is fundamental, the Constitution constrains when the state can intrude on such a fundamental right—including by way of unaffordable cash bail. *See* U.S. v. Salerno, 481 U.S. 739, 751 (1987) (acknowledging that an individual has a "strong interest in liberty" from pretrial physical restraint but holding that pretrial detention does not violate a fundamental right).

27. *Infra* Part II.

28. *Infra* Part III.

29. *Infra* Part III.

IV argues that the Eighth Amendment prohibits excessive cash bail as applied to poor individuals in misdemeanor cases.[30] Thus, cash bail may be imposed only in the rare circumstances which require it after an adequate assessment is taken by the presiding judge. Part V concludes that the Constitution affords more protections for individuals accused of misdemeanors, and judges must take additional steps before imposing bail.[31]

II. EIGHTH AMENDMENT CLAIMS BEFORE THE SUPREME COURT: A BRIEF REVIEW

The concept and application of bail and pretrial release have historical roots dating back long before this great nation was formed.[32] In more recent times, however, the practice has gone astray, resulting in a system of abuse

30. *Infra* Part IV.

31. *Infra* Part V.

32. Medieval England had bail as a mechanism to free "untried prisoners." *See* DANIEL J. FREED & PATRICIA M. WALD, BAIL IN THE UNITED STATES 1 (1964); *see also* Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329 (1982); Sistrunk v. Lyons, 646 F.2d 64, 68 (3d Cir. 1981) (noting that the "right to be free from excessive bail . . . belongs to those 'fundamental principles of liberty and justice which lie at the base of our civil and political institutions.'" (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932))); Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 967–75 (1965). Massachusetts was the first territory in the United States to recognize a right to bail in its Body of Liberties, dating to 1641, which held: "No mans person shall be restrained or imprisoned . . . before the law hath sentenced him thereto." Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, 10 ALA. C.R. & C.L. L. REV. 115, 118 (2019) (alteration in original); *see also* Timothy R. Schnacke et al., The History of Bail and Pretrial Release, PRETRIAL JUST. INSTITUTE 4 (2010), https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-Pre-TrialRelease-PJI_2010.pdf. The United States eventually adopted a surety system from these roots where a respectable person would take personal responsibility for the accused and promise to pay the required money if the individual failed to show up. Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, NATIONAL INSTITUTE OF CORRECTIONS 25 (2014), https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf; *see also* Connelly & Linthorst, *supra* note 32, at 118–19; Schnacke et al., *supra*, at 4–5. States would take a liberal approach to the right to bail and pretrial release in most instances—some going so far as to have a presumption that defendants would be released pending trial. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 531–32 (1983); *see also Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 967 (1961). Historically, this right has acted as a protection from governmental overreach. *See* Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 916–20. These protections became known as the Consensus Right to Bail. *Id.* at 921–23.

with little oversight and serious societal impacts. Depending on the state, courts impose secured cash bail through two mechanisms: judicial discretion and fixed bail schedule.[33] For states that use a fixed schedule, a dollar amount is set for every crime ex-ante, thus the only thing that matters is the nature of the offense charged.[34] For states that use judicial discretion, judges set the bail based on what they perceive to be sufficient.[35] There are also eight states which require cash-only bail, meaning that, in these states, the defendant must pay *the entire amount* of bail in cash to be released before trial.[36]

Over the years, the Supreme Court has given very little attention to bail. In fact, the first time the Supreme Court addressed bail was over one hundred fifty years after the Eighth Amendment was ratified, in *Stack v. Boyle*.[37] In *Boyle*, a dozen individuals were charged with being Communist sympathizers.[38] The lower court judge set bail at $50,000—the equivalent of over $500,000 today.[39] The accused individuals sought to reduce the amount, arguing the bail amount violated the Excessive Bail Clause when taking account of their financial abilities at the time.[40] The District Court for the Southern District of California denied the applications and the Ninth

33. *See, e.g.*, O'Donnell v. Harris Cnty., 892 F.3d 147, 153–54 (5th Cir. 2018) (fixed bail schedule); Stack v. Boyle, 342 U.S. 1, 6 (1951) (judicial discretion).

34. Johnson, *supra* note 19, at 50–51 (discussing how judges in states with fixed bail schedules often fail to consider factors like the defendant's ability to pay). *But see O'Donnell*, 892 F.3d at 153 (explaining that, even with a fixed bail schedule, judges in Texas "are legally proscribed from mechanically applying the bail schedule to a given arrestee," and that "the Texas Code requires officials to conduct an individualized review based on five enumerated factors . . . .").

35. Connelly & Linthorst, *supra* note 32, at 125–26 (discussing secured money bail's contours).

36. Johnson, *supra* note 19, at 56–57. *But see Stack*, 342 U.S. at 5 ("the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."); Trujillo v. State, 483 S.W.3d 801, 805 (Ark. 2016) ("In Arkansas, like Wyoming, we have held that the purpose of bail is to ensure the presence of the defendant."); Saunders v. Hornecker, 344 P.3d 771, 780 (Wyo. 2015) ("This Court has stated that the *purpose of bail* in Wyoming is to ensure the defendant's presence to answer the charges without excessively restricting the defendant's liberty pending trial."); Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 849–50 (2016).

37. 342 U.S. 1 (1951).

38. *Id.* at 3.

39. *Id.*

40. *Id.*

Circuit affirmed the denial.[41] The Supreme Court disagreed.[42] The Court vacated the bail amount, concluding that any amount of bail "set at a figure higher than an amount reasonably calculated to [give adequate assurance to the individual that he will stand trial and submit to sentence if found guilty] is 'excessive' under the Eighth Amendment."[43] The Court gave the following reason: "[The] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[44] That presumption, the Court noted, will mean that generally the individual will be entitled to pretrial freedom, which will permit "the unhampered preparation of a defense . . . and serv[ing] to prevent the infliction of punishment prior to conviction."[45] Just a few months later, the Court revisited bail, in *Carlson v. Landon*.[46] *Carlson* dealt with the issue of whether individuals who pose a flight risk could be held without bail at all.[47] The Court asserted for the first time that the Eighth Amendment only requires bail not to be excessive—it does not guarantee bail in all circumstances.[48] Individuals charged with certain crimes—such as capital offenses—need not be granted bail at all.[49] Yet if they are granted bail, it cannot be excessive—and excessiveness is *to be determined on an individualized basis*.[50]

The last time the Court spoke on bail was over three decades ago in *United States v. Salerno*.[51] In *Salerno*, Anthony Salerno, boss of the Genovese crime family, was indicted on a slew of serious charges, including

41. Stack v. Boyle, 192 F.2d 56, 57 (9th Cir. 1951).
42. *Stack*, 342 U.S. at 7.
43. *Id.* at 5.
44. *Id.* at 4.
45. *Id.*
46. 342 U.S. 524 (1952).
47. *Id.* at 526–28.
48. *Id.* at 545.
49. *Id.*
50. *See Stack*, 342 U.S. at 5.
51. 481 U.S. 739 (1987). In 1984, Congress supplemented these cases when it enacted the Bail Reform Act of 1984, which added the determination of dangerousness to be included in the inquiry to setting bail. 18 U.S.C. § 3142(c). Congress was worried about "the alarming problem of crimes committed by persons on release," and thus wanted to allow judges to use their discretion in determining bail. S. REP. NO. 98-225, at 3 (1983).

racketeering.[52] At issue in *Salerno* was whether danger to the community alone provides a legitimate reason for denying bail.[53] The Court concluded that the Constitution does not prohibit an arrestee from being detained pending trial "if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'"[54]

These three cases highlight the Court's view that pretrial release is an important liberty interest.[55] The only reasons to detain someone before trial is if they are a flight risk, pose a danger to society or the community, or some combination of the two.[56] Wealth-based pretrial detention, however, does not rest on either of these reasons, and thus this practice fails to find constitutional grounding.

III. NAVIGATING THE BRIDGE OVER TROUBLED WATERS: THE EIGHTH AMENDMENT

A. History of The Excessive Bail Clause

It is hard to understand contemporary debates about bail without going further back through the history of what would become the Eighth Amendment. The Excessive Bail Clause traces its origins all the way to the Magna Carta, the foundation of English law.[57] After adopting the Magna

52. *Id.* at 743.

53. *Id.* at 744–45.

54. *Id.* at 741 (quoting 18 U.S.C. § 3142 (alteration in original)).

55. *Cf.* Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 780–88 (9th Cir. 2014) (holding that Arizona's Proposition 100, which categorically denied bail to any undocumented persons awaiting a felony trial, violated the liberty interest of the substantive due process clause); Schultz v. State, 330 F. Supp. 3d 1344, 1358 (N.D. Ala. 2018) ("Criminal defendants have a constitutional right to pretrial liberty . . . absent extenuating circumstances like flight risks or dangers to the community, the State may not incarcerate a defendant pretrial.").

56. *See, e.g.*, *Schultz*, 330 F. Supp. 3d at 1358.

57. *See* Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 270–71 (1989) (noting that the Magna Carta established that fines may not be so large as to deprive a person of his livelihood); English Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.)("That excessive bail ought not to be required . . . ."); Foote, *supra* note 32, at 965–66; CHARLES PETERSDORFF, A PRACTICAL TREATISE ON THE LAW OF BAIL IN CIVIL AND CRIMINAL PROCEEDINGS 483 (1824); 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, 127 (2009) [hereinafter Wiseman, *Bail Reform Act*].

Carta, Parliament sought to "implement the promise of the famous 39th chapter of Magna Carta that 'no freeman shall be arrested, or detained in prison . . . unless . . . by the law of the land.'"[58] For the next few centuries, further developments established firm protections for bail.[59]

Routine abuses occurred because the common law of 1689 afforded courts very broad discretion in setting bail.[60] These abuses led to the enactment of the Excessive Bail Clause in the English Bill of Rights.[61] The clause sought to firmly close loopholes which allowed judges to circumvent the will of Parliament—that pretrial release is the norm save for exceptional circumstances.[62] [63]

Soon after the English Bill of Rights became law, the courts of the King's Bench began to examine whether individuals had the ability to post bond.[64] Commentators noted that to be reasonable, bail must consider the financial ability of the individual.[65] This history shows that policing abusive pretrial imprisonment through the Excessive Bail Clause was a fundamental

58. Foote, *supra* note 32, at 965–66 (alteration in original).

59. FREED & WALD, *supra* note 32, at 1; Foote, *supra* note 32, at 966–68. Difficulties in securing release on bail led Parliament to create the Petition of Right of 1628. Foote, *supra* note 32, at 967. However, there was no strong mechanism to force judges to set timely bail and release hearings. Foote, *supra* note 32, at 967. This led to Parliament enacting the Habeas Corpus Act of 1679, which could force the setting of bail hearing. Foote, *supra* note 32, at 967. However, this led to judges setting bail at unreasonably high levels so that individuals would remain detained. LOIS SCHWOERER, THE DECLARATION OF RIGHTS, 1689, 106, 239–40 (1981).

60. Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 122 (2004).

61. COLIN RHYS LOVELL, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 388–94 (1962); SCHWOERER, *supra* note 59, at 87, 90–92; Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 HARV. J. L. & PUB. POL'Y 35, 37 (2008); Foote, *supra* note 32, at 967. As a drafter of the English Bill of Rights described it, judges set bail so high "to elude the Benefit of the Laws made for the Liberty of the Subjects," that they were, in effect, "denying him the right to bail." English Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.); SCHWOERER, *supra* note 59, at 90.

62. *See generally* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34–66 (1977).

63. Claus, *The Antidiscrimination Eighth Amendment*, *supra* note 60, at 122.

64. *See, e.g.*, Daw v. Swaine (1670) 88 Eng. Rep. 1195 (KB) (action for excessive bail); Neal v. Spencer (1698) 88 Eng. Rep. 1305 (KB) (collecting cases that note the diversity of bail amounts given for the same offense in an action for excessive bail); Parker v. Langley (1712) 88 Eng. Rep. 667 (QB) (action for excessive bail); King v. Bowes (1787) 99 Eng. Rep. 1327(KB) (allowing for a "lessening" of bail, as there may be "difficulty" in procuring the sums).

65. WILLIAM HAWKINS, A TREATISE OF PLEAS OF THE CROWN 138–39 (8th ed.1824); *see also* JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 88–89 (1819).

aspect of liberty the English sought to protect.[66]

The clause was adopted almost verbatim in the American Bill of Rights.[67] It was a non-controversial provision that sparked almost no debate.[68] American history shows that the founders adopted the English understanding of the clause.[69] For federal cases, The Judiciary Act of 1789 conferred rights to bail proceedings in all federal criminal cases.[70] The practice in the colonies was either very similar or even more in favor of the pretrial release of the individual.[71] Judges had little room to abuse their discretion to set bail. When they did abuse their discretion in setting bail, it was viewed as objectively excessive.[72]

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66. Michael S. Woodruff, *The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation*, 66 RUTGERS L. REV. 241, 290–92 (2013).

67. *Compare* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."), *with* English Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.) (declaring that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); *see also* Wiseman, *Bail Reform Act*, *supra* note 57, at 127.

68. Only one delegate, Representative Samuel Livermore, spoke on it, saying, "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?" 1 Annals of Cong. 782 (1789) (Joseph Gales ed., 1834). The lack of controversy may have stemmed from the well-understood principle of pretrial release dating back centuries and present in colonial America. Foote, *supra* note 32, at 966–75; *see also* Duker, *supra* note 62, at 33–60.

69. *Ex parte* Milburn, 34 U.S. 704, 710 (1835); United States v. Lawrence, 4 D.C. 518 (1835); United States v. Brawner, 7 F. 86, 88–89 (W.D. Tenn. 1881); Jones v. Kelly, 17 Mass. 116, 116–17 (1821); Whiting v. Putnam, 17 Mass. 175, 175–78 (1821).

70. Judiciary Act of 1789, § 33, 1 Stat. 73, 91 (1789). It said that, for a noncapital defendant, "bail shall be admitted," and for a capital defendant, bail *may* be admitted. *Id.*

71. The Virginia and Massachusetts bills of rights prohibited excessive bail. VA. CONST. art. I, § 9 ("[E]xcessive bail ought not to be required"); MASS. CONST. art. XXVI ("[N]o . . . court of law, shall demand excessive bail"). Pennsylvania and North Carolina used a definition that many 19th century state constitutions copied: "All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great." PA. CONST. OF 1776, § 28; N.C. CONST. OF 1776, §XXXIX.

72. SCHWOERER, *supra* note 59, at 87. One important feature to note is many colonial charters guaranteed that individuals would enjoy the same liberties as Englishmen, and these charters would be adopted when the colonies became states. Hermine Herta Meyer, *Constitutionality of Pretrial Detention, I*, 60 GEO. L.J. 1139, 1163 (1972) (noting how state constitutions followed the pattern of English law). Another feature of these bail clauses was that they were inalienable rights. Hegreness, *supra* note 32, at 912. For all crimes that were not punishable by death, the right to bail was automatic. *Id.*; *cf.* Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 422 (2016) [hereinafter Wiseman, *Fixing Bail*] (observing some of the problems of the modern cash bail system including the incentives judges have to detain defendants).

One cannot properly understand or interpret this right to reasonable bail without considering its origins and historical interpretation. In *Boyle*, the Court described a "right to bail" as the "traditional right to freedom before conviction," and "[t]he right to release before trial conditioned upon the accused's giving adequate assurance."[73] Although a court may impose bail conditions, the primary function of bail is to allow for pretrial release, while making certain the individual accused of a crime will appear in court when required.[74] Historically, when people were charged with misdemeanors, they had the right to release.[75] For bail to be reasonable, the calculation must be based on the character and circumstances of each individual who comes before the judge—including their financial abilities.[76]

B. History of The Excessive Fines Clause

Similar to the right to be free from excessive bail, the history of the right to be free from an excessive monetary sanction—which comes after one is convicted—dates back to the Magna Carta.[77] The Magna Carta was created to "reduce arbitrary royal power."[78] The Magna Carta treated a fine that would impoverish an individual as *per se* disproportionate.[79] Parliament confirmed and restated these principles many times during the thirteenth,

73. Stack v. Boyle, 342 U.S. 1, 4 (1952).

74. *Id.* at 4–5; United States v. Salerno, 481 U.S. 739, 752–54 (1987).

75. Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 863–64 (2018) [hereinafter Baughman, *History*]. The founders intended the Excessive Bail Clause to secure to American citizens the entire right as it existed in the English Bill of Rights and as the Framers understood it. *See* A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 205–10, 233–49 (1968) (tracing the origins of the Bill of Rights to the Magna Carta); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446–47, 467–68 (Jonathan Elliot 2d ed., 1836) (statements of Patrick Henry and Edmond Randolph to Virginia Convention).

76. *Stack*, 342 U.S. at 5, 5 n.3 ("the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant," including "the financial ability of the defendant to give bail"). Pretrial release upholds the presumption of innocence. *Id.* at 4.

77. The Court has referred to this as the "foundation of our English law heritage." Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

78. Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc., 492 U.S. 257, 270 (1989); JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 99–103 (2005); GOLDWIN ALBERT SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 129, 131 (1955).

79. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 321 (2014).

fourteenth, and fifteenth centuries.[80] Yet despite the guarantees, those with power continued to impose unaffordable fines on individuals—for reasons including harassment—and would detain those unable to pay.[81]

After the overthrow of the last Stuart king, Parliament sought to reaffirm the Magna Carta's protection from excessive fines once and for all. When Parliament adopted the English Bill of Rights, it included an Excessive Fines Clause which it crafted to prevent English from judges abusing their power.[82] When crafting the provision, the drafters made clear that they sought to curb the pattern of imposing excessive fines—and doing so in an "arbitrar[y], illegal[], and [biased]" manner."[83] As one commentator put it, "[t]he great object [of the Excessive Fines Clause was that it ensured in] no case could the offender be pushed absolutely to the wall: his means of livelihood must be saved to him."[84]

The earliest application of the excessive fines provision came less than a year after its adoption, where the House of Lords reversed an excessive fine the Court of King's Bench had imposed on Lord Devonshire.[85] The House of Lords declared:

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80. *See* FAITH THOMPSON, MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629 10 (1948) (noting that Parliament reaffirmed the principles of the Magna Carta at least thirty-seven times during the time prior to adoption of the English Bill of Rights); *see also* Le Gras v. Bailiff of Bishop of Winchester, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 THE PUBLICATIONS OF THE SELDEN SOCIETY 3 (1934).

81. THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625–1660 210–12 (S. Samuel Rawson Gardiner ed., 3rd ed. 1906). The excessive fines judges imposed with impunity during the reigns of several monarchs, from Henry VII to Charles II, led to Parliament seeking to make a lasting change. 2 LORD MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 3 (1848).

82. SCHWOERER, *supra* note 59, at 91.

83. SCHWOERER, *supra* note 59, at 91. The drafters further provided three examples of large fines imposed upon disfavored individuals, in amounts so high that no individual could pay. 9 H.C. Jour. 689–90 (1680) ("[I]t is the Opinion of this Committee, That the Court of King's Bench, in the Imposition of Fines on Offenders of late Years, hath acted arbitrarily, illegally, and partially"). As one scholar has found, these individuals were not being fined for anything they did, but for who they were. Claus, *The Antidiscrimination Eighth Amendment*, *supra* note 60, at 139; *see also* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 287 (2d ed. 1914); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373 (1769) ("[I]mprisonment . . . is better than an excessive fine, for [an excessive fine] amounts to imprisonment for life.").

84. MCKECHNIE, *supra* note 83, at 287.

85. 11 A COMPLETE COLLECTION OF STATE TRIALS 1353–72 (T.B. Howell ed., 1811); State v. Driver, 78 N.C. 423, 428 (1878).

> [T]hat the fine of 30,000 pounds imposed by the Court of King's Bench, upon the Earl of Devon, was excessive and exorbitant, against Magna Charta, the common right of the subject and the law of the land [partly because] the Judge 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 . . . thus every man's liberty is wrested out of the dispose of the law and is stuck under the girdle of the Judges.[86]

The ability to pay was an essential element in determining what constitutes "excessiveness."[87]

These English principles became deeply rooted in U.S. constitutional thought and shaped the Eighth Amendment.[88] Virginia became the first state to adopt the language from the English Bill of Rights in its Virginia Declaration of Rights of 1776.[89] The drafters of the Constitution adopted the Eighth Amendment almost verbatim from the Virginia Declaration of Rights.[90] Under these provisions, an individual had to be able to save his or her "contenement";[91] in this way, the Virginia Declaration of Rights prevented a judge from imposing fines so severe as to deprive an individual the ability to secure the necessities of life.[92]

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86. *Driver*, 78 N.C. at 428.

87. SCHWOERER, *supra* note 59, at 91; *see also* BLACKSTONE, *supra* note 83, at 373; Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 849 (2013).

88. Colgan, *supra* note 79, at 335 (finding that "the idea of saving defendants from persistent impoverishment was a guiding principle reaching back to the days of the Magna Carta and the English Bill of Rights, and enduring through the ratification of the Eighth Amendment").

89. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

90. Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989); Ingraham v. Wright, 430 U.S. 651, 664 (1977); HOWARD, *supra* note 75, at 205–07; 1 THE PAPERS OF GEORGE MASON 71 (Robert Rutland ed. 1970). The Framers of the Eighth Amendment were well aware of the reasonings for the adoption of the Excessive Fines Clause in the English Bill of Rights.

91. *Timbs*, 139 S. Ct. at 687.

92. 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 186 (1798); 2 HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND FROM THE ACCESSION OF HENRY VII TO THE DEATH OF GEORGE II 34 (8th ed. 1867); THOMAS MADOX, THE HISTORY AND ANTIQUITIES OF THE EXCHEQUER OF THE KINGS OF ENGLAND IN TWO PERIODS 678 (1711); Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1259–60 (1987); MCKECHNIE, *supra* note 83, at 287–93; McLean, *supra* note 87, at 854–74. Blackstone's observations also provide helpful insight. He noted the "reasonableness of fines in

Other courts and commentators of the era similarly reflected this understanding. For example, in 1799 the Virginia Supreme Court of Appeals explained that any "fine or amercement ought to be according to the degree of the fault and the estate of the defendant."[93] Commentator Thomas Cooley recounted in his influential constitutional treatise that the Excessive Fines Clause requires a fine to "have some reference to the party's ability to pay it."[94] Lawmakers also reiterated such an understanding.[95]

Even though the Court has rarely spoken on the Excessive Fines Clause, it has observed that the Magna Carta limited the power of the government to impose punitive fines.[96] In *Timbs*, the most recent Supreme Court case to reference the clause, the Court also cited with approval a statement from Blackstone that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear."[97] The Court then went on to instruct how to determine if a fine is excessive, beginning with determining whether the fine acts as punishment.[98] If the answer to this first question is yes, the next focus turns on if the fine is "grossly disproportional to the gravity of a defendant's offense."[99] Thus, the essence of the constitutional inquiry lies in the principle of proportionality—the fine must bear some relationship to the gravity of the offense.[100] The Court's citations

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criminal cases has also been usually regulated by the determination of magna carta, concerning amercements for misbehavior [he describes how the law requires] that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear . . . ." BLACKSTONE, *supra* note 83, at 372. He then elaborated, explaining how the "ancient practice was to enquire by a jury, when a fine was imposed upon any man, '*quantum inde regi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum*'" which translates to how much from thence he be able to pay the King annually, having besides a maintenance for himself, his wife and children. BLACKSTONE, *supra* note 83, at 373.

93. Jones v. Commonwealth, 5 Va. 555, 557 (1799).

94. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 328 (1st ed. 1868).

95. McLean, *supra* note 87, at 884 (noting how one lawmaker stated a fine a fine must "be determined from the condition of the man how much he could pay without touching the sustenance of his wife and children.").

96. Browning-Ferris Indus. Of Vermont v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989); *see also Bajakajian*, 524 U.S. at 335.

97. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

98. *Id.* at 689; *Bajakajian*, 524 U.S. at 328–33; Austin v. United States, 509 U.S. 602, 618 (1993); Alexander v. United States, 509 U.S. 544, 558–59 (1993); *Browning-Ferris*, 492 U.S. at 275–76.

99. *Bajakajian*, 524 U.S. at 334.

100. *Timbs*, 139 S.Ct. at 689 (emphasizing that every state has "a constitutional provision

in *Timbs* to the historical predecessors of the Excessive Fines Clause, as well as the Court's endorsement of considering a person's ability to pay, provide persuasive evidence that a fine that is more than a person can pay may be "excessive."

IV. ARGUMENT: MISDEMEANOR PRETRIAL DETENTION IS UNCONSTITUTIONAL AS-APPLIED

A. It Is Not Illegal to Be Poor

Arguably, a mandate that judges setting bail consider an individual's ability to pay is the clearest principle that came out of the treatment of the Excessive Bail Clause in England and the United States Supreme Court's interpretation of the Excessive Fines Clause in *Timbs*. Concern with arbitrary imprisonment by the government may explain why the Excessive Fines Clause is coupled with—and appears right after—the Excessive Bail Clause. The Clauses together serve the purpose of assuring judges set bail with the individual's ability to pay in mind.[101] Judges unconstitutionally intrude on an individual's liberty interest when setting bail without any meaningful process—causing the same injury as if it had simply ordered detention outright.[102] It would make no sense to permit the government to

prohibiting the imposition of excessive fines either directly or by requiring proportionality").

101. To meet this standard, a court must determine what an individual can pay. Bearden v. Georgia, 461 U.S. 660, 672 (1983). If the bail is set beyond the individual's means, the unaffordable bail amount violates the Eighth Amendment unless the court determines that it is the least restrictive means for a compelling state interest. United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). Yet currently, no process for evaluating a defendant's ability to pay bail exists in most states. Wiseman, *Fixing Bail*, *supra* note 72, at 445–46 (noting that such a process is nonexistent in most places).

102. O'Donnell v. Harris Cnty., 892 F.3d 147, 158 (5th Cir. 2018). This is impermissibly over-inclusive and under-inclusive. As to over-inclusiveness, the Supreme Court has recognized, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. In other words, the Constitution protects an individual's liberty from government intrusion. Yet wealth-based pretrial detention turns this principle on its head, allowing courts to intrude on an individual's liberty, in hopes of targeting the "bad apple" of misdemeanor defendants. Wealth-based limits are also impermissibly under-inclusive. If an individual can pay bail, he or she will be released. Also, if an individual pleads guilty to a crime, he or she will be released. This is despite the obvious risk that such individuals may pose the same danger to the community as violent individuals not granted bail. Consequently, if the government believed that certain individuals needed monitoring or supervision to mitigate their risk of flight or dangerousness, those individuals

take actions that would otherwise be unconstitutional simply because the concerned individual is a pretrial detainee—in other words suggesting that pretrial detainees have fewer constitutional rights than all other people.[103] After *Timbs*, judges may no longer set bail without considering a defendant's ability to pay.[104] To do so would allow judges to place poor individuals in indefinite pretrial detention solely because of who they are, thus constituting the modern version of a punitive economic sanction.[105]

For bail to be constitutional, it must be reasonable.[106] Yet income data

would receive neither monitoring nor supervision when they are released by paying money bail or by pleading guilty and receiving no jail time. Furthermore, the federal scheme provides an apt example. The Bail Reform Act, provides judges with statutory guidelines if a defendant cannot afford bail. *See* S. REP. 98-225, 16 (1984); *see also* SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 2 (2017) [hereinafter BAUGHMAN, BAIL BOOK] (noting that the broken bail system is the "single most preventable cause of mass incarceration in America").

103. Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) (concluding that "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt"); *see generally* Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING 71 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (exploring in detail the misdemeanor process's pervasive disregard for basic criminal law and procedural protections as well as its strong tendencies toward punishing the poor).

104. As the Court made clear in *Timbs*, these two clauses "place 'parallel limitations' on 'the power of those entrusted with the criminal-law function of government.'" *Timbs*, 139 S. Ct. at 687 (quoting Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc., 492 U.S. 257, 263 (1989)). The text and the historical context of the Excessive Fines and Excessive Bail Clauses lead to the conclusion that the Eighth Amendment does not permit government action that imposes bail beyond a defendant's ability to pay. This is especially so since the Supreme Court "has long been sensitive to the treatment of indigents in our criminal justice system." *Bearden*, 461 U.S. at 664. Despite this historical context, scholars continue to document bail's widespread misuse. *See* ARTHUR L. BEELEY, THE BAIL SYSTEM IN CHICAGO (1927); John W. Roberts & James S. Palermo, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693 (1958).

105. Such governmental actions contravene the United States's "fundamental . . . scheme of ordered liberty." *Timbs*, 139 S. Ct. at 686; *see also* Alexandra Natapoff, *Misdemeanors*, *in* ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 73 (Erik Luna ed., 2017) (explaining the problems with the misdemeanor system); WAYNE H. THOMAS, JR., BAIL REFORM IN AMERICA 11, 19 (1976) ("The American system of bail allows a person arrested for a criminal offense the right to purchase his release pending trial. Those who can afford the price are released; those who cannot remain in jail."); Wiseman, *Fixing Bail*, *supra* note 72, at 434 (noting that most defendants awaiting trial in jail are not detained because they were found to be dangerous or have a particularly high flight risk).

106. And reasonableness depends on whether bail is set "at a figure higher than an amount reasonably calculated to" assure presence at trial. *Stack*, 342 U.S. at 5. Relatedly, the Supreme Court's reliance in *Timbs* on the history of the Excessive Fine Clause supports implementation of a test of reasonableness that includes a consideration of the effects of the economic sanction on the accused, rather than simply the value of bail. *Timbs*, 139 S. Ct. at 688.

reveals how unrealistic and non-individualized bail is set for many individuals. As one study shows, "[t]he median bail bond amount . . . represents eight months of income for the typical detained defendant."[107] Estimates also suggest that "over 60% of the people unable to post bail bonds fall within the poorest third of society. 80% fall within the bottom half."[108] Our criminal justice system has no legitimate purpose to unnecessarily confine individuals accused of most misdemeanors.[109] That is essentially a punishment.[110] And *Bearden v. Georgia* made clear that imprisoning an indigent defendant because of inability to pay a fine violates the Constitution.[111]

Wealth-based pretrial detention infringes on both protections afforded in the Eighth Amendment. It also affects taxpayers and the state, as they bear

107. Rabuy & Kopf, *supra* note 26, at 2; *see also* Carlisle v. Landon, 73 S. Ct. 1179, 1182 (1953) (noting that "a person may not be capriciously held. Requirement of bail in an amount that staggers the imagination is obviously a denial of bail").

108. Rabuy & Kopf, *supra* note 26, at 2 n.11; *see also* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 135 (2018) (noting the reality for many misdemeanor defendants in New York City is that "bail means jail" due solely to the financial price they must otherwise pay).

109. Yet, in practice, these decisions face almost no scrutiny. *Cf.* Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 868 (2020) (noting in practice, that judges enjoy "almost unreviewable discretion in making [bail] decisions"); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1415–16 (2017) ("Today, in most jurisdictions, bail judges are granted vast discretion to make pre-trial release decisions that take into account [several] factors").

110. Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1304–05 (2012). Yet people in pretrial detention make up nearly two-thirds of America's jail population, and nearly 20% of the world's pretrial jail population. Connelly & Linthorst, *supra* note 32, at 141; Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/; *Bail Reform: A Guide for State and Local Policymakers*, CRIM. JUST. POL'Y PROGRAM AT HARVARD L. SCH. 7 (2019), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9a804d1d-f9be-e0f0-b7cd-cf487ec70339&forceDialog=0.

111. 461 U.S. 660, 672–73 (1983) ("To . . . deprive [a person] of his conditional freedom simply because, through no fault of his own, he cannot pay . . . would be contrary to the fundamental fairness required by the [Constitution]."). Consistent with this principle, the Court has rejected a number of practices that punished indigent individuals with imprisonment because they were poor. *See* Tate v. Short, 401 U.S. 395, 397–98 (1971) (inability to pay traffic fines); Williams v. Illinois, 399 U.S. 235, 240–41 (1970) (inability to pay criminal fine); Smith v. Bennett, 365 U.S. 708, 711–12 (1961) (inability to pay filing fee); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (inability to afford trial transcript for appeal). This is especially true given the fact that conditions in jails are far worse than in prisons nationwide. Baughman, *History*, *supra* note 75, at 876–77.

the costly burden of housing and feeding those whom judges could safely release.[112] As one study found: "[P]retrial detention costs taxpayers $38 million per day, or $14 billion per year—an amount that could support the employment of 250,000 elementary schoolteachers, the provision of free or reduced-cost lunch for thirty-one million children, or the provision of shelter and services for the country's 50,000 homeless veterans . . . ."[113] Moreover, courts dismiss most misdemeanor charges—so the cost of detaining these individuals is almost worthless to the public.[114] As an example, the state of California spent almost $40 million in only six counties over two years by jailing individuals who either were never charged or whose charges courts dropped or dismissed.[115]

On any given night, about 450,000 people are in jail awaiting trial—solely because they are poor.[116] And overcrowding is one of the most serious problems facing American jails.[117] Such a system turns the presumption of innocence and prohibition against the infliction of

112. *See Timbs*, 139 S. Ct. at 687, 689 (explaining that "[e]xorbitant tolls undermine other constitutional liberties," and that the excessive fines clause places "parallel limitations" on "the power of those entrusted with the criminal-law function of government"); *see also* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (explaining that an individual "may not be punished prior to an adjudication of guilt in accordance with due process of law").

113. CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 147 (2019). Some think this number is too low. *See generally* Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1 (2017) [hereinafter Baughman, *Pretrial Detention*] (finding that the savings could reach an estimated $78 billion a year).

114. Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 1012 (2020) [hereinafter Baughman, *Bail Reform*].

115. *"Not in It for Justice": How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, HUM. RTS. WATCH 3 (Apr. 11, 2017), https://www.hrw.org/report/2017/04/11 /not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly; *see also* Schnacke, *supra* note 32, at 15 (finding that "the United States Department of Justice estimates that keeping the pretrial population behind bars costs American taxpayers roughly 9 billion dollars per year").

116. *Challenging the Money Bail System*, C.R. CORPS, https://www.civilrightscorps.org/work/ wealth-based-detention (last visited Feb. 5, 2022).

117. MICHAEL MUSHLIN, RIGHTS OF PRISONERS 77 (5th ed., 2017). This has led to the problem of "deteriorating housing facilities, lack of access to appropriate services, a shortage of properly trained staff, and increases in victimization for both staff and inmates." *See* Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 805 (2018); *see also* Appleman, *supra* note 110, at 1301–02. Moreover, the pretrial detention of nonviolent, misdemeanor offenders largely drives this overcrowding. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1314 n.7 (2012) [hereinafter Natapoff, *Misdemeanors I*].

punishment before conviction on its head.[118] Pretrial detention solely because of indigent status clearly violates the Constitution.[119]

As the Supreme Court has instructed:

> To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation . . . the punitive/regulatory distinction turns on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].[120]

Where a court determines the accused is not a danger to the community or a flight risk, no alternative purpose requiring detention exists.[121] Thus detaining the indigent while the wealthy go free far exceeds what is reasonably necessary to assure presence in court.

Such pretrial detention places individuals at a significant disadvantage in defending their cases in the vast majority of instances.[122] Time is not of

118. Baughman, *History*, *supra* note 75, at 845–46. This prohibition on punishment before conviction applies with special force in the context of cash bail. *See Timbs*, 139 S. Ct. at 687; United States v. Montalvo-Murillo, 495 U.S. 711, 716 (1990); Walker v. City of Calhoun, GA, 901 F.3d 1245, 1259–60 (11th Cir. 2018); Pugh v. Rainwater, 572 F.2d 1053, 1056–57 (5th Cir. 1978); *accord In re* Humphrey, 482 P.3d 1008, 1015–19 (Cal. 2021); State v. Pratt, 166 A.3d 600, 607 (Vt. 2017); State v. Brown, 338 P.3d 1276, 1292 (N.M. 2014).

119. *See, e.g.*, Griffen v. Illinois, 351 U.S. 12, 19–20 (1951) (vacating and remanding an Illinois Supreme Court case that had denied a petitioner review of his trial transcript simply because he was too poor to pay for the stenographer, and such a classification was invidious). It also runs afoul of the Constitution because a pretrial detention requirement is not necessary to provide reasonable assurance of appearance at court. United States v. Salerno, 481 U.S. 739, 750 (1987). Any requirement in excess of the amount necessary to ensure a defendant's presence in court is inherently punitive. Appleman, *supra* note 110, at 1303; *see also* Darcel D. Clark et al., *Why We Need to Reform New York's Criminal Justice Reforms*, N.Y. TIMES: OPINION (Feb. 25, 2020), https://www.nytimes.com/2020/02/25/opinion/new-york-bail-reform.html (advocating for New York to adopt bail reforms like New Jersey's, which limit the use of cash bail).

120. *Salerno*, 481 U.S. at 747 (alterations in original) (citation omitted).

121. *See id.* (holding that "preventing danger to the community is a legitimate regulatory goal" but failing to state that the state would have a legitimate regulatory interest beyond that). Setting bail which places poor individuals in pretrial detention as a punishment before conviction is contrary to the concept of "ordered liberty." *Timbs*, 139 S. Ct. at 689; *see also* Stack v. Boyle, 342 U.S. 1, 5 (1951).

122. Barker v. Wingo, 407 U.S. 514, 532–533 (1972); *see also* O'Donnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1106 (S.D. Tex. 2017); Shima Baradaran Baughman et al., *Reforming State Bail Reform*, 74 SMU L. REV. 447, 448 (2021).

the essence when resolving misdemeanor cases.[123] The individual's access to counsel is significantly limited, and he or she is less able to prepare a defense.[124] As one scholar notes, "the misdemeanor system propels defendants through in bulk with scant attention to individualized cases and often without counsel."[125] Even worse, misdemeanors represent nearly three-quarters of all criminal charges in the United States.[126] Similarly, pretrial detention can last a long time—longer than the maximum sentence which the statute would otherwise authorize for the crime.[127]

123. Natapoff, *Misdemeanors I*, *supra* note 117, at 1315 ("While these individuals are largely ignored by the criminal literature and policymakers, they are nevertheless punished, stigmatized, and burdened by their convictions in many of the same ways as their felony counterparts."). "Misdemeanor defendants are especially impacted by delayed . . . appearance procedures." Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)appearance*, 88 GEO. WASH. L. REV. 392, 411 (2020); *see also* Benjamin Weiser & James C. McKinley Jr., *Chronic Bronx Court Delays Deny Defendants Due Process, Suit Says*, N.Y. TIMES (May 10, 2016), https://www.nytimes.com/2016/05/11/nyregion/chronic-bronx-court-delays-deny-defendants-due-process-suit-says.html ("Defendants charged with misdemeanors in the Bronx regularly see their cases languish far past the 60- and 90-day speedy trial limits set down in state law for various low-level offenses . . . . Defendants who wish to go to trial must often wait years and sometimes never get their day in court, a 2013 study showed. . . . Misdemeanor defendants must wait on average 642 days for a bench trial and 827 days for a jury trial in the Bronx . . . [and] over 500 misdemeanor cases had been pending for more than two years.").

124. Maine v. Moulton, 474 U.S. 159, 170 (1985) ("[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."). Douglas J. Klein, *The Pretrial Detention "Crisis": The Causes and the Cure*, 52 WASH. U. J. URB. & CONTEMP. L. 281, 294 (1997) (noting that "pretrial detainees[] may be incarcerated in facilities far away from the district in which they are tried[, which] can inhibit a defense attorney from consulting with the pretrial detainee"). And there is no individualized substantive assessment of an individual's risk of not appearing. Since there is no legitimate government interest in such a system, courts "may infer that the purpose of the governmental action is punishment . . . inflicted upon detainees *qua* detainees." Bell v. Wolfish, 441 U.S. 520, 539 (1979); *see also Timbs*, 139 S. Ct. at 689; Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 256 (2015) [hereinafter Natapoff, *Misdemeanors II*] (describing misdemeanors as "dominated by police arrest practices and assembly-line processing"). This violates individual liberties secured by the Eighth Amendment. *See, e.g.*, *Salerno*, 481 U.S. at 750–51 (considering how to balance government interest in community safety and crime prevention against individuals' interest in liberty); United States v. Montalvo-Murillo, 495 U.S. 711, 716 (1990) ("[W]e recognize that a vital liberty interest is at stake."); *Stack*, 342 U.S. at 4.

125. Natapoff, *Misdemeanors I*, *supra* note 117, at 1315; *see also* Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1172–74 (2004) (describing the unconstitutional conditions of the New York misdemeanor system).

126. Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 1015 (2020).

127. Nothing is more ironic than that. *See* Baughman, *History*, *supra* note 75, at 874–75; Robert C. Boruchowitz et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken*

For example, in 2010, Kalief Browder, a sixteen-year-old boy accused of stealing a backpack, spent more than 1000 days in pretrial detention, including 800 days in solitary confinement, without ever having a trial.[128] In 2018, a homeless man spent almost a year in pretrial detention for stealing $5.00 and a bottle of cologne, without ever receiving a trial.[129] In Texas, a sixty-one-year-old great-grandmother died in pretrial detention after spending nearly five months awaiting trial for a misdemeanor trespassing.[130] In Louisiana, law enforcement can detain individuals on misdemeanor charges for at least thirty days without ever even scheduling an arraignment.[131] In Georgia, police charged a man with a misdemeanor for jumping a subway turnstile to evade a $1.75 fare.[132] Doing so landed him in pretrial detention for fifty-four days—far longer than the maximum sentence he could have received if convicted—before the court appointed a lawyer for him.[133] Those who suffer pretrial detainment are often desperate to resolve their cases to escape the lengthy and often dangerous—even deadly—

Misdemeanor Courts, NAT'L ASS'N OF CRIM. DEF. LAWS. 18–19 (2009), https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf; Alisa Smith et al., *Testing the Effects of A Prosecutor Policy Recommending No-Money Release for Nonviolent Misdemeanor Defendants*, 48 AM. J. CRIM. L. 43, 51 (2020); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356 (2014) [hereinafter Wiseman, *Pretrial Detention*]; William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013), https://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html. Detention can last quite a while. *Moving Beyond Money: A Primer on Bail Reform*, CRIM. JUST. POL'Y PROGRAM AT HARVARD L. SCH. 6–7 (2016), https://www.prisonpolicy.org/scans/cjpp/FINAL-Primer-on-Bail-Reform.pdf; Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 721 (2017); Wiseman, *Pretrial Detention*, *supra*, at 1354 (noting that "despite speedy trial requirements, many defendants awaiting trial are detained for months").

128. *See* Johnson, *supra* note 19, at 30; *see also* Jennifer Gonnerman, *Before the Law: A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, NEW YORKER (Oct. 6, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law.

129. Bob Egelko, *Homeless Man Couldn't Afford $330,000 Bail, So Judge Orders Him Free For Now*, S.F. GATE (Mar. 14, 2018), https://www.sfgate.com/crime/article/Home-less-man-couldn-t-afford-330-000-bail-so-12753950.php.

130. Dotson v. Bexar Cnty. Hosp. Dist., 2019 WL 6311375, at *1–2 (W.D. Tex. 2019).

131. *See* LA. CODE CRIM. PROC. ANN. Art. 701(C) (2022).

132. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1032 (2006).

133. *Id.* at 1032. In 2015, an 18-year-old boy was held in pretrial detention for almost two months when he was the victim in the case because he was too poor to afford bail. Connelly & Linthorst, *supra* note 32, at 143. Six weeks after being stabbed, charges were dropped because no evidence existed that he committed any crime. Connelly & Linthorst, *supra* note 32, at 143.

conditions in jail.[134]

Moreover, there is no such thing as a low-stakes pretrial detention.[135] Pretrial detention *causes* adverse outcomes in the case.[136] Sentences can be twice as long for individuals who cannot afford bail.[137] Wealth-based

134. Mihir Zaveri, *Harris County to Place Public Defenders at Bail Hearings*, HOUS. CHRON. (Mar. 14, 2017), https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-to-place-public-defenders-at-bail-11002089.php (finding that just n Harris County alone, "55 people died in pre-trial detention from 2009 to 2015, including defendants arrested for misdemeanors such as trespassing."). The issues are somewhat profound, as illness and suicide are the two leading causes of death in jail. Figures for 2014 (the most recent year), show the highest level of suicide in jail in nearly two decades, almost 5 times higher than in the general population. Margaret E. Noonan, *Mortality in Local Jails, 2000–2014 – Statistical Tables*, U.S. DEPARTMENT OF JUSTICE 2 (Dec. 2016), https://www.bjs.gov/content/pub/pdf/mlj0014st.pdf.

135. Pretrial detention poses significant harm to individuals. Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization* 45 J. LEGAL STUD. 471, 487-97 (2016) (finding in an empirical study of the bail systems in two large cities that pretrial detention increases conviction likelihood, does not significantly reduce nonappearance, and increases future crime); Nick Pinto, *The Bail Trap*, N.Y. TIMES (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html (exploring the collateral effects resulting from poor defendants' inability to pay bail).

136. Heaton et al., *supra* note 127, at 715, 742–743 ("[P]retrial detention causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, [and] the length of a carceral sentence . . . ."); *see also* Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 204 (2018); Mary T. Phillips, *Bail, Detention, & Nonfelony Case Outcomes*, N.Y.C. CRIM. JUST. AGENCY 5 (2007), https://www.nycja.org/publications/brief-no-14-bail-detention-nonfelony-case-outcomes. As an example, the Bail Project, a non-profit that pays bail for indigent defendants, notes that in half of the cases where they pay bail, charges are dismissed—yet of those who remain in pretrial detention, 90% plead guilty. *See Why Bail?*, THE BAIL PROJECT, https://bailproject.org/why-bail/ (last visited Feb. 6, 2022).

137. *See, e.g.*, Heaton et al., *supra* note 127, at 747; Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment*, 25 CRIM. JUST. POL'Y REV. 59, 62 (2014); Marian R. Williams, *The Effect of Pretrial Detention on Imprisonment Decisions*, 28 CRIM. JUST. REV. 299, 313–14 (2003). As one court found:

> The credible, reliable, and well-supported testimony of the witnesses and the statistical studies in the record overwhelmingly prove that thousands of misdemeanor defendants [in Harris County] each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention.

O'Donnell v. Harris Cnty., 251 F. Supp. 3d 1052, 1107 (S.D. Tex. 2017); *see also* Heaton et al., *supra* note 127, at 715, 718–28 (discussing studies that have found that pretrial detention causes these adverse results, rather than other variables). Other drastic consequences are also prevalent. *See* Barker v. Wingo, 407 U.S. 514, 532–33 (1972) (describing possible consequences of jail time: "[i]t often means loss of a job; it disrupts family life; . . . it enforces idleness; [and it hinders an individual] in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."); *see also* Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention*, ARNOLD

pretrial detention also inflicts unnecessary harm on families and communities.[138] These consequential effects are greatest for individuals detained before trial on misdemeanors.[139]

Additionally, prosecutors hold significant power over whether and when to file or drop charges, offer plea deals, and set hearings.[140] This power

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FOUNDATION 3 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf (discussing how pretrial detention often increases the risk that defendants will commit further crimes); Amanda Petteruti & Nastassia Walsh, *Jailing Communities: The Impact of Jail Expansion and Effective Jail Expansion and Public Safety Strategies*, JUST. POL'Y INSTITUTE 3 (2008), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/08-04_rep_jailingcommunities_ac.pdf (asserting that incarceration negatively impacts mental and physical health and family dynamics); Appleman, *supra* note 110, at 1319–20 (emphasizing the burden incarceration places on a defendant's family); Shima Baradaran Baughman & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 555 (2012) (noting the negative financial consequences of incarceration); Megan Comfort, *"A Twenty-Hour-a-Day Job": I Impact of Frequent Low-Level Criminal Justice Involvement on Family Life*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 63, 67 (2016) ("Jail stays of several weeks are long enough to cause evictions for nonpayment of rent, suspensions of government entitlements such as food stamps and SSI, and the loss of possessions . . . ."); Connelly & Linthorst, *supra* note 32, at 143 (providing examples of the economic burdens incarceration can impose on family members); Dobbie et al., *supra* note 136, at 204 (explaining the lasting impact conviction has on employment); Johnson, *supra* note 19, at 31 (summarizing negative consequences of pretrial detention); Wiseman, *Pretrial Detention*, *supra* note 127, at 1356–57 ("Many detainees lose their jobs even if jailed for a short time, and this deprivation can continue after the detainee's release.").

138. Gerstein v. Pugh, 420 U.S. 103, 114 (1975); AMANDA PETTERUTI & NASTASSIA WALSH, JUSTICE POLICY INSTITUTE, JAILING COMMUNITIES: THE EFFECT OF JAIL EXPANSION AND EFFECTIVE PUBLIC SAFETY STRATEGIES 17 (2008) (noting that "only 25 percent of children are able to stay in the custody of their father when their mother is sent to jail"); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1320 (2012) (finding that "[f]amily members of the person in jail experience not only emotional and economic hardships, but . . . also physical ailments and declining health"); Megan Comfort, *A Twenty-Hour-a-Day Job: the effect of Frequent Low-Level Criminal Justice Involvement on Family Life*, 665 ANN. AM. ACAD. POL. SOC. SCI. 1, 5 (2016) ("Jail stays of several weeks are long enough to cause evictions for nonpayment of rent, suspensions of government entitlements such as food stamps and SSI, and the loss of possessions."); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356–57 (2014) ("Many detainees lose their jobs even if jailed for a short time, and . . . [w]ithout income, the defendant and his family also may fall behind on payments and lose housing, transportation, and other basic necessities."). This presents an individual with an impossible choice: plead guilty and go home, or plead not guilty and stay in jail. *See* John Raphling, *Plead Guilty, Go Home. Plead Not Guilty, Stay in Jail*, L.A. TIMES: OPINION (May 17, 2017, 4 AM), https://www.latimes.com/opinion/op-ed/la-oe-raphling-bail-20170517-story.html.

139. Yang, *supra* note 109, at 1424.

140. Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 643–53 (2014) (exploring prosecutorial discretion in misdemeanor case-handling). Research shows

manifests itself when a prosecutor offers detained individuals the opportunity to go home *immediately* simply by pleading guilty—rather than staying in jail for months (or sometimes years) to fight the case.[141] What is more concerning, prosecutors purposely use this plea-inducing tactic to drive conviction numbers up.[142] With the tolls of pretrial detention well in the mind of the accused, pleading guilty seems to be the inevitable decision—in fact, the one only an irrational person would turn down.[143] Yet misdemeanor

an increase in guilty pleas among individuals who wanted to shorten their stays in jail but who otherwise would have had their charges dropped, had viable defenses (or would have had a viable defense if out of detention), or would in all likelihood have been found not guilty. *See* Lindsey Devers, *Bail Decisionmaking*, BUREAU OF JUST. ASSISTANCE 2 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/BailDecisionmakingResearchSummary.pdf; Gupta et al., *supra* note 135, at 2–5; Heaton et al., *supra* note 127, at 747; *see generally* Dobbie et al., *supra* note 136; Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529 (2017); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L., ECON., & ORG. 511 (2018).

141. Wiseman, *Pretrial Detention*, *supra* note 127, at 1356 ("In some cases, the periods that defendants spend in jail awaiting trial is comparable to, or even greater than, their potential sentences, *thus substantially incentivizing quick plea deals regardless of guilt or innocence*." (emphasis added)); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1136–37 (2008) ("If the defendant can get a plea to a misdemeanor and time served, then the process constitutes the whole punishment. Any plea that frees this defendant may be more than advisable—it may be salvation. No matter how certain of acquittal, she is better off pleading guilty.").

142. Prosecutors are incentivized to secure quick and efficient convictions. BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 86 (2017); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 103 (1978); *cf.* Foucha v. Louisiana, 504 U.S. 71, 81 (1992) ("The statute [at issue in *Salerno*] carefully limited the circumstances under which detention could be sought . . . and was narrowly focused on a particularly acute problem in which the government interests are overwhelming. . . . [T]he duration of confinement . . . was strictly limited.").

143. Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America*, VERA INSTITUTE OF JUST. 38–40 (2015), https://www.vera.org/downloads/publications/incarceration-front-door-report_02.pdf; BAUGHMAN, BAIL BOOK, *supra* note 102, at 84; Heaton et al., *supra* note 127, at 714; *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2492–93 (2004) ("The pretrial detention can approach or even exceed the punishment that a court would Impose after trial. So even an acquittal at trial can be a hollow victory . . . ."); Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1364–65 (2000) (explaining that if a defendant is able to get out if he pleads guilty but remains in jail indefinitely if he does not, "we confront the disturbing possibility that he is being threatened with additional punishment precisely because he is both innocent and naïve or stubborn or principled enough to insist upon a trial to establish that fact"); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 85–86 (1995) ("Many defendants, especially first offenders, will agree to almost anything to get out of jail."). This occurs even though they are demonstrably innocent.

pretrial detention as a bargaining chip against the indigent is unquestionably disproportional.[144]

Perhaps the most noteworthy of the flaws of this system is the fact that it does not protect the public; in fact, it makes the community less safe.[145] Studies have shown that as little as two days in pretrial detention increases the likelihood that an individual will commit a crime in the future and increases the future risk level of even low-risk individuals.[146]

B. It Is Unconstitutional to Punish Poverty

As demonstrated above, court routinely impose bail at rates indigent defendants just cannot afford to pay, with amounts significantly "higher than an amount reasonably calculated to" assure the individuals' presence in court.[147] In *Timbs v. Indiana*, the Court held that an economic sanction can be excessive if it is "grossly disproportionate to the gravity of [the defendant's] offense . . . ."[148] And in *Stack v. Boyle*, the Court held "[b]ail set at a figure higher than an amount reasonably calculated to [assure

Alexandra Natapoff, *Negotiating Accuracy: DNA in the Age of Plea Bargaining*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 85–96 (Daniel S. Medwed ed., 2017); Boruchowitz et al., *supra* note 127, at 8; Baughman, *History*, *supra* note 75, at 872; Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 494 (2000). This violates our most basic notions about fairness and justice. *See* NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 25, at 150-70 (discussing the many consequences of pretrial detention for such low-level offenses and its centrality to the incarceration mindset); *see also* Russell M. Gold, *Paying for Pretrial Detention*, 98 N.C. L. REV. 1255, 1271 (2020).

144. *See* NATAPOFF, PUNISHMENT WITHOUT CRIME, *supra* note 25, at 53–54; Baughman, *History*, *supra* note 75, at 872.

145. The current system *decimates* communities. BAUGHMAN, BAIL BOOK, *supra* note 102, at 77–92; Lars H. Anderson, *How Children's Educational Outcomes and Criminality Vary by Duration and Frequency of Paternal Incarceration*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 149, 149–50 (2016); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 612–30 (2017).

146. Schnacke, *supra* note 32, at 15–16; Lowenkamp et al., *supra* note 137, at 3 (finding that "[w]hen held 2–3 days, low-risk defendants are almost 40% more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours"); Heaton et al., *supra* note 127, at 768 (concluding after a study that "[w]hile pretrial detention clearly exerts a protective effect in the short run, for misdemeanor defendants it may ultimately service to compromise public safety").

147. Stack, 342 U.S. 1, 5 (1951); *cf.* Wiseman, *Bail Reform Act*, *supra* note 57, at 140, 140 n.104 (arguing that despite courts not being required to "set bail at an amount that defendants can actually afford," at least two circuits "have held that if the defendant protests that the trial court has set bail higher than he can pay, the trial court must provide a reasoned explanation for its arrival at the disputed figure").

148. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

presence at trial violates the] Eighth Amendment."[149] Because the money-bail systems in many states fail to account for individuals' ability to pay, these states have cash bail systems that function as punitive economic sanctions.

If a judge does not consider an individual's ability to pay, the judge cannot possibly know whether the bail he or she set in a particular case operates as the functional equivalent of a pretrial detention order. Furthermore, detaining an individual whom the judge has already deemed safe to return to the community provides insufficient respect to the individual's fundamental right to be free from wealth-based detention as well as the fundamental right to pretrial liberty.[150]

At a minimum, courts must develop a process for deciding whether an individual is indigent and can pay the bail the court will impose. The process must occur within a reasonable amount of time after arrest. If the individual is indigent and cannot pay bail, the court must then consider whether any reasonable alternatives exist to assure reappearance.[151] Since these are individuals whom courts have already deemed safe to return to the community, courts can release the vast majority of them without any

149. *Stack*, 342 U.S. at 5.

150. *See, e.g.*, U.S. v. Salerno, 481 U.S. 739, 750–51 (1987) (holding that the government's narrowly tailored purpose in preventing dangerous individuals from being released into the community on bail met the difficult standard for depriving a person of pretrial liberty). If one believes that pretrial detention helps protect society in certain circumstances, using an outdated model of pretrial detention offends faith in the system as a whole. There can be no dispute that individual liberty is paramount when determining bail. *See id.* at 750 ("On the other side of the scale, of course, is the individual's strong interest in liberty."). Judges disregard this consideration when they do not make individualized assessments, especially given that state legislatures afford alleged misdemeanants far fewer procedural rights than those accused of felonies. *See, e.g.*, Blaisdell v. Comm'r of Pub. Safety, 375 N.W.2d 880, 883 (Minn. App. 1985) (noting that the disparate treatment of felonies and misdemeanors is a "legislative recognition that the public concerns served by warrantless misdemeanor arrests are in some degree outweighed by concerns for personal security and liberty"); Minn. R. Crim. Proc. 26.01 (codifying that people who commit mere "petty misdemeanors" are not entitled to a jury trial); *see also* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that misdemeanant who was not subject to "actual imprisonment" upon a conviction was not entitled to counsel). However, in many states, felonies and misdemeanors are not treated with an understanding of this distinction. *See* Baughman, *Bail Reform*, *supra* note 114, at 1024; *see also* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 282 (2011).

151. *See generally* Stack v. Boyle, 342 U.S. 1, (1951) (discussing how "the function of bail is limited" and must be confined to "assuring the presence of that [particular] defendant").

conditions.[152] Without a revised process, millions of individuals will continue to face a misdemeanor criminal justice system that is both fundamentally unfair and incompatible with constitutional imperatives.[153]

The need for such a process emanates directly from the essential nature of physical liberty the Constitution guarantees. Bail, like other protections of the criminal justice system—such as the presumption of innocence and the mandate of proof beyond a reasonable doubt—should deny the government the power to punish simply based on allegations.[154] Cash bail, in practice, dilutes the sanctity of justice. The individual loses so much, and society gains little.[155]

Further, it is rarely the case that pretrial detention is the least restrictive means of assuring presence at court. To begin with, very few individuals even pose a significant enough risk to warrant detention. For example, most nonappearance is not due to willful flight; rather, it stems from lack of adequate notice of court dates, inability to miss work, or lack of

152. Without such a process, these bail schemes run afoul of the Eighth Amendment. Only a clear and compelling state interest can justify such an intrusion on individual liberty, and punishing poverty is not one. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 537 (1979) (concluding that a "court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose . . . . Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'"). However, after a judge already has determined that an individual is *not* a flight risk, *see Carlson v. Landon*, 342 U.S. 524, 544 (1952), *nor* a danger to the community, *see Salerno*, 481 U.S. at 755, the only question that remains left to be answered is whether the bail is set at an amount "higher than an amount reasonably calculated" to receive adequate assurances that the accused will stand trial. Stack v. Boyle, 342 U.S. 1, 5 (1951). If the amount is not reasonably calculated, the bail amount would be viewed as "excessive" under the Eighth Amendment. *Stack*, 342 U.S. at 5. If judges make no inquires as to an individual's ability to pay the bail imposed, the judge has no way of knowing whether the amount is one which provides "adequate assurances. Rather, the bail determination is "is arbitrary or purposeless". Bell v. Wolfish, 441 U.S. 520, 539 (1979); *see also* Magluta v. Samples, 375 F.3d 1269, 1273 (11th Cir. 2004); Valdez v. Rosenbaum, 302 F.3d 1039, 1045–47 (9th Cir. 2002); Brogsdale v. Barry, 926 F.2d 1184, 1190 (D.C. Cir. 1991) Union Cnty. Jail Inmates v. Di Buono, 713 F.2d 984, 992 (3d Cir. 1983).

153. United States v. Salerno, 481 U.S. 739, 752–53 (1987); O'Donnell v. Harris Cnty., 892 F.3d 147, 162–63 (5th Cir. 2018); *cf.* BAUGHMAN, BAIL BOOK, *supra* note 102, at 41, 195.

154. *See Stack*, 342 U.S. at 7–8 (1951) (Jackson, J., concurring) ("bail . . . is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.").

155. Baughman, *Pretrial Detention*, *supra* note 113, at 5–7.

transportation, to name a few reasons.[156] And for those few who do pose a flight risk, alternative conditions—such as electronic monitoring, regular check-ins, community housing, and drug and alcohol treatment—are usually sufficient to mitigate such risks.[157] In fact, some jurisdictions currently rely on nonmonetary conditions and are often more efficient at assuring appearances as well as protecting the community.[158]

Kentucky provides a good example. In 2011, Kentucky reformed its pretrial detention system.[159] The legislature adopted a bill that requires pretrial services to use a valid risk-assessment tool to measure the individual's likelihood of returning for trial without threatening the public at large; and if the individual is deemed to be low risk, he or she must be released on their own recognizance unless the judge handling the matter finds that release is not appropriate.[160] After the legislature enacted the law, the number of individuals released on unsecured bonds increased by about 15%, which also correlated with court appearance rates rising to over 90%.[161] Other studies have shown similar results, casting doubt on the proposition that cash bail systems are necessary to promote public safety or assure appearance at court.[162] For example, D.C. releases nearly all arrestees

156. Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 729–36 (2018).

157. Wiseman, *Pretrial Detention*, *supra* note 127, at 1364–72; *see also* Connelly & Linthorst, *supra* note 32, at 150–55 (describing several alternatives to cash bail).

158. *Pretrial Justice: How Much Does It Cost?*, PRETRIAL JUST. INSTITUTE 5 (2017), https://portal.ct.gov/-/media/Malloy-Archive/Reimagining-Justice/Reimagining-Justice---Pretrial-justice-at-what-cost-PJI-2017.pdf (estimating that "implementing validated, evidence-based risk assessment to guide pretrial release decisions could yield $78 billion in savings and benefits, nationally"). Some nonmonetary conditions include: unsecured bonds, phone and text message reminders, rides to court, and home confinement. *The D.C. Pretrial Services Agency: Lessons From Five Decades of Innovation and Growth*, PRETRIAL JUST. INSTITUTE 6 (2020), https://www.psa.gov/sites/default/files/PJI-DCPSACaseStudy.pdf

159. KY. REV. STAT. ANN. § 431.066 (West 2011).

160. *Id.*

161. *Pretrial Reform in Kentucky*, PRETRIAL SERVS. 16–17 (2013), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=95c0fae5-fe2e-72e0-15a2-84ed28155d0a&forceDialog=0; Kamala D. Harris & Rand Paul, *Kamala Harris and Rand Paul: To Shrink Jails, Let's Reform Bail*, N.Y. TIMES: OPINION (July 20, 2017), https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html (noting Kentucky's use of risk assessments as an example of best practices in bail determinations).

162. Colorado is another example. Researchers found that 97% of individuals who were judged to be low risk and granted unsecured bail attended all court appearances. Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, PRETRIAL JUST. INSTITUTE 11 (2013), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?Document

pretrial, and in every year between 2011 and 2017, at least 98% of those arrestees released avoided arrest for a violent crime.[163] States must address these unconstitutional systems that plague society and leave many individuals in an unbelievable position. The Constitution requires more.

V. CONCLUSION

When judges set bail far beyond an individual's ability to pay, it is the functional equivalent of a detention order. Every year, hundreds of thousands of individuals are jailed indefinitely without having been convicted of a single crime. The evidence this article has presented establishes a few things. First, courts can impose pretrial detention when it serves one of two legitimate state interests: (1) to ensure an individual will show up to all court proceedings; or (2) to ensure an individual does not pose a danger to the community. Second, individuals have a fundamental right to pretrial release.[164] Wealth-based pretrial detention is not a legitimate

FileKey=87a896e2-5ab4-8123-b044-b84fba86e131&forceDialog=0. For individuals who were deemed to be a moderate risk, yet were still granted unsecured bail, researchers found that 87% appeared at all court appearances. *Id.* In both studies, the rate of appearance was higher than when the individuals were given secured bail. *Id.*; *see also* Claire M. B. Brooker, *Yakima County, Washington Pretrial Justice System Improvements: Pre- and Post-Implementation Analysis*, JUST. SYS. PARTNERS 6 (2017) (finding a significant increase in the number of arrestees released pretrial with no statistically significant difference in court appearance and public safety outcomes.); Glenn A. Grant, *Report to the Governor and the Legislature*, N.J. CTS. 14 (2018), https://www.njcourts.gov/courts/assets/criminal/2018cjrannual.pdf (finding that in New Jersey court appearance rates remained above 89% after the state reformed its criminal justice system—significantly limiting the use of cash bail). Illinois is another example. Under a recent statute that takes effect January 1, 2023, pretrial release for individuals charged with misdemeanors will be the rule, not the exception. H.B. 3653, 101st Gen. Assemb., Reg. Sess. §§ 110-1.5, 110-10(b) (Ill. 2021).

163. *Congressional Budget Justification and Performance Budget Request: Fiscal Year 2019*, PRETRIAL SERVS. AGENCY FOR D.C. 27 (2018), https://www.psa.gov/sites/default/files/FY2019%20PSA%20Congressional%20Budget%20Justification.pdf; *see also* Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1130 (2018). San Francisco provides another good example. The city eliminated cash bail—resulting in the city's jail population decreasing by 47% and the rate of new criminal activity by people awaiting trial being only 10%. *See* Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE (Nov. 17, 2020), https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/; *see also* Jordan Gross, *Devil Take the Hindmost: Reform Considerations for States with A Constitutional Right to Bail*, 52 AKRON L. REV. 1043, 1079 (2018) (discussing how numerous jurisdictions have successfully changed their laws, minimizing money bail).

164. United States v. Salerno, 481 U.S. 739, 755 (1987).

practice—as it does not serve one of the two legitimate state interests, constitutes an unconstitutional intrusion on a fundamental liberty interest, and hurts all poor defendants charged with misdemeanors.

This Essay offers a new way to think about wealth-based detention and suggests some ways the states can confront these unjust systems of pretrial detention. Society is best served if states address the evils of wealth-based pretrial detention. And courts and legislatures must always remember, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[165]

165. *Id.*