

## MORE APPEALING: REFORMING BAIL REVIEW IN STATE COURTS

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*On any given day, local jails detain nearly half-a-million people who cannot afford bail. Opposition to this status quo, and to monetary conditions of pretrial release more broadly, has reached a fever pitch in recent years. Critics from across the political spectrum decry bail as a wellspring of mass incarceration and acknowledge its profoundly discriminatory effects, particularly within low-income communities of color. Academic studies link bail to poorer case outcomes and a myriad of destabilizing collateral consequences for pretrial detainees. And local justice systems have begun to grapple with the high human and economic costs of incarcerating large numbers of people still presumed innocent under the law.*

*Amid widespread agreement that bail is broken, it is easy to forget that the system has been in a suspended state of crisis for decades and proved resistant to change before. In the face of this critical and persistent problem, this Note offers appellate review of bail determinations as a viable avenue for reform. By revamping the “bail appeal”—a procedure that has received little attention from reformers and academics alike—states have an opportunity to reduce the scourge of pretrial detention, conserve the time and resources of local justice systems, and provide a durable promise of pretrial justice.*

### INTRODUCTION

It is no secret that the bail system is in desperate need of reform. Within the last few years, stories like that of Kalief Browder—a seventeen-year-old wrongfully arrested and then jailed for three years on a \$3,000 bail he could not afford<sup>1</sup>—have shocked the public conscience and

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1. See Jennifer Gonnerman, Before the Law, *New Yorker* (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [https://perma.cc/5KJ9-M62J] [hereinafter Gonnerman, Before the Law] (detailing the incarceration and frequent solitary confinement of Browder on New York City’s Rikers Island and the horrifying effects of pretrial imprisonment on his psyche). In June 2015, Browder took his own life. See Jennifer Gonnerman, Kalief Browder, 1993–2015, *New Yorker* (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [https://perma.cc/QCP4-LGKX]. Truly, Kalief Browder deserves more than a footnote—all readers are encouraged to learn more about his extraordinary life.

generated renewed interest in an age-old practice.<sup>2</sup> Processes usually relegated to dark corners of the criminal justice system have invaded popular discourse, begging critical (and basic) questions about the function and efficacy of bail as an institution.

Outrage over bail has manifested not only in a flurry of in-depth media coverage<sup>3</sup> but also in a deluge of scholarly criticism.<sup>4</sup> Commentators regularly note bail decisions that are marred by biases against criminal defendants' race<sup>5</sup> and socioeconomic status.<sup>6</sup> Several empirical studies have found that individuals detained due to their inability to pay bail experience markedly worse case outcomes than their peers awaiting trial on the outside.<sup>7</sup> Still others have posited, at a macro level, that the flawed

2. See, e.g., Sally Baumler, Appellate Review Under the Bail Reform Act, 1992 U. Ill. L. Rev. 483, 499 ("The American bail system evolved from medieval times.").

3. For the tip of the iceberg in terms of media coverage of bail issues, see Nick Pinto, *The Bail Trap*, N.Y. Times Mag. (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [<https://perma.cc/2UQF-JGH7>] (decrying "[t]he long-term damage that bail inflicts on vulnerable defendants"); Margaret Talbot, *The Case Against Cash Bail*, New Yorker (Aug. 25, 2015), <http://www.newyorker.com/news/news-desk/the-case-against-cash-bail> [<https://perma.cc/QL4E-F975>] ("Cash bail has been getting [increased media] scrutiny, since it clearly burdens the poor disproportionately, without any greater assurance of public safety."); Nick Wing, *Our Bail System Is Leaving Innocent People to Die in Jail Because They're Poor*, HuffPost (July 14, 2016), [http://www.huffingtonpost.com/entry/cash-bail-jail-deaths\\_us\\_57851f50e4b0e05f052381cb](http://www.huffingtonpost.com/entry/cash-bail-jail-deaths_us_57851f50e4b0e05f052381cb) [<https://perma.cc/55YR-KTPD>] ("When freedom is only available to those who can afford it, many end up paying with their lives.").

4. See, e.g., Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 *The Academy for Justice, Reforming Criminal Justice* 21, 23 (Erik Luna ed., 2017), [http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice\\_Vol\\_3.pdf](http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_3.pdf) [<https://perma.cc/T3ST-DBWD>] (surveying pretrial-reform initiatives and scholarly criticism thereof, and finding that "[i]n the last few years, the hefty costs of pretrial detention have generated growing interest in bail reform").

5. See, e.g., Cynthia E. Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. Legis. & Pub. Pol'y 919, 938 (2013) ("[N]early every study on the impact of race in bail determinations has concluded that African Americans are subjected to pretrial detention at a higher rate and . . . higher bail amounts than . . . white arrestees with similar charges and similar criminal histories.").

6. See, e.g., Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 714, 769–73 (2017) (questioning whether pretrial detention produces "class-based case outcomes" that implicate equal protection and due process concerns).

7. As Paul Heaton, Sandra Mayson, and Megan Stevenson's excellent study *The Downstream Consequences of Misdemeanor Pretrial Detention* elaborates:

There is . . . substantial reason to believe that detention affects case outcomes. A detained defendant 'is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.' This is thought to increase the likelihood of conviction . . . and may also increase the severity of any sanctions imposed. More directly, a detained person may plead guilty—even if innocent—simply to get out of jail.

*Id.* at 713–14 (footnotes omitted) (quoting *Barker v. Wingo*, 407 U.S. 514, 533 (1972)); see also Christopher T. Lowenkamp, Marie VanNostrand & Alexander Holsinger, Laura & John Arnold Found., *Investigating the Impact of Pretrial Detention on Sentencing*

imposition of bail may bear ultimate responsibility for astronomic and unsustainable jail populations countrywide.<sup>8</sup> Politicians of all stripes<sup>9</sup> and the U.S. Department of Justice have joined the chorus, speaking out against bail practices that discriminate against poor parties.<sup>10</sup> Even celebrities have begun to weigh in: Jay-Z, for instance, has taken to print and

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Outcomes 10–11 (2013), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/IJAF\\_Report\\_state-sentencing\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/IJAF_Report_state-sentencing_FNL.pdf) [<https://perma.cc/WR9R-B3TH>] (finding that pretrial detention increases both the likelihood that an individual will receive prison time and the length of any sentence that is imposed); Heaton, Mayson & Stevenson, *supra* note 6, at 717–18 (finding misdemeanor pretrial detainees 25% more likely to be convicted and 43% more likely to receive jail sentences than releasees).

8. See, e.g., Peter Wagner, *Jails Matter. But Who Is Listening?*, Prison Policy Initiative: Blog (Aug. 14, 2015), <http://www.prisonpolicy.org/blog/2015/08/14/jailsmatter> [<https://perma.cc/5KKV-BDJC>] (finding that the “pre-trial’ or ‘unconvicted’ population is driving the growth in jail populations” and noting that “99% of the growth in jails over the last 15 years has been a result of increases in the pre-trial population”); Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, Prison Policy Initiative (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/YWF3-GQQ4>] (“The United States has more people—536,000—detained before trial than most countries have in their prisons and jails combined.”).

For recent numerical comparisons of unconvicted detainees versus convicted prisoners, see Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Jail Inmates in 2015*, at 5 tbl.4 (2016), <https://www.bjs.gov/content/pub/pdf/ji15.pdf> [<https://perma.cc/UD3G-FBP9>] (reporting that nearly 63% of detainees in the United States prison system are unconvicted).

9. While one might expect responses to the bail status quo to skew liberal, disfavor of the system has been undeniably bipartisan. See, e.g., Kamala D. Harris & Rand Paul, *Opinion, To Shrink Jails, Let’s Reform Bail*, N.Y. Times (July 20, 2017), <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html> (on file with the *Columbia Law Review*) (criticizing the “discriminatory and wasteful” bail system); Nicole Hong & Shibani Mahtani, *Cash Bail, a Cornerstone of the Criminal-Justice System, Is Under Threat*, Wall St. J. (May 22, 2017), <http://www.wsj.com/articles/cash-bail-a-cornerstone-of-the-criminal-justice-system-is-under-threat-1495466759> (on file with the *Columbia Law Review*) (discussing bipartisan agreement that the bail system unfairly detains individuals who cannot pay); Talbot, *supra* note 3 (discussing bail and the fight for criminal justice reform by parties “from Bernie Sanders to the Koch brothers”).

10. See, e.g., Office for Access to Justice, Civil Rights Div., U.S. Dep’t of Justice, *Dear Colleague Letter 2* (Mar. 14, 2016), <https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf> [<https://perma.cc/747C-KT5W>] (“[D]ue process and equal protection[] require . . . [that courts] not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release . . .”).

social media to become a spokesman for the cause.<sup>11</sup> Almost everyone, it seems, can agree that bail is broken.<sup>12</sup>

Consensus on how to fix the bail system, however, is much harder to come by. In large part, responsibility to pave the way forward has fallen to local justice systems, which effectuate the vast majority of criminal prosecutions in the United States.<sup>13</sup> It is “local implementation that truly shapes pretrial practice,” and local variation abounds.<sup>14</sup> Articulation of common goals<sup>15</sup> has yet to produce a discrete set of common solutions, capable of replication on a larger scale state-to-state.<sup>16</sup> Advocates are keen on effecting a radical reshaping of bail procedure but face systemic inertia and increasingly vocal resistance.<sup>17</sup>

Generally overlooked amidst calls for reform and academic analyses are the processes already guaranteed to criminal defendants when bail

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11. See, e.g., Shawn Carter, Jay Z: For Father’s Day, I’m Taking on the Exploitative Bail Industry, *Time* (June 16, 2017), <http://time.com/4821547/jay-z-racism-bail-bonds> [<https://perma.cc/29U4-Q664>] (describing the rapper’s endeavor to bail out fathers from local jails on Father’s Day and offering his general critique of the bail system). Jay-Z notes, “[Y]ou can be disappeared into [the] jail system simply because you can’t afford bail.” *Id.* Jay-Z is also an executive producer of the recent six-part documentary on Kalief Browder, *Time: The Kalief Browder Story*. Neil Genzlinger, Review: A Shameful Story Gets its Due in ‘Time: The Kalief Browder Story,’ *N.Y. Times* (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/arts/television/review-time-kalief-browder-story.html> (on file with the *Columbia Law Review*); see also *supra* note 1 and accompanying text.

12. Former New York State Chief Judge Jonathan Lippman may have put it best when he exclaimed that “our bail system . . . is totally ass-backwards.” Jillian Jorgensen, New York State’s Top Judge: Bail System ‘Totally Ass-Backwards in Every Respect,’ *Observer* (June 16, 2015), <http://observer.com/2015/06/a-push-to-reform-backwards-bail-system-after-kalief-browders-death/> [<https://perma.cc/3PPT-4NDX>].

13. The federal pretrial-detainee population pales in comparison to the collective state pretrial-detainee population. Compare Minton & Zeng, *supra* note 8, at 4 tbl.3 (finding approximately 434,000 unconvicted inmates in local jails in 2015), with E. Ann Carson & Elizabeth Anderson, Bureau of Justice Statistics, U.S. Dep’t of Justice, Prisoners in 2015, at 5 tbl.2 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> [<https://perma.cc/FW97-XX3L>] (finding 196,455 total federal inmates in 2015). See also Ram Subramanian et al., Vera Inst. of Justice, Incarceration’s Front Door: The Misuse of Jails in America 4 (2015), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy\\_downloads/incarcerations-front-door-report\\_02.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/incarcerations-front-door-the-misuse-of-jails-in-america/legacy_downloads/incarcerations-front-door-report_02.pdf) [<https://perma.cc/M9WR-9FY6>] (noting that local “[j]ails have a much broader reach than prisons,” including “almost 19 times the number of annual admissions”).

14. Stevenson & Mayson, *supra* note 4, at 28 (“There is huge variance across counties with respect to the timing of bail hearings, the presence of counsel, the qualifications and training of bail judges, the resources allocated for bail hearings, . . . the customary standards for bail-setting, and the availability of alternatives to detention or money bail.”).

15. Popular reform goals include reduction in the use of cash bail and the elimination of racial disparities in detention rates. See *id.* at 28–46 (discussing the major goals of bail-reform advocates). For a more precise definition of “cash bail,” see *infra* note 22.

16. See *infra* Part II.

17. See, e.g., Heaton, Mayson & Stevenson, *supra* note 6, at 716–17 (noting the persistence of money-bail practices and listing factors, like a powerful bail-bondsman lobby, that inhibit change).

has been set beyond their reach: bail appeals. The bail appeal (or “bail review”<sup>18</sup>) seems an intuitive choice for correcting systemic and individual errors in the bail process, if only because it follows the same basic logic as a trial verdict: If at first you don’t succeed, appeal to the next-highest court.

Naturally, the promises and pitfalls of the bail review are far more complex than its simple logic. This Note examines how criminal defendants challenge bail determinations in state court and investigates the bail appeal as a tool of reform. Part I provides a snapshot of bail procedure and then describes the background and legal foundations for appealing bail in state criminal courts. Part II elaborates on the gap in the law that makes bail appeals necessary and important for preserving the rights of criminal defendants. Finally, in Part III, this Note posits that the adoption of a flexible and robust appeals procedure for bail—which includes automatic interlocutory appellate reviews for indigent defendants—is a viable option for mitigating the ever-evolving bail problem.

## I. BAIL APPEAL BASICS

Pretrial practice and the bail experience are shaped by the peculiarities of state law.<sup>19</sup> An individual arraigned in one jurisdiction may find even the most critical rules of criminal procedure—when her first appearance in court may be scheduled, for example, or whether she is entitled to counsel at that time—unrecognizable from the rules governing the experience of a peer accused of an identical crime in a neighboring state.<sup>20</sup> At the same time, the characteristics that local justice systems have in common are telling: When states are laboratories of criminal justice,<sup>21</sup> the shared conditions of the experiment may be key to replicating successes across the board.

It follows that understanding the bail appeal requires study of the differences among local justice systems and the commonalities that run through pretrial practice nationwide. To that end, this Part surveys the law surrounding judicial review of bail and examines how defendants might appeal the bail set in their case. Section I.A provides a snapshot of bail procedure. Section I.B introduces relevant constitutional bail law—in the form of Supreme Court precedent on the Eighth Amendment and

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18. “Bail review” and “bail appeal” are used interchangeably to describe judicial review of initial bail determinations for the purposes of this Note.

19. See, e.g., Stevenson & Mayson, *supra* note 4, at 28 (describing the “huge variance” across states in substantive bail procedure).

20. *Id.*; see also *infra* section II.A.

21. Cf. *County of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991) (discussing the importance of “flexibility and experimentation by the States” with respect to pretrial procedure (internal quotation marks omitted) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975))).

procedural due process—that comes closest to requiring a level of uniformity in bail jurisprudence from the states. Finally, section I.C elucidates the existing options for defendants who wish to challenge bail amounts, by either the common law writ of habeas corpus or jurisdiction-specific bail appeals processes.

A. *Setting the Stage: Bail Hearings in Brief*

Before delving into bail law and appeals, it is necessary to have a rough picture of bail hearings and their place in pretrial procedure. The bail determination—whether an individual must furnish the court with monetary collateral to avoid pretrial incarceration or may be released on her own recognizance<sup>22</sup>—is typically made during a defendant’s first appearance before a presiding judge or magistrate.<sup>23</sup> Guided primarily by state statute, presiding officials are tasked with determining whether bail should be set and at what amount.<sup>24</sup> In some jurisdictions, local law directs courts to consider specific factors in imposing bail,<sup>25</sup> but ultimately leaves officials with broad discretion over the decision.<sup>26</sup> Other

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22. See Timothy R. Schnacke et al., Pretrial Justice Inst., Glossary of Terms and Phrases Relating to Bail and the Pretrial Release or Detention Decision 2–5 (2011), [https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/Glossary\\_Bail-PretrialRelease\\_DetentionDecision-PJI\\_2011.pdf](https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/Glossary_Bail-PretrialRelease_DetentionDecision-PJI_2011.pdf) [<https://perma.cc/28VX-WJKE>]. To be more precise, the term “bail” is used throughout this Note to refer to what is most accurately labeled “cash bail” or “secured” money bail or bond, meaning a “set sum of money that will be held by the court as collateral to . . . assure the defendant’s appearance for subsequent court hearings.” Jones, *supra* note 5, at 922 n.7. “Although many jurisdictions employ [additional] non-financial or ‘supervised’ conditions of release, in seventy percent of all criminal cases pretrial release is subject to payment of a money bond.” *Id.* at 922 (footnote omitted). This Note focuses mainly on money bail determinations and contains limited discussion of other forms of pretrial release.

23. See, e.g., Stevenson & Mayson, *supra* note 4, at 25–26 (describing typical bail procedures). While the details vary by jurisdiction, many local courts combine the bail hearing with a judicial determination of probable cause, which must be made within forty-eight hours of arrest. *Id.* at 25.

Bail hearings are also frequently intertwined with arraignments, when formal charges are filed against a defendant in open court. See, e.g., Megan T. Stevenson, Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes, 34 *J.L. Econ. & Org.* 511, 514 (2018) (“After the bail hearing there are a series of pretrial court appearances that defendants must attend. . . . [T]hese usually include at least an arraignment (where formal charges are filed) and some sort of preliminary hearing or pretrial conference . . .”). The word “arraignment” is used at times in this Note to refer generally to bail hearings and accompanying pretrial procedure.

24. See, e.g., Stevenson & Mayson, *supra* note 4, at 25–26 (describing state statutes’ controlling effect on bail decisionmaking). For a more detailed discussion of local bail statutes, see *infra* section II.A.

25. See, e.g., N.Y. Crim. Proc. Law § 510.30 (McKinney 2018) (requiring that judges set bail based on the weight of the evidence against a defendant, her character, and her community ties, among other factors).

26. See Stevenson & Mayson, *supra* note 4, at 25 (“These statutes provide little guidance about how to weigh the factors, or which conditions of release are appropriate to

jurisdictions restrict bail judges to consulting “bail schedules,” a list of preset bail amounts for each type of offense.<sup>27</sup>

Naturally, local bail decisions—and valid grounds for their appeal—are also guided by the Constitution and applicable Supreme Court precedent, addressed in the following section.

B. *Constitutional Bail Law and the Grounds for Appeal: Eighth Amendment Excessiveness and Procedural Due Process*

In six words—“[e]xcessive bail shall not be required”—the Eighth Amendment opens a potentially powerful avenue for bail appeals.<sup>28</sup> Section I.B.1 lays out the modicum of controlling guidance on what constitutes “excessive” bail, gleaned through two landmark Supreme Court cases.<sup>29</sup> Section I.B.2 then outlines the limitations of Eighth Amendment jurisprudence as applied to bail determinations and subsequent appeals, through discussion of the Excessive Bail Clause’s incorporation and lackluster doctrinal development. Finally, section I.B.3 sheds light on crucial procedural due process<sup>30</sup> concerns that animate appellate review.

1. *Stack, Salerno, and the Boundaries of Excessive Bail.* — Modern bail jurisprudence was born in the fall of 1951, in *Stack v. Boyle*.<sup>31</sup> *Stack* marked the Supreme Court’s first meaningful foray into the Excessive Bail Clause

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manage different pretrial risks.”). For a more detailed discussion of local bail statutes, see *infra* section II.A.

27. Bail schedules are “procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the characteristics of an individual defendant.” Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, *Crim. Just.*, Spring 2011, at 12, 13.

The existence of bail schedules differs across states and counties, though surveys indicate their use is widespread. *Id.* at 13–14 (“In a recently conducted poll, nearly 64 percent of respondent counties indicated that their jurisdiction uses bail schedules.”). Schedules may be formally introduced into state law or “informally employed by local officials,” and are more or less mandatory depending on the jurisdiction. See *id.* at 13 (“[Bail schedules] may be mandatory or merely advisory, and may provide minimum sums, maximum sums, or a range of sums to be imposed for each crime.”).

28. The Eighth Amendment reads in full: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

29. The Excessive Bail Clause has been the subject of very little litigation. See, e.g., *Galen v. County of Los Angeles*, 477 F.3d 652, 659 (9th Cir. 2007) (“The Supreme Court has directly addressed the [Excessive Bail] Clause only three times since its adoption.”); Samuel Wiseman, *McDonald’s Other Right*, 97 *Va. L. Rev.* In Brief 23, 28 (2011) [hereinafter *Wiseman, McDonald’s Other Right*], <http://www.virginialawreview.org/sites/virginialawreview.org/files/wiseman.pdf> [https://perma.cc/286Y-BNZL] (discussing why the Supreme Court and scholars alike have overlooked the Eighth Amendment and noting that “it is not merely coincidental that it remains ‘one of the least litigated provisions in the Bill of Rights’” (quoting *Galen*, 477 F.3d at 659)).

30. See U.S. Const. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

31. 342 U.S. 1 (1951).

and the law of pretrial detention.<sup>32</sup> The case involved twelve petitioners, each arrested on charges of conspiring to violate the Smith Act, a Cold War-era law targeting Communist sympathizers on American soil.<sup>33</sup> The District Court for the Southern District of California initially fixed bail in amounts varying from \$2,500 to \$100,000 for each defendant, which it later modified to a uniform amount of \$50,000 per defendant.<sup>34</sup> Petitioners moved for a reduction in bail amount, claiming that the large sum violated the Excessive Bail Clause.<sup>35</sup> In support of that application, petitioners submitted “statements as to their financial resources, family relationships, health, prior criminal records, and other information” tending to show they could not afford the \$50,000 ordered.<sup>36</sup> Apparently as a point of comparison, the government’s response consisted solely of cursory information on bail amounts for four other individuals previously convicted of violating the Smith Act in the same jurisdiction.<sup>37</sup>

The district court held a hearing on the motion, in which the trial judge examined and an Assistant U.S. Attorney cross-examined the petitioners.<sup>38</sup> Notably, no further information was supplied on the four individuals referenced in the government’s response, and petitioners’ documentation of their inability to pay remained unchallenged.<sup>39</sup> Yet, the district court denied the petitioners’ initial motion to reduce bail and subsequent applications for habeas corpus challenging their pretrial incarceration.<sup>40</sup> The Ninth Circuit affirmed, and the Supreme Court granted certiorari.<sup>41</sup>

In a brief but forceful opinion by Chief Justice Frederick Vinson, the Court reversed, holding that the petitioners’ bail amounts violated “statutory and constitutional standards” as excessive.<sup>42</sup> The majority began by firmly planting the institution of bail in the annals of American

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32. See Scott W. Howe, *The Implications of Incorporating the Eighth Amendment Prohibition on Excessive Bail*, 43 Hofstra L. Rev. 1039, 1039–40 & nn.11–12 (2015) (listing *Stack* as the first of three Supreme Court cases on excessive bail).

33. See *Stack*, 342 U.S. at 3; see also Smith Act, ch. 439, 54 Stat. 670, 671 (1940) (codified as amended at 18 U.S.C. § 2385 (2012)). The arrest of these defendants, each actual or purported members of the Communist Party, came at the height of a second “Red Scare.” Carlson, *supra* note 27, at 12.

34. *Stack*, 342 U.S. at 3.

35. See *id.*

36. *Id.*

37. See *id.* (“The only evidence offered by the [g]overnment was a certified record showing that four persons previously convicted under the Smith Act in the Southern District of New York had forfeited bail.”).

38. *Id.*

39. See *id.* (“No evidence was produced relating those four persons to the petitioners in this case.”).

40. *Id.* at 4.

41. *Id.*

42. *Id.* at 6.



jurisprudence, calling on bail's ancient roots and long history in U.S. law.<sup>43</sup> Chief Justice Vinson refused to mince words in explaining the gravity of pretrial detention and the potentially devastating effects of its misuse: “[The] right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.”<sup>44</sup> A threat to the right to bail, the majority warned, is a threat to the very foundations of the criminal justice system: “Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”<sup>45</sup>

Acknowledging the subtext of the case—a resurgent fear of Communism<sup>46</sup>—head on, the Court took a similarly plainspoken tact. In perhaps the most powerful portion of the majority opinion, the Chief Justice assailed government attorneys for unsubstantiated claims of criminal conspiracy and issued a (metaphorical) indictment of abuses of prosecutorial power:

The [g]overnment asks the courts to depart from the norm by assuming, without the introduction of evidence, that each petitioner is a pawn in a conspiracy and will . . . flee the jurisdiction. To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute under which petitioners have been indicted.<sup>47</sup>

The Court went on to tailor the boundaries of the Excessive Bail Clause to bail's efficacy as collateral: “Bail set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose [of returning a defendant to court] is ‘excessive’ under the Eighth Amendment.”<sup>48</sup> In the case of *Stack* and his fellow petitioners, the Court found that the requested bail sum of \$50,000 not only far exceeded the maximum fine for the offense at hand but was also “much higher than that usually imposed for offenses with like penalties.”<sup>49</sup> Particularly given the absence of evidence supporting an amount “greater than that usually fixed for

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43. See *id.* at 4–5 (analyzing federal bail statutes going back to the Judiciary Act of 1789 and comparing modern bail to its “ancient practice”).

44. *Id.* at 4.

45. *Id.*

46. See *supra* note 33 and accompanying text.

47. *Stack*, 342 U.S. at 5–6.

48. *Id.* at 5 (noting further that “the modern practice of requiring . . . bail . . . serves as additional assurance of the presence of an accused”).

49. *Id.*

serious charges” and the blanket nature of the amount rather than individualized determinations, petitioners’ bail was held excessive.<sup>50</sup>

Nearly forty years passed before the Court addressed the Excessive Bail Clause again in *United States v. Salerno*.<sup>51</sup> The case involved a constitutional challenge to the Bail Reform Act of 1984,<sup>52</sup> a federal statute permitting the pretrial detention of a criminal defendant when the “[g]overnment demonstrates by clear and convincing evidence . . . that no release conditions ‘will reasonably assure . . . the safety of any other person and the community.’”<sup>53</sup> Petitioners in *Salerno* were arrested on assorted racketeering, fraud, and gambling charges.<sup>54</sup> The prosecution moved to deny Salerno and his codefendants bail, providing evidence that the men were major mafia players who represented a threat to public safety.<sup>55</sup> The district court granted the government’s motion.<sup>56</sup>

In addition to a due process claim,<sup>57</sup> Salerno and his cohorts appealed on Eighth Amendment grounds, arguing that the Bail Reform Act’s authorization of pretrial detention for public safety offended the Excessive Bail Clause.<sup>58</sup> The Court’s short analysis of the latter issue<sup>59</sup> validated public safety as the second acceptable function of bail and narrowly interpreted *Stack*’s seemingly broad protections for criminal defendants.<sup>60</sup>

Writing for the majority, Chief Justice Rehnquist rejected a clear-cut constitutional “right to bail” and noted that the Eighth Amendment provides few answers about the availability of bail, as opposed to its overimposition.<sup>61</sup> Turning to the definition of “excessive,” the Court recognized that legitimate government interests in regulating pretrial release may extend beyond ensuring defendants do not flee the jurisdiction before their next court appearance (“flight risk”), the only factor at

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50. See *id.* at 6; see also Carlson, *supra* note 27, at 12 (discussing the Court’s determination that “such blanket bail setting was improper”); *infra* section I.B.3 (discussing the procedural due process implications of this portion of the opinion).

51. 481 U.S. 739 (1987).

52. 18 U.S.C. §§ 3141–3150 (2012).

53. *Salerno*, 481 U.S. at 741 (quoting 18 U.S.C. § 3142).

54. *Id.* at 743.

55. *Id.*

56. *Id.* at 743–44.

57. See *infra* section I.B.3.

58. *Salerno*, 481 U.S. at 752–53.

59. This portion of the opinion spanned barely two-and-a-half pages. See *id.* at 752–55.

60. See *id.*; see also Howe, *supra* note 32, at 1047–49 (describing the Court’s rejection of a “nearly pervasive right to bail” and outlining unanswered questions about the *Salerno* decision).

61. See *Salerno*, 481 U.S. at 752 (“This Clause, of course, says nothing about whether bail shall be available at all.”).

play in *Stack*.<sup>62</sup> Whether conditions of release are “excessive,” the majority determined, is a necessarily comparative exercise: “[W]e must compare that response against [whatever legitimate] interest the Government seeks to protect by means of that response.”<sup>63</sup> While “[i]n our society liberty is the norm,” the Court found that pretrial detention is rightfully authorized when defendants are “charged with serious felonies . . . [and] found after an adversar[ial] hearing to pose a threat” to individual or public safety.<sup>64</sup>

2. *The Muddled Incorporation of the Excessive Bail Clause and Its Weak Progeny.* — *Stack v. Boyle*’s and *United States v. Salerno*’s interpretations of excessiveness—bail beyond what is required to ensure a defendant’s return to court or assuage valid public safety concerns—remain the touchstones of bail jurisprudence.<sup>65</sup> Yet their legacy has been complicated by lingering controversy over the Eighth Amendment’s incorporation and a lack of doctrinal development.

The unusual incorporation of the Eighth Amendment has injected a measure of uncertainty into constitutional bail precedent.<sup>66</sup> Recall that both *Stack* and *Salerno* contemplated bail in federal courts, where the Eighth Amendment was certain to apply.<sup>67</sup> To date, no opinion has explicitly held that Fourteenth Amendment due process demands similar adherence to the Excessive Bail Clause by state courts,<sup>68</sup> a fact that could theoretically render constitutional bail law irrelevant in the local context. On the other hand, the Supreme Court has signaled on multiple occasions that the Clause’s incorporation has been long assumed.<sup>69</sup> One

62. See *id.* at 753 (“While we agree that a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants, we reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other . . . compelling interests . . .”); see also *id.* at 754 (clarifying that the *Stack* Court’s definition of “excessive” required consideration only of flight risk, because other legitimate government interests, like public safety, were not raised).

63. *Id.* at 754.

64. *Id.* at 755.

65. See, e.g., *Galen v. County of Los Angeles*, 477 F.3d 652, 659 (9th Cir. 2007) (explaining that “[t]he Supreme Court has directly addressed the [Excessive Bail] Clause only three times since its adoption,” including *Stack* and *Salerno*).

66. See, e.g., *Wiseman, McDonald’s Other Right*, *supra* note 29, at 24–29 (discussing the odd legal history of Eighth Amendment incorporation and its effect on excessive bail jurisprudence).

67. *Stack* analyzed a claim from a California District Court, see *Stack v. Boyle*, 342 U.S. 1, 3–4 (1951), and *Salerno* involved the federal Bail Reform Act, see *Salerno*, 481 U.S. at 741.

68. See generally *Wiseman, McDonald’s Other Right*, *supra* note 29.

69. The presumption of incorporation of the Eighth Amendment—that is, its application to each of the fifty states through the Fourteenth Amendment—was first alluded to in *Schilb v. Kuebel*, in which the majority noted in dicta that the Clause “has been assumed to have application to the States.” 404 U.S. 357, 365 (1971). The Court made even stronger acknowledgement of the Clause in *Kennedy v. Louisiana*, assuming at least partial incorporation by holding that the Eighth Amendment’s prohibition against cruel and unusual punishment barred Louisiana from imposing the death penalty for

recent decision went so far as to list the Excessive Bail Clause among other incorporated rights in a footnote,<sup>70</sup> a move some have interpreted as a determinative ruling on the issue.<sup>71</sup> Even if doubts over incorporation flare in the future, analysis of “excessive” bail that sticks to constitutional principles is unlikely to be wholly invalid. *Stack* and *Salerno* are still cited as controlling precedent in many state bail cases,<sup>72</sup> and most states have simply adopted the Clause into their own constitutions<sup>73</sup>—all but assuring that the Supreme Court’s guidance will continue to play a part in state bail determinations and appeals.<sup>74</sup>

The more serious shortcoming of constitutional bail law has been the degree to which the doctrine has stagnated.<sup>75</sup> In over thirty years, no meaningful precedent has emerged to fill in the gaps left by *Stack*’s broad brushstrokes or to limit the government interests articulated in *Salerno*.<sup>76</sup>

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child rape, where the crime did not and was not intended to result in the victim’s death. 554 U.S. 407, 419 (2008); see also Wiseman, *McDonald’s Other Right*, supra note 29, at 24 n.4 (“[T]he Court in *Kennedy* found that the entire Eighth Amendment applied to the states . . . [but] [t]his appears to have been judicial sloppiness rather than an accurate statement of the law . . .”).

70. That case, *McDonald v. Chicago*, actually contains two footnotes that mention the Excessive Bail Clause. See 561 U.S. 742, 764–65 nn.12–13 (2010). The above-the-line text of the decision notes that “[t]he Court eventually incorporated almost all of the provisions of the Bill of Rights” while the corresponding footnote directs the reader, in pertinent part: “With respect to the Eighth Amendment, see *Robinson v. California*, 370 U.S. 660 (1962) (cruel and unusual punishment); *Schilb v. Kuebel*, 404 U.S. 357 (1971) (prohibition against excessive bail (assumed)).” *Id.* at 764–65 & n.12.

71. For a discussion of the ramifications of the fateful *McDonald* footnote, see generally Wiseman, *McDonald’s Other Right*, supra note 29, at 24 (“[W]hile the incorporation of the Second Amendment prompted over two hundred pages of opinions, the incorporation of the . . . Excessive Bail Clause . . . required only a footnote.”).

72. See, e.g., *Simpson v. Owens*, 86 P.3d 478, 484, 486 (Ariz. Ct. App. 2004) (citing *Stack* and *Salerno*); *Brangan v. Commonwealth*, 80 N.E.3d 949, 953, 962 (Mass. 2017) (same); *State v. Brown*, 338 P.3d 1276, 1286, 1287 (N.M. 2014) (same).

73. See Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail*, 32 N. Ky. L. Rev. 1, 18–19 (2005) (noting “most state constitutions . . . include” the Excessive Bail Clause). For state versions of the Clause, see, for example, Cal. Const. art. I, § 12 (“Excessive bail may not be required.”); N.Y. Const. art. I, § 5 (“Excessive bail shall not be required . . .”); Tex. Const. art. I, § 13 (“Excessive bail shall not be required . . .”).

74. See Howe, supra note 32, at 1043–44 (explaining that incorporation of the Excessive Bail Clause should “mean that the clause defines the proper function of bail and, thus, the measure of excessiveness”).

75. See *Galen v. County of Los Angeles*, 477 F.3d 652, 659 (9th Cir. 2007) (“The Supreme Court has directly addressed the [Excessive Bail] Clause only three times since its adoption.”). The third case, *Carlson v. Landon*, 342 U.S. 524 (1952), considers bail in deportation proceedings and is not relevant to this Note’s discussion of the issues considered in *Stack* and *Salerno*.

76. See 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, 123 (2009) [hereinafter Wiseman, *Discrimination, Coercion, and the Bail Reform Act*] (noting in 2009 that “[t]here has been relatively little innovation in

Rather, the Excessive Bail Clause has been largely “abandoned . . . as a meaningful source of law.”<sup>77</sup> Consequently, the Eighth Amendment has largely failed to live up to its promise of relief for individuals seeking out its protections.<sup>78</sup>

3. *Procedural Due Process in Bail Precedent.* — As with excessive bail jurisprudence, the Supreme Court has had few occasions to consider the procedural due process implications of bail determinations and ensuing judicial review. Again, *Stack* and *Salerno* are the reigning authorities: While not the focus of the Court’s holding in either decision, aspects of appellate review linger in the shadows of both.<sup>79</sup> Together, the cases hint at two important features of a constitutionally valid bail appeal. First, the *Stack* opinion emphasized the role of individualized bail assessments over preset or blanket amounts: “[T]he fixing of bail for any *individual* defendant must be based upon standards relevant to the purpose of assuring the presence of *that defendant*.”<sup>80</sup> Second, both cases stressed temporal restrictions on judicial review of bail determinations. *Stack* was the earliest to note that “[r]elief in this type of case must be speedy if it is to be effective.”<sup>81</sup> Picking up where *Stack* left off, the *Salerno* Court relied on the existence of “prompt” bail review procedure to deny petitioner’s due process claims.<sup>82</sup> The majority opinion expressly acknowledged the provisions of the Bail Reform Act that provide federal defendants quick

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the law and scholarship on bail in the twenty years since *Salerno*”); see also Wiseman, McDonald’s Other Right, *supra* note 29, at 28 (commenting that “it is not merely coincidental” that the Excessive Bail Clause remains rarely litigated, given the deference to government interests established in *Salerno*).

77. Wiseman, Discrimination, Coercion, and the Bail Reform Act, *supra* note 76, at 148. As Professor Samuel Wiseman poetically noted, “without renewed consideration of the core purpose embodied in the Excessive Bail Clause, the Clause will continue to be little more than empty verbiage.” *Id.* at 123.

78. “[A]s things stand, the Excessive Bail Clause protects the accused-but-not-yet-convicted from only the most extreme legislatures and courts, and the most careless.” Wiseman, McDonald’s Other Right, *supra* note 29, at 29.

79. See Michael Edmund O’Neill, Note, A Two-Pronged Standard of Appellate Review for Pretrial Bail Determinations, 99 *Yale L.J.* 885, 899–900 (1990) (citing *Stack* and *Salerno* in a discussion of the constitutional rights implicated by appellate review in the context of the Bail Reform Act).

80. *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (emphasis added); see also *id.* at 5–6 (holding that petitioners’ bail was constitutionally invalid for using a blanket amount of \$50,000 without a “factual showing to justify such action” for each individual).

81. *Id.* at 4.

82. See *United States v. Salerno*, 481 U.S. 739, 752 (1987) (“The Act’s review provisions . . . provide for *immediate appellate review* of the detention decision. We think these extensive safeguards suffice to repel a facial challenge.” (emphasis added)); see also O’Neill, *supra* note 79, at 899–900 (“The Supreme Court in *Salerno* held that the preventive detention sections of the [Bail Reform Act] passed Fifth Amendment scrutiny because the determination of whether to deny bail is made by a judicial officer subject to appellate review.”).

judicial review of bail determinations<sup>83</sup> while emphasizing the regulatory nature of the Act and its other procedural safeguards.<sup>84</sup>

C. *The Modes of Appeal: Habeas Writs and Interlocutory Appeals in State Court*

Guided by the broad framework of constitutional bail law, as well as local incarnations of the Excessive Bail Clause,<sup>85</sup> states have been largely left to their own devices in the actual implementation of bail appeal procedure. This section details the two existing modes of appeal for defendants in state court, fashioned from a combination of common law tradition and state statute: writs of habeas corpus (section I.C.1) and interlocutory bail appeals (section I.C.2).

1. *The Traditional Mode of Appeal: Writs of Habeas Corpus.* — Traditionally, state prisoners seeking to appeal conditions of their detention have had a singular option: a writ of habeas corpus.<sup>86</sup> Defined as “writ[s] employed to bring a person before a court . . . to ensure that the person’s imprisonment or detention is not illegal,”<sup>87</sup> habeas petitions operate as a catchall for challenging the conditions of pretrial incarceration.<sup>88</sup>

The scope of habeas relief includes excessive bail amounts that result in unlawful detention.<sup>89</sup> In the modern proceeding, habeas writs challenging bail determinations may be filed in state or federal court in

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83. See *Salerno*, 481 U.S. at 743 (“Should a judicial officer order detention, the detainee is entitled to expedited appellate review of the detention order.”).

84. See *id.* at 747 (concluding “that the detention imposed by the Act falls on the regulatory side of the dichotomy,” while stressing the importance of procedural safeguards built into the Bail Reform Act, like “carefully limit[ed] . . . circumstances under which detention may be sought”).

85. Almost every state has adopted some version of the Eighth Amendment’s Excessive Bail Clause into its own constitution. See *supra* note 73 and accompanying text.

86. See James Basta, *Habeas Corpus: Unresolved Standard of Review on Mixed Questions for State Prisoners*, 83 J. Crim. L. & Criminology 978, 979–82 (1993) (describing the remedy’s historically fundamental role for detainees in the American legal system).

87. *Habeas Corpus*, Black’s Law Dictionary (10th ed. 2014).

88. See Basta, *supra* note 86, at 979 (“Habeas corpus is the fundamental safeguard against illegal restraint or confinement.”).

89. *Habeas Corpus*, Black’s Law Dictionary, *supra* note 87 (“[T]he writ may be used to obtain judicial review of . . . the right to or amount of bail . . .”).

the jurisdiction where a petitioner is incarcerated<sup>90</sup> and are governed both by their long tradition in the common law<sup>91</sup> and by state statute.<sup>92</sup>

Habeas writs' common law roots command uniformity in the availability of the remedy for criminal defendants.<sup>93</sup> But while the availability of the writ is relatively constant across states, most other features of the remedy are not. Procedural rules for the granting of hearings and further fact-finding pursuant to habeas claims vary state to state.<sup>94</sup> Several states, for instance, require notice many days in advance of further hearings.<sup>95</sup> Others give judges wide berth in scheduling habeas

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90. See, e.g., State Habeas Corpus: Florida, New York, and Michigan, *in* A Jailhouse Lawyer's Manual 635, 635 (11th ed. 2017), <http://jlm.law.columbia.edu/files/2017/05/33.-Ch.-21.pdf> [<https://perma.cc/998R-EK59>]. It bears mention that habeas petitions may only be filed in federal court once all state remedies have been exhausted. See *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (requiring "total exhaustion" for federal claims); see also Michael S. Woodruff, Note, The Excessive Bail Clause: Achieving Pretrial Justice Reform Through Incorporation, 66 Rutgers L. Rev. 241, 273 (2013) (discussing exhaustion as applied to habeas petitions). For the purposes of this Note, analysis of habeas will be limited mainly to those writs filed in state court, though some reference to federal writs filed by state prisoners provides helpful background.

91. See Basta, *supra* note 86, at 979–80 ("The writ became a heritage of English common law and was adopted in the American colonial common law prior to the Revolution.").

The right of state prisoners to pursue federal writs of habeas corpus also has extensive history in American jurisprudence: State prisoners' use of the writ to challenge conditions of their detention in federal court may be traced to post-Civil War Reconstruction, when "legislative action and judicial decree expanded federal habeas corpus jurisdiction . . . to include jurisdiction over state prisoners." *Id.* at 980; see also 28 U.S.C. § 2241(d) (2012) (permitting federal jurisdiction over writs filed by state prisoners). Again, this Note leaves further discussion of federal procedure to other authors.

92. For examples of local codes addressing the habeas remedy for bail determinations, see Cal. Penal Code § 1490 (2018) ("When a person is imprisoned or detained in custody on any criminal charge, for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail . . ."); N.Y. C.P.L.R. 7010(b) (McKinney 2018) (governing habeas corpus hearings for excessive bail); Tex. Code Crim. Proc. art. 11.24 (2017) ("Where a person has been committed to custody for failing to enter into bond, he is entitled to the writ of habeas corpus, if it be stated in the petition that there was no sufficient cause for requiring bail, or that the bail required is excessive.").

93. The availability of habeas in state courts is evidenced by the existence of local statutes themselves. See, e.g., Cal. Penal Code §§ 1490–1493.

94. See, e.g., State Habeas Corpus: Florida, New York, and Michigan, *supra* note 90, at 635 (noting that laws differ for habeas petitions depending on the jurisdiction, and warning that state prisoners should "check the laws in [their] own state before filing a state habeas petition").

95. New York, for example, requires notice several days prior to a hearing on a habeas petition. See N.Y. C.P.L.R. 7009 (mandating notice either "eight days prior to the hearing, or in any other manner or time as the court may order").

hearings regardless of how long the petitioner has been incarcerated.<sup>96</sup> Similarly, the assistance of counsel is not universally assured.<sup>97</sup>

Moreover, state habeas writs are judged not only by the controlling constitutional boundaries of excessiveness<sup>98</sup> but also by each jurisdiction's own statutory guidance and precedent on bail.<sup>99</sup> In a single state, statutory factors for consideration might include the gravity and nature of the underlying offense<sup>100</sup> in addition to a myriad of personal details about the defendant, including previous criminal record, financial resources, and family and community ties,<sup>101</sup> among combinations of others.

Finally, the peculiarities of the standard of review for habeas proceedings are also state specific, though "abuse of discretion" is "[t]he traditional standard for determining excessiveness."<sup>102</sup> State courts applying the standard have emphasized that abuse of discretion requires a high level of deference to trial court decisions, unless there has been an extraordinary and blatant invasion of constitutional rights.<sup>103</sup>

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96. Texas, for instance, allows judges to "appoint a time . . . [to] examine the cause of the applicant, and . . . specify some place in the county where" the motion will be heard, provided the time appointed is "the earliest day which the judge can devote to hearing the cause of the applicant." Tex. Code Crim. Proc. arts. 11.10–11. California gives even less guidance, providing simply that writs be served and returned "forthwith, unless the Court or Judge shall specify a particular time for any such return." Cal. Penal Code § 1503.

97. See, e.g., *Coffee v. Wainwright*, 172 So. 2d 851, 853 (Fla. Dist. Ct. App. 1965) (holding that "a petitioner in habeas corpus . . . is not entitled, as a matter of right, to the appointment of counsel," given that such proceedings are civil and not criminal); see also *State Habeas Corpus: Florida, New York, and Michigan*, supra note 90, at 648 & nn.99–100 (discussing the right to counsel for habeas petitions in state court). For further discussion of the role of counsel in habeas proceedings, see infra note 167 and accompanying text.

98. See supra section I.B.

99. See, e.g., Lester, supra note 73, at 24 ("All fifty states as well as the federal government have their own standards for setting bail."). For a more detailed discussion on the features of state bail statutes, see infra section II.A.

100. See, e.g., Tex. Code Crim. Proc. art. 17.15.

101. See, e.g., N.Y. Crim. Proc. Law § 510.30 (McKinney 2018).

102. Lester, supra note 73, at 26. Both Texas and New York use the abuse of discretion standard. See *Ex parte Ruiz*, 129 S.W.3d 751, 753 (Tex. App. 2004) ("The standard of review for reviewing bail settings is whether the trial court abused its discretion."). Per the New York Court of Appeals, "[t]he habeas corpus court is not to 'examine the bail question afresh' or to make a '*de novo* determination of bail.'" *People ex rel. Rosenthal v. Wolfson*, 397 N.E.2d 745, 746 (N.Y. 1979) (quoting *People ex rel. Klein v. Krueger*, 255 N.E.2d 552, 555 (N.Y. 1969)). Intermediate courts of appeals have followed this example in applying the abuse of discretion standard. See *People ex rel. Brown v. Bednosky*, 593 N.Y.S.2d 859, 860 (App. Div. 1993) (applying the abuse of discretion standard); *People ex rel. Siegel v. Sielaff*, 582 N.Y.S.2d 131, 132 (App. Div. 1992) (same).

103. See, e.g., *Klein*, 255 N.E.2d at 554–56 (explaining the application of abuse of discretion in affirming the bail determination of the lower court); *Ex parte Taylor*, No. 03-16-00689-CR, 2017 WL 4898989, at \*2 (Tex. App. Oct. 26, 2017) ("An abuse of discretion does not occur unless the trial court acts '*arbitrarily or unreasonably*' or 'without reference to *any* guiding rules and principles' . . ." (emphasis added) (quoting *State v. Hill*, 499 S.W.3d 853, 865 (Tex. Crim. App. 2016))).



2. *The Other Appeal: Interlocutory Challenges to Bail Determinations.* — Interlocutory appeals—appeals undertaken prior to the final adjudication of a case<sup>104</sup>—represent the other potential mode of redress for individuals incarcerated pretrial on excessive bail.<sup>105</sup> Unlike the habeas writ, interlocutory bail appeals are a purely statutory remedy.<sup>106</sup>

Whether interlocutory bail appeals are feasible in practice is complicated in part by the uncertain applicability of the final decision rule, but more seriously by the limited statutory basis for judicial review. Not all trial court action may be appealed pre- or midtrial. As a general rule, the right to appeal attaches only to final trial court decisions that “end[] . . . litigation on the merits and leave[] nothing for the court to do but execute the judgment.”<sup>107</sup> The Supreme Court has time and again upheld the “final decision rule,”<sup>108</sup> justifying a restriction on interlocutory appeals in federal courts largely on the ground of judicial efficiency: “The foundation of this policy is not in merely technical conceptions of ‘finality.’ It is one against piecemeal litigation[,] . . . [for] conservation of judicial energy[,] . . . [and] elimination of delays . . . .”<sup>109</sup>

The applicability of the final decision rule, and the inclusion of bail as an appealable determination before trial, is a settled matter in the federal system. The final decision rule has been codified in federal law<sup>110</sup> and its bounds litigated extensively in federal courts.<sup>111</sup> Exceptions to the rule are known collectively as the collateral order doctrine,<sup>112</sup> a “small

104. See Appeal: Interlocutory Appeal, Black’s Law Dictionary, *supra* note 87.

105. See Woodruff, *supra* note 90, at 275 (explaining that in addition to habeas, defendants “held in pretrial detention due to an inability to afford bail may generally submit an application for a reduction on the ground that the amount fixed was excessive”); cf. *Stack v. Boyle*, 342 U.S. 1, 6–7 (1951) (discussing habeas and interlocutory appeals as the two forms of remedy for excessive bail claims).

106. See Timothy P. Glynn, Discontent and Indiscretion: Discretionary Review of Interlocutory Orders, 77 *Notre Dame L. Rev.* 175, 176 (2001) (describing the interlocutory appellate regime and its myriad exceptions as “statutory, rule-based, and judge-made”); see also *supra* notes 91–92 and accompanying text.

107. *Catlin v. United States*, 324 U.S. 229, 233 (1945); see also *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 865, 867–68 (1994) (elaborating on the final decision rule).

108. The rule is also referred to as the “final judgment” rule. See Final-Judgment Rule, Black’s Law Dictionary, *supra* note 87.

109. *Catlin*, 324 U.S. at 233–34; see also *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–47 (1949) (describing the policy implications of exceptions to the final decision rule).

110. See 28 U.S.C. § 1291 (2012) (“The courts of appeals . . . shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States . . . .” (emphasis added)).

111. For examples of federal cases elaborating on the final decision rule, see generally *Dig. Equip. Corp.*, 511 U.S. 863; *Lauro Lines v. Chasser*, 490 U.S. 495 (1989); *Cohen*, 337 U.S. 541.

112. The collateral order doctrine was first laid out by the Court in *Cohen v. Beneficial Industrial Loan Corp.*, in which the Court held that the jurisdiction of courts of appeals was

class” of circumstances in which the rights at issue are “too important to be denied review and too independent of the cause [of action] itself to require that appellate consideration be deferred until the whole case is adjudicated.”<sup>113</sup> *Stack v. Boyle* clarified that, at least in the federal context, bail falls into this “small class” and is therefore appealable as a final decision.<sup>114</sup> Accordingly, as the *Stack* Court explained, “[t]he proper procedure for challenging bail as unlawfully fixed [in federal court] is by motion for reduction of bail and [interlocutory] appeal to the Court of Appeals from an order denying such motion” pretrial.<sup>115</sup>

Yet while *Stack* and accompanying federal law make plain that *federal* defendants may pursue judicial review of bail, state pretrial detainees are not universally assured the same right. For one, the final decision rule and accompanying collateral order doctrine have not been held binding in state courts,<sup>116</sup> leaving ambiguity in the legal basis for appealing bail pretrial. Additionally, claims of excessive bail rarely reach higher courts of appeals,<sup>117</sup> meaning the right to bail review in the several states is unlikely to be clarified or articulated fully in local case law.<sup>118</sup> Rather, notwithstanding federal law and the constitutional boundaries of excessive bail, state pretrial detainees are forced to look to local statutes for relief

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intended to cover “claims of right separable from, and *collateral* to, rights asserted in the action.” 337 U.S. at 546 (emphasis added).

113. *Id.* The Court noted further that certain decisions by trial courts must be reviewed prior to final adjudication or else “it [would] be too late effectively to review [them], and the rights conferred . . . will have been lost, probably irreparably.” *Id.*

114. See 342 U.S. 1, 6 (1951) (holding that orders denying a motion to reduce bail are “appealable as a ‘final decision’ of the District Court” under the final decision rule).

115. *Id.* at 6. The Court also discussed the interaction between habeas corpus and interlocutory appeals of bail, holding that interlocutory appeals must be exhausted before habeas comes into play: “While habeas corpus is an appropriate remedy for one held in custody in violation of the Constitution, the District Court should withhold relief in this collateral habeas corpus action where an adequate remedy available in the criminal proceeding has not been exhausted.” *Id.* at 6–7 (citation omitted).

It is worth noting, moreover, that federal law post-*Stack* has codified this process, expressly providing defendants with the right to a prompt interlocutory appeal of bail in the Bail Reform Act of 1984. See 18 U.S.C. § 3145 (2012); see also *supra* notes 82–84 and accompanying text (describing the *Salerno* Court’s discussion of appeal procedure under the Bail Reform Act).

116. See, e.g., Glynn, *supra* note 106, at 184 (“Most state court systems apply their own brand of the final judgment rule.”).

117. See Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. Pa. L. Rev. 1125, 1130–31 (1965) (describing the difficulties of bringing successful challenges to bail determinations and the resulting dearth of state precedent on the subject); see also Howe, *supra* note 32, at 1044–45 (explaining that claims under the Excessive Bail Clause are extremely rare in part because they come with a built-in expiration date, becoming nonjusticiable upon conviction of the defendant); Woodruff, *supra* note 90, at 275–76 (finding limited opportunities for review by higher courts of appeals and remarking that “it is a rare occasion for a state’s supreme court to rule on an excessive bail claim”).

118. See Foote, *supra* note 117, at 1131 (noting the weak state of bail case law).

or else hope that common practice in that jurisdiction provides another opportunity to be heard on bail.

Unfortunately for most criminal defendants, local penal codes have overwhelmingly failed to follow the federal lead.<sup>119</sup> The majority of states provide no statutory avenue for appealing the excessiveness of bail beyond the habeas writ,<sup>120</sup> and those that do often provide just a sentence or two on the procedure.<sup>121</sup> These silences in local law and their ramifications are discussed in greater depth in the following Part.<sup>122</sup>

## II. REALLY APPEALABLE? THE REAL-WORLD DIFFICULTIES AND COLLATERAL CONSEQUENCES OF CHALLENGING BAIL

Although criminal defendants have no constitutional right to appeal any trial court decision,<sup>123</sup> much less bail determinations, appellate relief in general remains a fundamental feature of federal and local justice systems.<sup>124</sup> In practice, a robust appellate system serves not only to “correct[] legal and factual errors” but also to “encourag[e] the development and refinement of legal principles,” “increas[e] uniformity and standardization in the application of legal rules,” and generally “promot[e] respect for the rule of law.”<sup>125</sup> In a more abstract sense, the ability to demand judicial review is also a concession to the fact of imperfect decisionmakers. To err, after all, is human—and procedures that “diffus[e] the power of an individual judge” protect a litigant’s dignity, preserve the voice of the accused, and lessen the impact of any mistakes made.<sup>126</sup>

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119. See Amber Widgery, Pretrial Detention, Nat’l Conference of State Legislatures (June 7, 2013), <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-detention.aspx> [<https://perma.cc/U2FB-B9Z5>] (listing only fifteen states and the District of Columbia that provide a statutory guarantee of judicial review of bail determinations).

120. See *id.* For further discussion of local bail appeals procedure, see *infra* section II.C.

121. See, e.g., N.Y. Crim. Proc. Law § 530.30 (McKinney 2018) (providing that criminal defendants may appeal bail determinations to a superior court judge when the “local criminal court . . . [h]as fixed bail which is excessive,” but providing no further procedural guidelines). A closer look at selected penal law is even more indicative of how little bail appeals have been contemplated by local legislatures and justice systems. See *infra* section II.C.

122. This Note’s in-depth analysis focuses primarily on Texas, New York, and California. Collectively, these three states cover a large swath of types of pretrial procedure and are representative of the trend of little controlling guidance on bail appeals. For a detailed discussion of the bail appeal practices of these states, see *infra* section II.C.

123. See, e.g., Cassandra Burke Robertson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1221 (2013) (“[A]ppellate review is not constitutionally guaranteed . . .”).

124. See, e.g., *id.* at 1222 (“[A]ppellate remedies are nearly universal: the federal court system and forty-seven states provide—as a matter of state law—either a constitutional or statutory requirement for appeals as of right in both civil and criminal cases.”).

125. *Id.* at 1225.

126. *Id.* at 1274.

Concerns with fairness and individual dignity are amplified in the bail context, where—with freedom and more on the line<sup>127</sup>—criminal defendants are at the mercy of either a singular judge’s snap decision<sup>128</sup> or a preset bail schedule not tailored to their circumstances.<sup>129</sup> This Part explores these realities, expanding on the notion that a fair bail system has been compromised by the inability of criminal defendants to challenge initial determinations. Section II.A begins by providing an overview of the underlying systemic issues plaguing bail hearings, which are shockingly short proceedings that are prone to error and resistant to change. Next, section II.B expands briefly on habeas corpus as a mode of appeal, establishing the inadequacy of state procedure on the matter. Finally, section II.C surveys bail appeal procedure in three critical and representative states—Texas, New York, and California—which operate either without workable guidelines for review or with ineffective implementations of what might otherwise be a promising avenue for reform.

#### A. *The Trouble with Bail Hearings*

The flaws inherent in bail hearings bring the need for robust appeals into greater focus. Bail procedure in state criminal courts is deeply troubling to judges and defendants alike.<sup>130</sup> Viewed from the bench, bail hearings are thorny in two seemingly contradictory ways. First, states that do not rely on bail schedules frequently provide a complicated set of guidelines for judges to decipher,<sup>131</sup> without the time or the resources to execute a proper inquiry.<sup>132</sup> In Texas, for instance, judges or magistrates setting bail must analyze five enumerated (and rather nebulous) factors, one of which requires judges to ensure that the bail amount they set is not acting as an “instrument of oppression.”<sup>133</sup>

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127. See *infra* section II.A.

128. See *infra* section II.A.

129. Recall that bail schedules are “procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the characteristics of an individual defendant,” and that their use is widespread. Carlson, *supra* note 27, at 13; see also *supra* note 27 and accompanying text.

130. See *supra* note 12 (introducing Chief Judge Lippman’s critique of the bail system).

131. To reiterate, a court that does not rely on a bail schedule is one in which the sitting judge makes the bail determination under local law *without* a list of “standardized money bail amounts based on the offense charged.” Carlson, *supra* note 27, at 13.

132. See, e.g., Stevenson & Mayson, *supra* note 4, at 25 (“It is common for such hearings to last only a few minutes.”).

133. Tex. Code Crim. Proc. art. 17.15 (2017). The Texas Code further requires that “bail . . . be sufficiently high to give reasonable assurance that the undertaking will be complied with”; “[t]he nature of the offense and the circumstances under which it was committed are . . . considered”; “[t]he ability to make bail is . . . regarded”; and “[t]he future safety of a victim of the alleged offense and the community shall be considered.” *Id.*

California (until recent reforms) and New York have similar requirements. See, e.g., Cal. Penal Code § 1275(a) (2018) (requiring inquiry into factors including public safety,

The personal life and history of an individual may be scrutinized—from a defendant’s family relationships and community ties,<sup>134</sup> to her history with substance abuse.<sup>135</sup> Past contacts with the criminal justice system may come to bear as well, in the form of previous nonappearances in court or criminal records.<sup>136</sup> The ability of the defendant to make bail is not always taken into consideration,<sup>137</sup> nor is public safety a universally accepted guideline,<sup>138</sup> though both appear with some frequency in penal law. Some states even demand fact-finding on the underlying criminal matter in arraignments, requiring judges to weigh existing evidence against the defendant and dip into the merits of the case before it has begun.<sup>139</sup> Yet with all these factors and more at play, bail determinations are typically made in a few minutes at most.<sup>140</sup> It is a sad truism that while one “might expect that detention decisions would be made with care”—especially given the complicated legal frameworks judges are asked to parse—“[t]he hearings at which bail is set . . . are typically rapid and informal.”<sup>141</sup>

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seriousness of the offense, and the probability of flight, among others), repealed by California Money Bail Reform Act, S.B. 10, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018); N.Y. Crim. Proc. Law § 510.30 (McKinney 2018) (listing nine similar factors for bail determinations); see also *infra* sections II.C.2–3.

134. See, e.g., N.Y. Crim. Proc. Law § 510.30.

135. See, e.g., La. Code Crim. Proc. Ann. art. 316 (2018).

136. See, e.g., Neb. Rev. Stat. § 29-901.01 (2016) (“The judge may also take into account . . . the defendant’s record of criminal convictions, and the defendant’s record of appearances at court proceedings or of flight to avoid prosecution or of failure to appear at court proceedings.”).

137. See Lester, *supra* note 73, at 25 (“[O]nly a handful of states inquire specifically into the defendant’s ability to pay a bond if set . . .”). Compare Neb. Rev. Stat. § 29-901.01 (“[T]he judge shall, on the basis of available information, consider the defendant’s financial ability to pay . . .”), with Cal. Penal Code § 1275(a) (providing that public safety be the “primary consideration” and not mandating consideration of defendant’s ability to pay).

138. Compare N.Y. Crim. Proc. Law § 510.30 (lacking reference to public safety concerns), with Tex. Code Crim. Proc. art. 17.15(5) (“The future safety of a victim of the alleged offense and the community shall be considered.”).

139. See, e.g., La. Code Crim. Proc. Ann. art. 316 (directing judges to consider “the weight of the evidence against the defendant”).

140. See, e.g., Stevenson & Mayson, *supra* note 4, at 25 (“It is common for . . . hearings to last only a few minutes.”); Stevenson, *supra* note 23, at 514 n.5 (“While there is no systematic survey of the length of bail hearing [sic], they are reported to be very short in many jurisdictions . . .”); see also The Constitution Project, Don’t I Need a Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing 10 (2015), [http://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL\\_3.18.15.pdf](http://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf) [<https://perma.cc/P7WR-CSN4>] (“[J]udicial officers frequently move ‘in haste’ when making bail or release decisions and rarely inform unrepresented indigent and low-income defendants about less onerous options . . .” (footnote omitted) (quoting *Stack v. Boyle*, 342 U.S. 1, 11 (1951))).

141. Stevenson & Mayson, *supra* note 4, at 22–23.

Second, if judges have “too many”<sup>142</sup> rules to follow in making bail determinations, they are simultaneously endowed with a problematic amount of discretion.<sup>143</sup> In jurisdictions without bail schedules, this power is evident in statutory guidelines encouraging judges to consider whatever other information they feel relevant,<sup>144</sup> or allowing magistrates to craft conditions of release as they see fit.<sup>145</sup> Even jurisdictions with bail schedules frequently give judges control over when to deviate from preset bail amounts.<sup>146</sup> Of course, the existence of discretionary power alone is not necessarily problematic; the larger issue with judicial discretion in the bail context is that there are few bounds on that power.<sup>147</sup> Judges are almost never required to explain their decisions, in written opinions or otherwise.<sup>148</sup> In turn, there is little accountability when bail is set on the basis of factors beyond judges’ statutory and constitutional mandate.<sup>149</sup> This broad level of discretion has been criticized for permitting the misuse of money bail as “pretextual

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142. None of the preceding is to suggest that fewer statutory guidelines for judges or magistrates making bail determinations would be preferable. Nor does this Note assume either way that the shocking brevity of arraignments is self imposed by the bench, or else forced on judges who must process a large volume of defendants each day to keep up. Rather, the emphasis here is simply on the gravity of the factors judges are tasked with weighing and the limited time in which this calculation occurs in practice.

143. See Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. Rev. 837, 841–42 (“[T]here seems to be general agreement that constraining or improving judicial discretion is a central piece of the pretrial puzzle.”).

144. See, e.g., La. Code Crim. Proc. Ann. art. 316 (listing “[a]ny other circumstances affecting the probability of defendant’s appearance” as a factor for consideration).

145. See, e.g., Gouldin, *supra* note 143, at 854 (explaining that “most statutes permit [judges] to craft other appropriate conditions of release” at their discretion).

146. Until recently, California, for instance, widely relied on bail schedules, see Cal. Penal Code § 1269b(c) (2018) (“It is the duty of the . . . judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses . . .”), repealed by California Money Bail Reform Act, S.B. 10, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018), but also permitted judges wide discretion in altering those schedules, see Cal. Penal Code § 1269c (“The magistrate . . . is authorized to set bail in an amount that *he or she deems sufficient* . . . and to set bail on the terms and conditions that he or she, *in his or her discretion*, deems appropriate . . .” (emphasis added)), repealed by S.B. 10; see also *infra* section II.C.3 (discussing California bail procedure and recent reforms).

147. See generally Gouldin, *supra* note 143, at 862–65 (highlighting the problems with judicial discretion in bail-setting).

148. See Lester, *supra* note 73, at 28 (arguing that states should require judges to note the reasons why bail was set at a particular amount, which is infrequently required in most local justice systems).

149. See *id.* (“Without a statement of why a court set bail at a particular amount, it is difficult to determine if the judicial officer abused his or her discretion. All arbitrariness in the process should be removed by requiring a finding from every judicial officer in every case.” (footnote omitted)).

preventive detention” and for promoting the current trend in excessive pretrial incarceration.<sup>150</sup>

From the accused’s perspective, it is difficult to comprehend just how distressing bail hearings are in real time. The extreme physical toll of being arrested and booked<sup>151</sup> is but one facet of the problem. Similarly disturbing is the idea that many individuals navigate bail hearings alone: At least eight states never provide counsel for defendants at the first appearance, and in many others, counsel is available infrequently, or only in “token jurisdictions” with highly populated urban areas.<sup>152</sup>

At this juncture, it is crucial to note that much more than freedom from restraint and proper participation in one’s own defense are on the line at initial bail hearings. For one, there is growing consensus that pretrial detention is causally linked to adverse case outcomes<sup>153</sup>—that is, bail decisions may be more determinative of a person’s “guilt” than the strength of the criminal case against her.<sup>154</sup> Advocates have become increasingly concerned about this “plea-inducing effect” on individuals who might otherwise have had their charges dropped or resolved with noncarceral dispositions.<sup>155</sup> Studies indicate that detained defendants may be as much as twenty-five percent more likely to be convicted than similarly situated peers,<sup>156</sup> results that are shocking on an individual basis

150. For a succinct critique of judicial discretion and the disturbing prevalence of low-risk pretrial detainees, see, for example, Gouldin, *supra* note 143, at 862–65.

151. To be “booked” is to endure the often-traumatic intake procedure at a local jail or precinct, which typically involves full-body searches. For a brief account of the typical arrest-to-arraignment process, see The Constitution Project, *supra* note 140, at 9.

152. See Douglas L. Colbert, *Prosecution Without Representation*, 59 *Buff. L. Rev.* 333, 386, 428–53 (tbls. I, II, III & IV) (2011) (conducting a fifty-state survey on the guarantee of counsel at initial appearances and finding ten states that deny counsel at the first appearance, several that provide counsel only in jurisdictions with highly populated cities, and that “about half of the country’s local jurisdictions persist in not providing counsel”); The Constitution Project, *supra* note 140, at 24 & n.125 (noting that “[l]awyers are never present at the first bail hearing” in Alabama, Kansas, Michigan, Mississippi, Oklahoma, South Carolina, Tennessee, and Texas, and that many other states fail to provide meaningful access except in “token jurisdictions”).

153. See Heaton, Mayson & Stevenson, *supra* note 6, at 713–14 (agreeing that there is “substantial reason to believe that detention affects case outcomes”); *supra* note 7 and accompanying text (collecting empirical studies that have found individuals detained due to their inability to pay bail to have poorer case outcomes than their peers on the outside).

154. See, e.g., Pinto, *supra* note 3 (“Bail makes poor people who would otherwise win their cases plead guilty.”).

155. See, e.g., Our Work, The Bronx Freedom Fund, <http://www.thebronxfreedomfund.org/our-work/> [<https://perma.cc/U48R-VFSS>] (last visited Aug. 10, 2018) (“While detained, people have no bargaining power or ability to prove their ties to family and community, forcing many to plead guilty to crimes they did not commit. This results in a criminal record that follows them for the rest of their lives.”).

156. Heaton, Mayson & Stevenson, *supra* note 6, at 717. Detained defendants are also more likely to receive jail sentences than releasees, and those sentences are frequently of longer duration. *Id.* (noting that detained defendants are forty-three percent “more likely

and broadly “undermine[] the legitimacy of the criminal justice system itself.”<sup>157</sup>

The collateral consequences of pretrial incarceration further contextualize the prevalence of guilty pleas. Individuals who cannot afford bail routinely experience “lost wages, worsening physical and mental health, [and] possible loss of custody of children, a job, or a place to live,” among other ramifications.<sup>158</sup> Even short stays in local jails can be traumatizing or fatal.<sup>159</sup> The outcome of bail hearings can thus create the “Sophie’s choice” of remaining in jail and maintaining innocence, or pleading guilty and returning home with a criminal record that “follows them for the rest of their lives.”<sup>160</sup>

Rampant pretrial incarceration punishes communities on a larger scale as well.<sup>161</sup> High bail has had especially corrosive and “grossly disproportionate” effects in low-income communities of color, whose members comprise the majority of pretrial jail populations and are more likely to remain in jail than their white counterparts.<sup>162</sup> As Professor Cynthia Jones recently noted, “nearly every study on the impact of race in bail determinations has concluded that African Americans are subjected to

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to be sentenced to jail” with sentences that are “more than double that of similar releasees”).

157. Stevenson & Mayson, *supra* note 4, at 22.

158. Subramanian et al., *supra* note 13, at 12–13. “A person detained for *even a few days* may lose her job, housing, or custody of her children.” Heaton, Mayson & Stevenson, *supra* note 6, at 713 (emphasis added); see also Open Soc’y Justice Initiative, *The Socioeconomic Impact of Pretrial Detention: A Global Campaign for Pretrial Justice Report 13* (2011), <http://www.opensocietyfoundations.org/sites/default/files/socioeconomic-impact-pretrial-detention-02012011.pdf> [<https://perma.cc/BC9F-QSFF>] (attempting to “catalogue the socioeconomic impact of excessive pretrial detention around the world”); Heaton, Mayson & Stevenson, *supra* note 6, at 713 n.4 (“While imprisoned [pretrial on a bail he could not afford], [Curry] missed the birth of his only child, lost his job, and feared losing his home and vehicle.” (alterations in original) (internal quotation marks omitted) (quoting *Curry v. Yachera*, 835 F.3d 373, 377 (3d Cir. 2016))); Pinto, *supra* note 3 (chronicling the story of a woman who, “five months after her arrest, . . . was still fighting in family court to regain custody of her daughter”).

159. Recent tragedies, like the death of Sandra Bland, underscore the dangers of even brief periods of incarceration. See Katie Rogers, *The Death of Sandra Bland: Questions and Answers*, N.Y. Times (July 23, 2015), <http://www.nytimes.com/interactive/2015/07/23/us/23blandlisty.html> (on file with the *Columbia Law Review*).

160. See The Bronx Freedom Fund, *supra* note 155.

161. See Subramanian et al., *supra* note 13, at 13 (“Ultimately . . . [the] consequences [of pretrial detention] are corrosive and costly for everyone because no matter how disadvantaged people are when they enter jail, they are likely to emerge with their lives further destabilized and . . . less able to be healthy, contributing members of society.”).

162. The Constitution Project, *supra* note 140, at 5, 28–29 (“Throughout the nation, unrepresented low-income and indigent defendants[,] . . . typically and disproportionately people of color accused of non-violent crimes[,] . . . remain in jail for lengthy periods . . . solely because they cannot afford money bail.”); see also Stevenson & Mayson, *supra* note 4, at 29–31 (noting severe racial disparities in pretrial detention and discussing the role of bail in these outcomes).



pretrial detention at a higher rate and . . . higher bail amounts than . . . white arrestees with similar charges and similar criminal histories.”<sup>163</sup>

In light of the stakes for criminal defendants, arraignments create an environment that seems dangerously prone to error.<sup>164</sup> The notion that judges can carefully apply discretion and scrutinize “a defendant’s whole life” in a matter of minutes has long been the subject of intense criticism.<sup>165</sup> And, as the following sections will establish, the lack of opportunities for defendants to challenge bail determinations by habeas corpus or interlocutory appeals compounds the problem.

### B. *Concerns with Habeas Corpus*

Habeas corpus has proven an incomplete remedy when it comes to stemming the tide of pretrial incarceration and offers little to counteract the deleterious effects of initial bail hearings.<sup>166</sup> To begin, some of the worst problems plaguing arraignments persist in habeas proceedings, rendering the writ just as ineffective as the initial bail determination. One of the most insidious is the lack of uniform right to counsel, which puts the neediest defendants at a severe disadvantage in the courtroom.<sup>167</sup>

163. Jones, *supra* note 5, at 938.

164. See Lester, *supra* note 73, at 53 (“There remains too much potential for abuse in the system.”).

165. See, e.g., Foote, *supra* note 117, at 1175 (elaborating on the “coming” constitutional crisis of bail in 1965 and commenting that “there is virtually no hearing on bail issues in the bail setting process”); Lester, *supra* note 73, at 25, 53 (“Without precise standards for bail and the bail procedure, courts will continue to administer inconsistent justice.”); *supra* notes 132–150 and accompanying text. Recognition of the potential for abuse has done little to alter the mechanics of bail hearings, which have remained largely static over the past fifty years. Compare Foote, *supra* note 117, at 1175 (discussing bail hearing procedure in the mid-1960s), with *supra* notes 23–27, 132–150 and accompanying text (describing modern bail hearing procedure).

166. Scarcely any academic literature exists studying habeas corpus in the bail context, but its lack of impact is visible in the current crisis facing bail systems, in which pretrial detainees make up the majority of jail inmates and represent the lion’s share of growth in local jail populations. See Stevenson & Mayson, *supra* note 4, at 21 (“The scope of pretrial detention in the United States is vast. Pretrial detainees account for two-thirds of jail inmates and 95% of the growth in the jail population over the last 20 years.”).

167. See, e.g., *Coffee v. Wainwright*, 172 So. 2d 851, 853 (Fla. Dist. Ct. App. 1965) (holding that “there is no absolute right to assistance of a lawyer” in habeas corpus hearings, given that such proceedings are civil and not criminal); see also *State Habeas Corpus: Florida, New York, and Michigan*, *supra* note 90, at 648–49 & n.100 (discussing the right to counsel for habeas petitions in state court). But see *People ex rel. Brock v. La Vallee*, 344 N.Y.S.2d 513, 515 (App. Div. 1973) (holding that an indigent prisoner, in connection with the filing of a habeas petition, is entitled to assignment of counsel to represent him at the corresponding hearing upon request).

Further, the Supreme Court has held that there is no federal constitutional right to counsel in habeas corpus proceedings. See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“[T]he right to appointed counsel extends to the first appeal of right, and no further.”).

The issue of timing in habeas hearings and its bearing on collateral consequences similarly determines the efficacy of the writ.<sup>168</sup> Long deadlines for state habeas hearings<sup>169</sup> or wide deference to judges' schedules<sup>170</sup> hinder the writ's ability to combat the potentially devastating ramifications of pretrial incarceration.<sup>171</sup> State habeas simply does not act fast or flexibly enough to provide meaningful relief.<sup>172</sup>

Finally, harsh standards of review have ensured that habeas hearings for bail accomplish little more than rubber-stamping trial judges' initial determinations. The popular application of the abuse of discretion standard in particular has led to near-systematic denial of excessive bail claims,<sup>173</sup> foreclosing habeas as a meaningful second look at initial determinations.

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168. Recall that "[r]elief in [these] type[s] of case[s] must be speedy if it is to be effective." *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

169. See, e.g., N.Y. C.P.L.R. 7009 (McKinney 2018) (mandating notice either "eight days prior to the hearing, or in any other manner or time as the court may order"); see also supra notes 95–96 and accompanying text (describing the timing of habeas petitions in state court); cf. Foote, supra note 117, at 1177 (explaining that, at least in the federal system, "extensions of time are the rule rather than the exception" for habeas proceedings).

170. See, e.g., Tex. Code Crim. Proc. arts. 11.10–11 (2017) (permitting judges to appoint the time and place for habeas hearings at their earliest convenience); see also supra notes 95–96 and accompanying text (discussing how judicial discretion in scheduling hearings can delay habeas petitions in state court).

171. See supra notes 153–163 and accompanying text (discussing the collateral consequences of pretrial incarceration).

172. Even the Supreme Court of the 1950s—long before the true boom in pretrial incarceration—realized that a habeas writ was a poor tool for challenging bail determinations. In his concurring opinion in *Stack v. Boyle*, Justice Jackson elaborated on the dangers of using habeas corpus as the default mode of appeal for excessive bail, arguing that the "writ will best serve its purpose and be best protected from discrediting abuse if it is reserved" for only the most extreme cases, for which no other remedy is available. 342 U.S. at 10–11 (Jackson, J., concurring in part). "Habeas corpus is not," Justice Jackson warned, "in the absence of extraordinary circumstances, the procedure to test reasonableness of bail." *Id.* at 11. Rather, challenging bail must take the form of "practical, simple, adequate[,] and expeditious" motions, which the Court "should define and limit . . . with considerable precision." *Id.*

Note that federal habeas writs filed by state prisoners run into a similar problem, as they may be pursued only once state remedies have been exhausted, and because the federal courts apply "highly deferential standards of review for both factual and legal error." *Aziz Z. Huq, Habeas and the Roberts Court*, 81 U. Chi. L. Rev. 519, 535 (2014). Without going deeper into federal law, it is clear that a state prisoner looking to exercise the writ in federal court must wade through the delay and deference of both procedures.

173. See, e.g., Lester, supra note 73, at 26–27 (noting the widespread use of the abuse of discretion standard and that appellate courts in bail cases consequently "will often yield to the factual finding of the lower judge"); see also supra notes 102–103 and accompanying text (elaborating on the abuse of discretion standard).

C. *The Inadequacy of Local Bail Procedure*

Given the generally problematic state of arraignments<sup>174</sup> and inadequacy of habeas corpus,<sup>175</sup> the lack of workable procedure for judicial review of bail—or, often, any guidelines at all—becomes a more glaring gap in the law. Most states lack any guarantee of judicial review of bail conditions beyond the habeas remedy.<sup>176</sup> Even those local systems that provide bail appeals in some form often do so ineffectively, while struggling with rampant pretrial overincarceration. As three of the most populous states in the country<sup>177</sup> and most “productive” local justice systems of the modern day,<sup>178</sup> Texas, New York, and California serve as helpful case studies.<sup>179</sup> The following subsections briefly discuss local problems with arraignments and walk through pretrial bail appeal procedure in each state.

1. *Texas*. — The Texas Constitution guarantees the right to bail for all criminal defendants, save those accused of capital crimes.<sup>180</sup> The state’s statutory guidance on how bail must be set may also be characterized as fairly ordinary.<sup>181</sup> The functionality of these statutory guidelines, however, is belied by the experiences of Texan defendants, who encounter woefully inadequate initial bail proceedings and bail reviews. Perhaps

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174. See *supra* section II.A.

175. See *supra* section II.B.

176. See Widgery, *supra* note 119 (listing only fifteen states, plus the District of Columbia, that provide a statutory guarantee of judicial review of bail determinations); see also *supra* notes 119–121 and accompanying text.

177. California, Texas, and New York are the first, second, and fourth most-populated states, respectively. Press Release, U.S. Census Bureau, Idaho Is Nation’s Fastest-Growing State (Dec. 20, 2017), <http://www.census.gov/newsroom/press-releases/2017/estimates-idaho.html> [<https://perma.cc/3C7S-9UYQ>].

178. Recent numbers from the Bureau of Justice Statistics indicate that Texas and California imprison the first and second most individuals in the United States, followed by New York in sixth place. See Carson & Anderson, *supra* note 13, at 5 tbl.2. These states also have extraordinarily large populations of pretrial detainees, discussed further *infra* sections II.C.1–3.

179. All three states have adopted the Constitution’s prohibition against excessive bail. See Cal. Const. art. I, § 12 (“Excessive bail may not be required.”); N.Y. Const. art. I, § 5 (“Excessive bail shall not be required . . .”); Tex. Const. art. I, § 13 (“Excessive bail shall not be required . . .”).

180. See Tex. Const. art. I, § 11 (“All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident . . .”).

181. In Texas, judges or magistrates setting bail are constrained to analyzing that the amount (1) gives the court reasonable assurance of the defendant’s return, (2) does not operate as an “instrument of oppression,” and that it reflects (3) the nature of the crime, (4) the defendant’s ability to pay, and (5) the future safety of the victim and community. Tex. Code Crim. Proc. art. 17.15 (2017); see also *supra* notes 133–138 (noting the prevalence of statutorily mandated inquiries into factors similar to those in the Texas code).

nowhere is more emblematic of this status quo than Harris County,<sup>182</sup> the largest county in the state,<sup>183</sup> third-largest county in the United States,<sup>184</sup> and home of the nation's fourth-largest city.<sup>185</sup> A wealth of judicial fact-finding on the area's bail practices, stemming from a recent federal lawsuit challenging their constitutionality, makes it a valuable resource for understanding the system on the ground.<sup>186</sup>

The findings are unsettling. Harris County misdemeanor defendants routinely find initial bail hearings conducted in an "assembly-line fashion," often through a video screen in a conferencing facility in jail.<sup>187</sup> Access to counsel during this first proceeding is rare, and defendants frequently appear without representation.<sup>188</sup> The entire arraignment may last no longer than a few minutes.<sup>189</sup> In short, as the District Court for the Southern District of Texas ultimately held, the county's bail practices are consistent with a "systematic policy and practice of imposing . . . bail as de facto orders of pretrial detention."<sup>190</sup>

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182. See generally Jolie McCullough, *How Harris County's Federal Bail Lawsuit Spreads Beyond Houston*, Tex. Trib. (Oct. 2, 2017), <http://www.texastribune.org/2017/10/02/how-harris-countys-bail-lawsuit-spreads-beyond-houston/> (on file with the *Columbia Law Review*) (detailing how the county's bail fight impacts and implicates other counties in Texas).

While it serves as a salient reflection of the rest of Texas, Harris County is also a valuable representative case for observing bail practices nationwide, given that it is a "populous urban area with criminal justice structures comparable to those in many large cities in the United States" and that many "pretrial practices in Harris County are regularly observed in other jurisdictions." Heaton, Mayson & Stevenson, *supra* note 6, at 731, 733.

183. Tex. Demographic Ctr., *Estimates of the Total Populations of Counties and Places in Texas for July 1, 2015 and January 1, 2016*, at 7 tbl.1 (2016), [http://demographics.texas.gov/Resources/TPEPP/Estimates/2015/2015\\_txpopest\\_county.pdf](http://demographics.texas.gov/Resources/TPEPP/Estimates/2015/2015_txpopest_county.pdf) [<https://perma.cc/9ZJ6-2Z28>].

184. The 25 Largest Counties in the U.S. in 2017, Statista, <http://www.statista.com/statistics/241702/largest-counties-in-the-us/> [<https://perma.cc/347W-MWSQ>] (last visited Aug. 9, 2018).

185. Houston sits behind New York, Los Angeles, and Chicago with a population of approximately 2.3 million. See U.S. Census Bureau, *The 15 Most Populous Cities (2016)*, <http://www.census.gov/content/dam/Census/newsroom/releases/2017/cb17-81-table3-most-populous.pdf> [<https://perma.cc/8Z34-YZDG>].

186. Arrestees in the case, *O'Donnell v. Harris County*, brought suit challenging the county's postarrest detention policies as violative of due process and equal protection. 251 F. Supp. 3d 1052, 1060–67 (S.D. Tex. 2017). The district court ruled in the plaintiffs' favor in 2017, issuing a preliminary injunction enjoining the county from detaining misdemeanor defendants based on their inability to pay. *Id.* at 1160–66.

187. Heaton, Mayson & Stevenson, *supra* note 6, at 730.

188. *Id.* at 730.

189. *Id.*; see also *O'Donnell*, 251 F. Supp. 3d at 1092.

190. *O'Donnell*, 251 F. Supp. 3d at 1059. The District Court's ruling has been hailed as a landmark victory for bail reformers. See Eli Rosenberg, *Judge in Houston Strikes Down Harris County's Bail System*, N.Y. Times (Apr. 29, 2017), <http://www.nytimes.com/2017/04/29/us/judge-strikes-down-harris-county-bail-system.html> (on file with the *Columbia Law Review*) (describing the Harris County verdict, in the words of one of the plaintiffs')

More distressingly, once initial bail has been set, Texas defendants are provided with few options for bail appeals. Any oral or other informal motions for bail reduction at the first few hearings are conducted largely at the discretion of the judge and “only in a minority of . . . cases.”<sup>191</sup> Even when judges consider reducing a defendant’s bail, their reliance on the county’s bail schedules often brings the discussion to a screeching halt: One Harris County judge “testified that in his experience . . . seeking a bail review at the first appearance was futile because County Judges ‘stick to the bond schedule. That would be the answer. What does the bond schedule say?’”<sup>192</sup>

More formal applications to revisit initial bail determinations also lack sufficient basis in statute or practical law. The state provides next-to-no procedural guidance for conducting appellate reviews of bail determinations, beyond one section in the Rules of Appellate Procedure.<sup>193</sup> And that same section of the code has been effectively gutted by the Court of Criminal Appeals, which held that the rule could not grant courts of appeals the jurisdiction to hear bail appeals.<sup>194</sup> That is to say that, in practice, bail appeals have no legitimate place in Texas law.

2. *New York*. — New York provides a statutory atmosphere similarly hostile to bail appeals. As a threshold matter, the arraignment system in New York—as in California and Texas<sup>195</sup>—has been plagued with horrific

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attorneys, as a “comprehensive and robust condemnation of the existing money bail system’ that would reverberate beyond Texas”).

191. *ODonnell*, 251 F. Supp. 3d at 1101.

192. *Id.*; see also *id.* at 1068 (“[M]isdemeanor arrestees are not able even to ask for a review of their bail in a counseled, adversarial proceeding, with an opportunity to present evidence and a right to findings on the record, until at least two or three days and often up to two weeks after their arrests.”).

193. Rule 31 of the Texas Rules of Appellate Procedure, entitled “Appeals in Habeas Corpus, Bail, and Extradition Proceedings in Criminal Cases,” reads in pertinent part:

An appeal in a habeas corpus or bail proceeding will be heard at the earliest practicable time. The applicant need not personally appear, and the appeal will be heard and determined upon the law and the facts shown by the record. The appellate court will not review any incidental question that might have arisen on the hearing of the application before the trial court. The sole purpose of the appeal is to do substantial justice to the parties.

. . . .

The appellate court will render whatever judgment and make whatever orders the law and the nature of the case require.

Tex. R. App. P. 31.2–3.

194. See *Ragston v. State*, 424 S.W.3d 49, 52 (Tex. Crim. App. 2014) (“There is no constitutional or statutory authority granting the [Texas] courts of appeals jurisdiction to hear interlocutory appeals regarding excessive bail or the denial of bail.”).

195. See *supra* section II.C.1 (describing the Texas bail system) and *infra* section II.C.3 (describing the California bail system).

problems.<sup>196</sup> Criminal defendants are met with a mechanical and short procedure comparable to the Harris County system.<sup>197</sup> The results regularly leave low-income and low-risk individuals incarcerated for months or years pending trial.<sup>198</sup>

New York's bail appeal procedure does little to alleviate these issues. While individuals challenging bail as excessive in court have two options beyond the habeas remedy, neither properly functions as an effective second look at initial bail determinations. The first mode of appeal extends from section 510.20 of the Criminal Procedure Law (C.P.L.), which permits unlimited applications for recognizance or bail "at any time when a principal is confined in the custody" of the state.<sup>199</sup> Yet the section 510.20 remedy does little to actually aid individuals incarcerated on bail they cannot afford: In practice, it is common knowledge that the vast majority of "such application[s] [are] unlikely to succeed."<sup>200</sup> These outcomes are perhaps unsurprising, given that the rule contemplates repeated oral applications to one judge, who was responsible for the initial bail decision and is unlikely to change her mind when presented with the same facts.<sup>201</sup>

The second method of challenging bail, through C.P.L. section 530.30, shows slightly more promise for challenging bail determinations, but leaves just as many questions unanswered.<sup>202</sup> The section entitles criminal defendants to one review of a lower court bail determination by a superior court,<sup>203</sup> a step up from the repeated pleas of section 510.20.<sup>204</sup>

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196. See, e.g., Pinto, *supra* note 3 ("Every year, thousands of innocent people are sent to jail [in New York] only because they can't afford to post bail, putting them at risk of losing their jobs, custody of their children—even their lives.").

197. See generally *id.* (providing a disturbing firsthand account of arraignment procedure in New York).

198. See, e.g., Gonnerman, *Before the Law*, *supra* note 1 (discussing Kalief Browder's nightmarish three-year journey through the New York City criminal justice system).

199. N.Y. Crim. Proc. Law § 510.20 (McKinney 2018).

200. 7 Lawrence K. Marks et al., *West's New York Practice Series: New York Pretrial Criminal Procedure* § 4:13, at 267 (2d ed. 2007) (noting that, in practice, section 510.20 motions are usually unsuccessful except under "changed and unusual circumstances").

201. See *id.* Even when applications are made at subsequent hearings to a new bench, judges may balk at disturbing the decisions of their colleagues, especially considering the underlying lack of structure in the section 510.20 process. See Brian Crow & Marika Meis, *Bail Advocacy in New York State* 12–13 (2011), <https://www.nycourts.gov/courts/ad1/Committees&Programs/CLE/Materials%20-%202010-20-11.pdf> [<https://perma.cc/9QJ8-YC9Z>] ("There is little, if any, authority governing the standard for a bail application by defense counsel under C.P.L. § 510.20 . . .").

202. The statute reads in pertinent part: "When a criminal action is pending in a local criminal court, other than one consisting of a superior court judge[,] . . . a judge of a superior court[,] . . . upon application of a defendant, may order recognizance or bail when such local criminal court . . . [h]as fixed bail which is excessive." N.Y. Crim. Proc. Law § 530.30.

203. Crow & Meis, *supra* note 201, at 12.

204. See *supra* notes 199–200 and accompanying text.

Courts are apparently free to consider the issue of bail *de novo*,<sup>205</sup> but real questions remain about how deferential superior courts should be to lower courts.<sup>206</sup> In keeping with similar statutes, the brevity of the text of section 530.30 also leaves the door wide open for judicial discretion: There is no mention of the standard of review and no procedural or substantive guidelines for how these proceedings should function. The entire process is fraught with ambiguity.<sup>207</sup>

In the recent past, New York has attempted to leverage the bail appeal to mitigate the crisis of pretrial detention. In October 2015, Judge Jonathan Lippman—then-Chief of the Court of Appeals—announced a series of reforms aimed at the injustices of the bail system.<sup>208</sup> A centerpiece of the effort was the implementation of automatic bail reviews for misdemeanor cases.<sup>209</sup> Since its announcement, however, lackluster implementation has plagued the program: Current accounts indicate that “automatic review hearings [do not] take place until at least *eight days* after defendants’ arrest,” and then only when “defendants agree that the hearings can occur in their absence. If the defendants want to be present for the hearings, they occur at least [ten] business days after the initial court appearance.”<sup>210</sup> Consequently, the state’s foray into bail appeals fails to meet the most basic demand of bail jurisprudence—speedy relief<sup>211</sup>—and remains a far cry from real progress.<sup>212</sup>

3. *California*. — Despite its liberal reputation and a decades-long “Democratic lock on the [l]egislature,” California has only recently made

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205. See N.Y. Crim. Proc. Law § 530.30 practice cmt. (“This section . . . provides an avenue for *de novo* review of securing orders fixed by all local criminal courts where defendants allege the terms to be unlawful or overly severe.”).

206. See Marks et al., *supra* note 200, § 4:13, at 267–68 & n.2 (discussing questions left unanswered in the bail appeal law with regard to the standard of review).

207. Practice commentaries on these bail review procedures are fairly frank about how unsettled the area of law is. See *id.* (“In truth, the superior court’s standard of review, and what deference, if any, should be paid to the local criminal court’s judgment under this statute, appear to be unsettled questions.”).

208. See Press Release, N.Y. State Unified Court Sys., Chief Judge Jonathan Lippman Announces Series of Reforms to Address Injustices of NY’s Current Bail System (Oct. 1, 2015), [http://www.nycourts.gov/press/PDFs/PR15\\_13.pdf](http://www.nycourts.gov/press/PDFs/PR15_13.pdf) [<https://perma.cc/9PYL-SJ9N>].

209. Judge Lippman’s bail appeal was envisioned as the institution of automatic *de novo* reviews of bail determinations, triggered “whenever a defendant charged with a misdemeanor has been unable to make bail.” *Id.* at 2. Judge Lippman intended each borough to have a judge dedicated to these appeals. *Id.*

210. See Wendy Davis, New York’s Bail Reforms Making Little Impact, Lawyers Say, City Limits (Mar. 21, 2016), <http://citylimits.org/2016/03/21/new-yorks-bail-reforms-making-little-impact-lawyers-say/> [<https://perma.cc/8CVM-QTMT>] (emphasis added).

211. See *supra* notes 80–84 and accompanying text (discussing the procedural due process implications of bail law).

212. See Davis, *supra* note 210 (“[I]nitial reports from criminal defense attorneys indicate that the measure has yet to make a meaningful difference.”).

hay of its supposedly fertile ground for progressive bail reforms.<sup>213</sup> This subsection addresses California’s “old” bail regime and its new bail landscape—effective October 1, 2019<sup>214</sup>—in turn.

Under the old regime, California defendants arrested for low-level offenses had two opportunities for bail-related appearances in succession.<sup>215</sup> Due in large part to overreliance on county bail schemes, though, neither offered a meaningful opportunity to contest bail amounts. Defendants were permitted to make oral applications for bail lower than the scheduled amount at their first court appearance, but judges and magistrates exercised essentially unlimited discretion in evaluating

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213. David Dayen, Opinion, *If California’s So Liberal, Why Do We Still Have Money Bail?*, L.A. Times (Aug. 25, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-dayen-money-bail-california-20170825-story.html> [<https://perma.cc/JH55-RAEQ>]. For decades, the state has attracted criticism for its astronomic pretrial detention population and the glacial pace of reform efforts. See, e.g., Bureau of Justice Statistics, U.S. Dep’t of Justice, State Court Processing Statistics: Felony Defendants in Large Urban Counties, 2009—Statistical Tables 36 tbl.29 (2013), <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/GZ6F-LGQK>] (listing the size of the pretrial populations in large counties across the United States, including California’s Los Angeles, Orange, San Bernardino, and Ventura counties); Human Rights Watch, “Not in It for Justice”: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People 2, 17 (2017), [https://www.hrw.org/sites/default/files/report\\_pdf/usbail0417\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/usbail0417_web_0.pdf) [<https://perma.cc/X5YV-YHG8>] (“California counties detain pretrial at a far higher rate than the rest of the country. . . . Bail and pretrial detention in California subject arrestees to unfair treatment, arbitrary detention, wealth discrimination, and other violations of their basic rights.”); Dayen, *supra* (observing that the “median bail rate in California is . . . unconscionabl[y] . . . out of reach to the disproportionately black and brown population in the criminal justice system” and discussing bail reform “put on ice” by the legislature despite popular demand for change); Jazmine Ulloa, *Legislation to Overhaul Bail Reform in California Hits a Hurdle in Assembly*, L.A. Times (June 1, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-legislation-to-overhaul-bail-reform-in-1496385464-htmstory.html> [<https://perma.cc/XT4D-KJCS>] (reporting on the failure of bail reform in the California Assembly). But see California Money Bail Reform Act, S.B. 10, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018); Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight*, NPR (Aug. 28, 2018), <https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail> (on file with the *Columbia Law Review*).

214. See S.B. 10.

215. California’s traditional scheme first permitted bail to be set immediately after booking, by the officer “in charge of [the] jail in which an arrested person is held in custody.” See Cal. Penal Code § 1269b(a) (2018); see also Human Rights Watch, *supra* note 213, at 26 (detailing California bail procedure). Alternatively, bail could be set during a defendant’s first court appearance, consisting of a brief hearing in front of a local magistrate. See Cal. Penal Code § 1269b(b) (“If a defendant has appeared before a judge . . . the bail shall be in the amount fixed by the judge at the time of the appearance.”). In both cases, initial bail amounts typically conformed to each “county’s bail schedule, which has a standardized amount based on the charge.” Human Rights Watch, *supra* note 213, at 26; see also Cal. Penal Code § 1269b(c) (“It is the duty of the . . . judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses . . .”).



applications for modification.<sup>216</sup> The fight for unscheduled bail at a first appearance was so infrequently successful that it became “[c]ommon court practice” not to waste energy on the issue.<sup>217</sup>

For individuals unable to afford scheduled bail, California law attempted a remedy somewhat approaching a formal bail appeal. Pursuant to the now-repealed Penal Code section 1270.2, defendants were entitled to a single judicial review when the conditions of bail result in their pretrial detention.<sup>218</sup> The review was automatic and held within a

216. See Cal. Penal Code § 1269c (“The magistrate . . . is authorized to set bail in an amount that *he or she deems sufficient* . . . and to set bail on the terms and conditions that he or she, *in his or her discretion*, deems appropriate . . . .” (emphasis added)); see also Human Rights Watch, *supra* note 213, at 26, 31 (“Hearings to decide pretrial release status and to set bail amounts in California are generally extremely fast and often involve minimal argument. Judges have imprecise guidelines to direct their discretion, and almost no meaningful oversight.”).

Release on unscheduled bail under this bail scheme was policed more strongly for serious or violent felony charges, for which detailed procedural guidance promoted deference to the bail schedules. Compare Cal. Penal Code § 1270.1 (providing extensive guidelines for hearings on unscheduled bail for persons arrested for serious crimes, including two-court-day written notice to both parties and the opportunity to be heard in open court), with Cal. Penal Code § 1275 (mandating only that public safety be the primary factor to be considered for noncapital offenses, among other factors such as “the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of” future appearance by the defendant). Studies suggest, however, that officials infrequently deviate from bail schedules regardless of the severity of the charge. See Human Rights Watch, *supra* note 213, at 5 (“[Judges] rely on arbitrarily determined bail schedules that set amounts to coincide with the level of the charge. While judges have discretion to depart from them, they tend to treat the schedules as mechanical formulas to apply in most cases.”).

217. See Human Rights Watch, *supra* note 213, at 32–33 (explaining that “judges tend to avoid making individualized decisions by automatically applying the bail schedule amount based on the charge”). Practically speaking, the initial bail-setting process has been little more than a formality, when defendants are advised of the charges against them and alerted to their place in the bail schedule. See *id.* at 5 (describing the “mechanical” application of bail schedules in the initial appearance).

218. Section 1270.2 of the California Penal Code reads in full:

When a person is detained in custody on a criminal charge prior to conviction for want of bail, that person is entitled to an automatic review of the order fixing the amount of the bail by the judge or magistrate having jurisdiction of the offense. That review shall be held not later than five days from the time of the original order fixing the amount of bail on the original accusatory pleading. The defendant may waive this review.

Cal. Penal Code § 1270.2. This right was recognized by the Fourth District Court of Appeal, see *In re Weiner*, 38 Cal. Rptr. 2d 172, 174 (Cal. Ct. App. 1995) (“A defendant is entitled to one automatic review of the order fixing the amount of bail and the issue of appropriate bail may be raised at various times throughout the criminal proceedings.”), and was thereby binding on all trial courts in California, see *Auto Equity Sales, Inc. v. Superior Court of Santa Clara Cty.*, 369 P.2d 937, 941 (Cal. 1962) (“Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of [the] state . . . .”).

definite time frame—“not later than five days”—from the initial bail determination,<sup>219</sup> two features that seemed promising compared to states that provide even less protection.<sup>220</sup> Yet in actual practice, the procedure lacked bite.<sup>221</sup> The code dedicated a single sentence to the procedure of the appeal, without mention of how the review was to be obtained or adjudicated other than that it should be “automatic” and occur in front of “the judge or magistrate having jurisdiction of the offense.”<sup>222</sup> As in initial hearings, reviewing judges operated with both “imprecise guidelines to direct their discretion, and almost no meaningful oversight.”<sup>223</sup> Consequently, “the practical likelihood of changing the original judge’s decision” in a bail review was always “very small.”<sup>224</sup>

Even when the California bail review procedure operated optimally, its timeline remained problematic. Despite a maximum waiting period of five days, the procedure still held individuals long enough to trigger many of the collateral consequences of pretrial incarceration and radically disrupt their lives—meaning the “automatic” intervention was likely too little, too late.<sup>225</sup> In sum, California’s traditional bail scheme largely failed to translate the spirit of constitutional bail law into practice.<sup>226</sup>

On August 28, 2018, Governor Jerry Brown signed the California Money Bail Reform Act into law.<sup>227</sup> The Act repeals large portions of the Penal Code pertaining to pretrial release and detention—including those

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219. Cal. Penal Code § 1270.2.

220. Compare Texas and New York bail procedure, discussed supra sections II.C.1–2.

221. See Human Rights Watch, supra note 213, at 31–32 (noting that “[a] defendant is entitled to review the bail order within five days” but that the process lends no practical benefits to defendants).

222. Cal. Penal Code § 1270.2.

223. Human Rights Watch, supra note 213, at 31–32. The presiding official, in fact, is sometimes the “original judge who set bail at arraignment.” See id. at 32.

224. Id. at 31–32.

225. Recall that “[a] person detained for even a few days may lose her job, housing, or custody of her children.” Heaton, Mayson & Stevenson, supra note 6, at 713; see also supra notes 153–161 and accompanying text (describing some common and devastating collateral consequences of pretrial incarceration).

226. As the First District Court of Appeals held earlier this year, California courts’ “unquestioning reliance upon the bail schedule without consideration of a defendant’s ability to pay, as well as other individualized factors bearing upon his or her dangerousness and/or risk of flight, runs afoul of the requirements of due process.” *In re Humphrey*, 228 Cal. Rptr. 3d 513, 541 (Ct. App. 2018) (holding unconstitutional a criminal court’s bail decision without an individualized assessment of the defendant’s ability to pay). The *Humphrey* decision has been credited with finally necessitating large-scale reform after years of legislative inaction. See Romo, supra note 213 (“An overhaul of the state’s bail system has been in the works for years, and became an inevitability earlier this year when a California appellate court declared the state’s cash bail system unconstitutional.”).

227. California Money Bail Reform Act, S.B. 10, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018); see also Romo, supra note 213.

discussed above—and will make California “the first state in the nation to abolish [money] bail for suspects awaiting trial.”<sup>228</sup>

The enormity of this achievement cannot be denied; eliminating cash bail is both historic and commendable. But the new law has critical shortcomings. To begin with, the Act “creates broad new categories of people who will now be presumed to be subjected to pretrial incarceration.”<sup>229</sup> That is, the Act lists a myriad of crimes and conditions that automatically foreclose the possibility of pretrial release.<sup>230</sup> This categorical approach has received swift criticism for being just as inhospitable to individual assessments as the bail schedules that came before it.<sup>231</sup> The Act also promises to release more individuals deemed “low risk,” but leaves responsibility for making risk determinations largely in the hands of the same government actors that misused that power under the old regime: county courts.<sup>232</sup> Local courts retain extremely

228. Romo, *supra* note 213; see also S.B. 10.

229. Why the ACLU Opposes California’s Decision to Eliminate Cash Bail, NPR (Aug. 29, 2018), <https://www.npr.org/2018/08/29/643062086/why-the-aclu-opposes-californias-decision-to-eliminate-cash-bail> (on file with the *Columbia Law Review*) [hereinafter ACLU Opposition].

230. S.B. 10, § 1320.10(e). One particularly expansive subsection forbids pretrial release for defendants who have been arrested for any felony offense that includes the mere threat of “physical violence to another person” or the “likelihood of great bodily injury.” *Id.* § 1320.10(e)(4). Other subsections would deny release on the basis of conditions that similarly reach large numbers of defendants. See *id.* § 1320.13(b) (establishing that “[t]he authority for court prearrest review and release . . . shall not apply” to “[p]ersons assessed as high risk,” individuals “charged with a serious . . . or a violent felony,” or those who have a pending felony trial or sentencing); *id.* § 1320.20(a) (establishing a “rebuttable presumption that no condition or combination of conditions of pretrial supervision will reasonably assure public safety”—and thus denying pretrial release—when certain felonies are charged, or in cases in which the defendant is assessed “high risk” and meets other criteria).

231. See, e.g., Thomas Fuller, California Is the First State to Scrap Cash Bail, N.Y. Times (Aug. 28, 2018), <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html> (on file with the *Columbia Law Review*) (“The details of how individuals will be assessed has been left for California’s judiciary to work out. And some legislators said the state was moving too fast on a very complex issue.”); ACLU Opposition, *supra* note 229 (interviewing the ACLU’s Deputy National Political Director Udi Ofer, who clarified that the organization is “OK with judges making individualized decisions” but “[w]hat we’re not OK with is the standard that is currently before them that just has general categories”).

232. The Act appears to grant local courts the power to form Pretrial Service Agencies—groups or programs that administer risk assessments—as they see fit. See S.B. 10, §§ 1320.7(g), 1320.26(a) (defining “Pretrial Assessment Services” as entities hired or created “at the option of the particular superior court” and clarifying that it is “[t]he courts” that “shall establish pretrial assessment services”); see also Meagan Flynn, California Abolishes Money Bail with a Landmark Law. But Some Reformers Think It Creates New Problems., Wash. Post (Aug. 29, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/08/29/california-abolishes-money-bail-with-a-landmark-law-but-some-reformers-think-it-creates-new-problems/?utm\\_term=.af99394122fc](https://www.washingtonpost.com/news/morning-mix/wp/2018/08/29/california-abolishes-money-bail-with-a-landmark-law-but-some-reformers-think-it-creates-new-problems/?utm_term=.af99394122fc) (on file with the *Columbia Law Review*) (discussing judicial discretion over risk assessments and noting

broad discretion over the release conditions of any individual deemed “medium” or “high” risk as well.<sup>233</sup> In all, the new law threatens to “empower[] judges to take away . . . liberty based on biased algorithms and the judges’ own subjective choices, with no standards and no due process.”<sup>234</sup>

Unfortunately, access to appellate review in the California Money Bail Reform Act also leaves much to be desired. Like its predecessor, the new law is light on procedural guidance for bail reviews, noting merely that “[i]f either party files a writ challenging the decision, the court of appeal shall expeditiously consider that writ.”<sup>235</sup> Given that assessments by newly minted pretrial assessment agencies are to take place within approximately twenty-four hours of arrest,<sup>236</sup> and preventive detention hearings approximately three days beyond that,<sup>237</sup> the new bail review timeline is strikingly similar to the previous five-day automatic review. Cash bail may be a thing of the past in California, but a more pernicious form of pretrial procedure may be on the horizon.

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critics’ concerns that “too many people may end up unfairly classified as ‘high-risk’ and detained based on subjective criteria and, crucially, that too many racial minorities will be classified this way”).

233. See S.B. 10, § 1320.11(a) (“The local rule shall provide Pretrial Assessment Services with authority to detain or release on own recognizance or supervised own recognizance defendants assessed as medium risk . . .”); see also *id.* (noting that local rules “may further expand the list of offenses and factors for which prearrestment release of persons assessed as medium risk is not permitted,” though local courts may not exclude all medium-risk defendants from release); *id.* § 1320.13(c)–(d) (directing courts to make prearrestment detention decisions based on Pretrial Assessment Services’ recommendations in addition to “any relevant and available information provided by law enforcement, the arrested person, any victim, and the prosecution or defense”).

234. See Jazmine Ulloa, California Gov. Jerry Brown Signs Overhaul of Bail System, Saying Now ‘Rich and Poor Alike Are Treated Fairly,’ *L.A. Times* (Aug. 28, 2018), <http://www.latimes.com/politics/la-pol-ca-brown-signs-bail-reform-20180828-story.html> [https://perma.cc/X9VL-VC94] (quoting a senior researcher from Human Rights Watch, who argues that “the law replaced an unfair system with a potentially worse one”); see also ACLU Opposition, *supra* note 229 (“[T]he problem . . . with the law is that it replaces this current system with another system that could . . . lead to an increase in pretrial detention and that gives way too much power to judges and to prosecutors without . . . oversight.”).

One positive feature of the Act worth mentioning at this juncture is the guaranteed right to counsel in pretrial detention hearings. See S.B. 10, § 1320.19(d).

235. Compare S.B. 10, § 1320.20(d)(3), with *supra* notes 219–224 and accompanying text (highlighting the lack of specific procedural guidance for bail appeals in California’s old statutory regime). The new law does, however, make a special provision for review when there has been “newly discovered evidence, facts, or material change in circumstances” germane to the detention determination. See S.B. 10, § 1320.21 (permitting courts to “reopen a preventive detention hearing based on newly discovered evidence . . . brought to the court’s attention by Pretrial Assessment Services” without specifying the timing of such review).

236. See S.B. 10, § 1320.10(f).

237. *Id.* § 1320.19(a)–(b).

### III. BUILDING A BETTER BAIL APPEAL

Texas, New York, and California are certainly not the only states that have struggled to provide fair bail hearings and bail reviews.<sup>238</sup> They are also not alone in contemplating changes to the status quo. Spurred in part by media fury<sup>239</sup> and an increasing awareness of the dire “costs of pretrial detention,”<sup>240</sup> local courts and legislatures countrywide seem genuinely inclined toward reform.<sup>241</sup> But as bail becomes somewhat of a cause célèbre, it is easy to forget that its problems are deeply entrenched, complex, and, in fact, old news.<sup>242</sup>

In the face of this seemingly insurmountable problem, this Part offers the implementation of a better bail appeal as a productive place to start. First, section III.A provides a roadmap for revamping judicial review by introducing ideal procedural guidelines—including automatic review for indigent defendants—that satisfy the constitutional boundaries of bail law and alleviate concerns stemming from bail hearings. Next, section III.B addresses potential criticism of increased and automatic judicial review in state bail systems.

#### A. *Procedural Guidelines*

This section offers a basic framework for an effective bail review. Section III.A.1 lays out guidelines for bail appeal procedure. Section III.A.2 then establishes automatic reviews for indigent clients as an essential component of a better bail appeal.

1. *The Bones of a Flexible Approach.* — The current state of bail hearings necessitates a bail review that takes longer than thirty seconds

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238. See Pretrial Justice Inst., *The State of Pretrial Justice in America* 11–15 (2017) [hereinafter *The State of Pretrial Justice in America*], <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=f9d452f6-ac5a-b8e7-5d68-0969abd2cc82&forceDialog=0> [<https://perma.cc/N2RS-LZ5N>] (discussing noteworthy bail practices across the country and grading states on the status of their pretrial justice systems); see also *supra* notes 119–121 and accompanying text (establishing that the majority of states do not provide judicial review of bail determinations).

239. See *supra* notes 1–3 and accompanying text (describing some of the recent media coverage of bail issues).

240. Stevenson & Mayson, *supra* note 4, at 22–23 (discussing the extraordinary financial burden that pretrial detention places on local justice systems). For a discussion of the more human costs of pretrial incarceration, see *supra* section II.A; see also *supra* notes 4–8 and accompanying text.

241. See *The State of Pretrial Justice in America*, *supra* note 238, at 5 (“Today it is the rare state that is not considering or has not recently implemented some adjustment to its pretrial justice system.”).

242. Cf. Foote, *supra* note 117, at 1125–26 (elaborating on the “coming constitutional crisis” of bail in 1965). Some of the most harmful aspects of the current bail system have been unaffected by—or are perhaps even borne from—reform efforts. See Stevenson & Mayson, *supra* note 4, at 24–25 (discussing the three major waves of bail reform and the current trend of rising rates of money bail and declining use of release on recognizance).

and takes place sufficiently soon after the initial determination. As established in section II.A, initial bail hearings are exceptionally short in practice, making bail determinations dangerously imprecise.<sup>243</sup> Bail appeals, properly formulated for longer hearings, can be leveraged to help correct for persistent deficiencies in arraignments. For the bench, alleviating the “assembly-line”<sup>244</sup> arraignment environment will allow a more thoughtful inquiry into complicated statutory factors, or at least a more meaningful exercise of judicial discretion.<sup>245</sup> For individuals challenging bail determinations, the ability to plead one’s case for more than a few minutes can be crucial. Given that pretrial detention status may determine whether a defendant is adjudicated guilty in the underlying criminal matter,<sup>246</sup> it is imperative that both sides have their say and that the process becomes properly adversarial. Longer hearings will also provide defendants a new opportunity to feel heard and respected in a process that can be extremely dehumanizing, even if outcomes remain effectively the same. Without advocating for a universal minimum length for appeal hearings, any bail appeal framework must be wary of pressures that conspire to shorten hearings in practice.<sup>247</sup>

Second, while bail appeals should generally be longer, the time between the initial determination and appellate hearing must be shorter. Even a few days of pretrial incarceration are enough to seriously compromise an individual’s livelihood—not to mention the physical threat to life and limb that local jail conditions may pose.<sup>248</sup> Current bail appeal procedure, in both state-specific bail appeals and habeas corpus, has left a critical gap in the law on this point.<sup>249</sup> A better bail appeal can address this gap head-on by explicitly establishing the speed at which appeals occur, ideally within a maximum of forty-eight hours after the initial

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243. See *supra* notes 140–141 and accompanying text (discussing the shocking brevity of bail hearings).

244. Heaton, Mayson & Stevenson, *supra* note 6, at 730.

245. See *supra* notes 131–150 and accompanying text.

246. See *supra* notes 7, 153–157 and accompanying text.

247. Beyond arguing that local justice systems should be extremely sensitive to timing concerns in the bail context, this Note leaves the specifics of how long bail reviews must last to future study. It is also difficult to say exactly how local courts and legislatures should ensure a longer appearance (for example, having state statute dictate a 15-minute block monitored by stopwatch, akin to timing in some appellate arguments). Ensuring that judges have more time to devote to lengthier hearings is certainly a part of this equation and may require that local systems dedicate significant financial resources toward staffing more courtrooms, for instance. The potential financial burdens of this Note’s better bail appeal are discussed further in section III.B.2.

248. See *supra* notes 153–163 and accompanying text (cataloguing the myriad collateral consequences of even brief stays in local jails).

249. See *supra* notes 166–173 and accompanying text (discussing the negative effects of timing in habeas corpus hearings). For relevant criticism on local bail review timing, see *supra* notes 219–224 and accompanying text (California); *supra* notes 208–212 and accompanying text (New York); *supra* section II.C.1 (Texas).

determination.<sup>250</sup> With a forty-eight-hour or similar deadline, courts can strike a far better balance between limited judicial resources and minimizing the damage of pretrial incarceration when bail has been improperly set.

Next, mandating the production of written opinions in bail appeals will demand a higher level of accountability from both the appellate judges who author them and the trial court judges and magistrates making the initial determination. During a bail review, even a short written opinion can help judges to reason through their own rulings, an especially important exercise when officials must parse complicated factors laid out in state statute.<sup>251</sup> A written opinion also provides an opportunity to pass critical judgment on the initial bail hearing official, and perhaps introduce an element of transparency typically lacking in the process.<sup>252</sup> Moreover, when an initial appeal is unsuccessful and defendants wish to continue the challenge, written opinions give subsequent appellate courts a record to work from that they presently lack.<sup>253</sup>

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250. This is not to suggest that a forty-eight-hour timeline is the *only* workable timeline for local courts to follow for bail appeals. Rather, this Note argues that a forty-eight-hour timeline strikes the most workable balance between minimizing the damaging effects of pretrial incarceration and what can reasonably be accomplished by local court systems. That this timeline is possible is best evidenced by states that already mandate a *twenty-four*-hour review of bail determinations, see *infra* section III.B.2, in addition to the attempt of the same by New York, discussed *supra* notes 208–212 and accompanying text. For further discussion on the feasibility of prompt appeals, see *infra* section III.B.2.

251. See Lester, *supra* note 73, at 28 (making an analogous argument that “arbitrariness in the [bail-setting] process” could be removed by “requiring a finding from every judicial officer in every case”); see also *supra* notes 133–139 (describing the complex statutory factors that judges are commonly required to consider in bail hearings). Written opinions need not be long, either; even a paragraph or two tailored to the facts of each case would be an improvement on the current system.

252. See Lester, *supra* note 73, at 28 (elaborating on the benefits of requiring clearly stated reasons for the amount of bail so that judges are unable to “hide” the decisionmaking process “behind an objective scale”). At present, transparency and an accompanying level of public shame function mainly to deter judges from releasing individuals on bail, in that judges may incur negative media attention when a defendant released on low or no bail commits a crime. See, e.g., Human Rights Watch, *supra* note 213, at 59–60 (noting that most judges “feel it is safer to keep people in custody” because they fear that “someone they release will commit a crime during the pretrial period, and the judge will be blamed”). Written opinions in bail appeals are an opportunity to use public shaming to opposite ends. More so than a blank record, an opinion that carefully explains the decisionmaking process can insulate judges from “blame” when they have acted according to law. Further, bail appeals judges will be creating a substantive record of when their trial court colleagues err.

253. Professor Caleb Foote makes a parallel point with regard to written opinions in initial bail determinations, noting that “if there is to be a meaningful appeal, it would appear that the original judge or magistrate would have to write an opinion or in some way indicate the reasons for his decision.” Foote, *supra* note 117, at 1175 (discussing in brief the “total inadequacy of existing judicial review” and identifying the lack of written opinions and adequate basis for judicial review as a key problem). The same argument

Each of these features will ensure that bail appeals meet the demands of Eighth Amendment bail jurisprudence and due process. Longer hearings that result in written opinions will force a more meaningful determination on whether bail is nonexcessive or “reasonably calculated” to avoid pretrial flight<sup>254</sup> and protect public safety.<sup>255</sup> Due process’s dual demands of individualized assessments<sup>256</sup> and timeliness of judicial review<sup>257</sup> are also satisfied by a bail appeal that is carefully administered within forty-eight hours of the initial determination.

Finally, the bones of a better bail appeal have the potential to precipitate other positive changes in bail hearings and bail review procedure. For one, a more robust appeals process—one that registers as undeniably adversarial—has a stronger likelihood of inducing states to provide counsel to indigent defendants at earlier stages in their case.<sup>258</sup> Similarly, a better bail appeal increases the odds of doctrinal development in bail, simply by being more productive than other modes of challenging bail.<sup>259</sup> A greater wealth of case law might not only define more permissive standards of review for bail appeals<sup>260</sup> but also fill in gaps left by the dearth of constitutional bail law with system-wide effects.<sup>261</sup>

2. *Automatic Reviews for Indigent Defendants.* — Automatic judicial reviews for indigent individuals are another essential component of a better bail review, targeted at the population rendered most vulnerable by the current system.<sup>262</sup> Despite widespread acknowledgement that wealth-based pretrial incarceration is not only bad practice, but may also

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may be applied to bail reviews themselves, as subsequent courts of appeals would benefit from an increased paper trail.

254. See *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (“Bail set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose [of returning a defendant to court] is ‘excessive’ under the Eighth Amendment.”).

255. See *United States v. Salerno*, 481 U.S. 739, 753–55 (1987) (validating the use of public safety in bail determinations).

256. See *supra* notes 79–80 and accompanying text.

257. See *supra* notes 81–84 and accompanying text.

258. As addressed above, the practice of providing attorneys in initial bail hearings is not guaranteed by law in many states and often varies from courthouse to courthouse within a state. See *supra* note 152 and accompanying text.

259. See *supra* note 117 and accompanying text (describing obstacles to doctrinal development in bail law). “Productivity” here refers especially to the increased volume of bail appeals that might occur under this framework. Automatic reviews, addressed *infra* section III.A.2, would also add to the prevalence of bail appeals.

260. Recall that the abuse of discretion standard is highly deferential to lower court determinations and has had a stifling effect on writs of habeas corpus used to challenge bail. See *supra* notes 103, 173 and accompanying text.

261. For a discussion of the weak state of constitutional bail law and accompanying lack of doctrinal development, see *supra* section I.B.2.

262. See *supra* notes 161–163 and accompanying text (discussing the disproportionate effects of bail and pretrial incarceration on poor communities).



violate constitutional rights,<sup>263</sup> many local bail systems continue to disproportionately lock up low-risk individuals who cannot afford to pay their way out.<sup>264</sup> These individuals are ideal candidates for pretrial release and arguably the easiest group to identify using an improved bail appeal. By automatically seeking out indigent defendants, and then permitting deeper inquiry into an individual's financial situation and related matters,<sup>265</sup> a better bail appeal can reduce the prevalence of pretrial incarceration in vulnerable populations.

### B. *Defending a Better Bail Appeal*

This section briefly responds to potential criticism of increased and automatic judicial review of bail determinations, concluding that bail appeals remain a worthwhile tool for reform.

1. *Avoiding Rubberstamping.* — A likely critique of bail reviews is that they might do little more than rubberstamp the results of bail hearings, particularly when judges review previous decisions using deferential standards of review.<sup>266</sup> Understanding that a high degree of deference is a risk of even a perfect bail appeal, this argument is unpersuasive for several reasons. First, refashioning the bail appeal may well result in doctrinal development in bail law, making it easier for appellate judges to consider the issue *de novo*.<sup>267</sup> Even if the standard of review remains the same, longer hearings and written opinions will give defendants better odds of having their bail lowered or eliminated than the current regime.<sup>268</sup>

Further, while the initial transition period after implementation of automatic bail appeals might be rocky, the process will quickly develop a large body of appellate decisions that can increase efficacy and efficiency

263. See, e.g., Stevenson & Mayson, *supra* note 4, at 26–27 & n.28 (arguing that the “Equal Protection and Due Process Clauses prohibit the state from conditioning a person’s liberty on payment of an amount that she cannot afford unless it has no other way to achieve an important state interest”); see also Standards for Criminal Justice: Pretrial Release §§ 10-1.4(c)–(e), 10-5.3 (Am. Bar Ass’n 2007) (emphasizing that wealth should not determine pretrial release or incarceration); *supra* note 10 and accompanying text (noting the Department of Justice’s determination that pretrial incarceration based on inability to pay bail is unconstitutional). As a caveat, the Supreme Court has yet to speak on whether pretrial incarceration based on the inability to afford bail is unconstitutional—though its silence may be explained in large part by the weak state of bail jurisprudence discussed *supra* section I.B.2.

264. See *supra* notes 161–163 and accompanying text.

265. See *supra* section III.A.1 (discussing the implementation of longer bail hearings).

266. See *supra* note 103 and accompanying text (explaining that the abuse of discretion standard, commonly applied, requires a high level of deference to trial court decisions and effectively protects criminal defendants against only the most blatant violations of their constitutional rights).

267. See *supra* text accompanying notes 260–261.

268. See *supra* sections II.B–C (discussing the limitations of habeas corpus and local bail review procedures).

without encouraging rubberstamping. Increased review and record-making will lead to increased transparency on the part of judges and prosecutors participating in the bail decision—a deterrent for overly deferential decisionmakers. Simultaneously, stronger bail appeal procedure will serve crucial legitimacy interests, in parallel to the benefits of regular appellate procedure.<sup>269</sup> Given the critical state of bail today, the potential for failure is a poor excuse for inaction.

2. *Conserving Limited Resources.* — The cost of instituting a better bail appeal may also be subject to strong criticism. Undoubtedly, reforming bail appeals will require new investment on the part of local justice systems. Meeting the increased volume of hearings alone, from both automatic and voluntary appeals, will be expensive.

Many factors combine to justify this expenditure. In dollars and cents, states have already been pushed to the brink of financial crisis by the current state of bail.<sup>270</sup> Pretrial detention of mostly low-risk individuals has been estimated to cost taxpayers \$38 million per day, or over \$14 billion annually.<sup>271</sup> Per individual, this breaks down to estimated costs near \$460 per day, or more than \$167,000 per year.<sup>272</sup> Bail appeals, while requiring immediate spending to meet demand for hearings, may lessen the resources spent on detention downstream by securing the release of more defendants. The influence of bail reviews on initial bail determinations may also lessen the need for appellate hearings, further reducing spending.

The bail review hearings envisioned by this Note might prove relatively affordable as well, best evidenced by the existence of similar procedures in some state systems: At least five states and the District of Columbia implement some form of a twenty-four-hour automatic review when defendants are unable to meet pretrial release conditions.<sup>273</sup> While

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269. See *supra* section III.A.1 (suggesting that a second opportunity to be heard may help alleviate some of the dehumanizing elements of the bail hearing process and contribute to its perceived legitimacy); see also *supra* notes 124–126 and accompanying text (discussing the benefits of a robust appeals system).

270. See, e.g., Stevenson & Mayson, *supra* note 4, at 22 (discussing the extraordinary financial burden that pretrial detention places on local justice systems).

271. Pretrial Justice Inst., *Pretrial Justice: How Much Does It Cost?* 2 (2017) [hereinafter *Pretrial Justice: How Much Does It Cost?*], <http://university.pretrial.org/viewdocument/pretrial-justice-how-much-does-it> [https://perma.cc/G7BP-KTBD] (“Jailing arrested people before trial is the greatest expense generated by current pretrial justice practice.”); see also Heaton, Mayson & Stevenson, *supra* note 6, at 781 & n.227 (citing the same statistics).

272. The \$460-per-day estimate is an example from New York City’s Rikers Island. See *Pretrial Justice: How Much Does It Cost?*, *supra* note 271, at 2.

273. Those states include Kentucky, Missouri, Nebraska, New Mexico, and South Dakota, not to mention New York State’s failed attempt at a similar type of review. See Ky. Rev. Stat. Ann. § 431.520(8) (West 2018); Mo. Ann. Stat. § 544.455.4 (West 2018); Neb. Rev. Stat. § 29-901.3 (2016); S.D. Codified Laws § 23A-43-8 (2018); N.M. R. Crim. P. 5-401(H); see also Widgery, *supra* note 119 (providing an overview of judicial review

implementing a system with longer hearings, written opinions, and a short waiting time seems a tall order in the face of limited resources, it is heartening to consider that some of that work has already been done. It is hardly academic idealism to imagine that defendants in the rest of the country, beyond those few states with automatic review, might also deserve a second chance at a bail hearing.

The human cost of pretrial detention also demands somewhat radical change in bail appeal procedure. At its core, locking people away without a meaningful opportunity to challenge their status is antithetical to a justice system that reveres the presumption of innocence, values appellate procedure,<sup>274</sup> and declares that “liberty is the norm.”<sup>275</sup> Bail appeals may not be a panacea against biased judges, the lack of a uniform right to counsel in bail hearings, and every other shortcoming of arraignments, but by introducing a modicum of guaranteed procedure into bail, the process can push the system as a whole toward fairer ends.

3. *Supporting Further Reforms.* — Lastly, current reform efforts and the existence of other promising avenues for change are not fatal to the concept of a better bail appeal. It bears emphasizing that enhanced judicial review is a uniquely palatable type of bail reform. At base, the internal logic of appellate procedure is one deeply engrained in local justice systems countrywide.<sup>276</sup> Moreover, most state courts already experience some type of bail appeal, in the form of habeas corpus or interlocutory appeals.<sup>277</sup> In comparison to gutting local bail statutes or more radical reforms, a robust appellate procedure for bail determinations seems less likely to spark controversy and engender pushback.

None of the preceding is to say that increased judicial review is a whole solution to the problems plaguing bail, or the optimal mode of reform. Rather, bail appeals are most attractive as a companion and procedural safeguard for other efforts. In tandem with other reforms, bail reviews can provide stopgap protections for defendants while the details of sustainable, system-wide changes are worked out. The simplicity and flexibility of the bail appeal is key here: Bail appeals need not wait for litigation against local governments to be resolved<sup>278</sup> or for

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procedure in the United States); supra notes 208–212 and accompanying text (describing New York’s attempt at instituting automatic bail appeals).

274. See supra notes 124–126 and accompanying text (elaborating on the important role of appeals in the American justice system).

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

276. See supra notes 123–126 and accompanying text (noting the fundamental place of appellate procedure in state courts).

277. See supra section I.C (describing habeas corpus and interlocutory bail appeals as the available modes of appeal in state court).

278. Such litigation is an important step in bail reform, but can take significant amounts of time to be resolved. For two impressive litigation campaigns against money-bail practices that do not take ability to pay into account, see *Challenging the Money Bail System*, Civil Rights Corps, <https://www.civilrightscorps.org/work/wealth-based-detention>

legislatures to complete a comprehensive reworking of bail statutes<sup>279</sup> to begin protecting individuals from unjust pretrial incarceration. There is also no reason to think the bail system of the future<sup>280</sup> will be unable to reap the benefits of a reformed bail review, which parallel those of appellate systems in general.<sup>281</sup> Even a “perfect” bail system will make mistakes. Giving defendants the opportunity to challenge bail determinations will continue to diffuse the power of individual judges and preserve the voice and dignity of the accused in the process.<sup>282</sup>

#### CONCLUSION

In his majority opinion in *Stack v. Boyle*, Chief Justice Vinson conjured bail as the fine line separating pretrial justice from tyranny: “Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”<sup>283</sup> Excessive bail, the Chief Justice opined, “inject[s] . . . [the] principles of totalitarianism” so anathema to the Constitution “into our own system of government.”<sup>284</sup> Yet those words stand in stark contrast to the bail system’s decades-long state of crisis and the experiences of countless pretrial detainees in local jails, incarcerated for their inability to afford freedom or otherwise challenge their detention status.

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[<https://perma.cc/4XVU-8A4R>] (last visited Nov. 20, 2018); Ending American Money Bail, Equal Justice Under Law, [https://perma.cc/6QKP-6JLY](https://equaljusticeunderlaw.org/money-bail-1/)] (last visited Aug. 10, 2018); see also Heaton, Mayson & Stevenson, *supra* note 6, at 733 n.105 (describing some of the Equal Justice Under Law litigation).

279. New Jersey, for one, has recently undertaken a series of extensive reforms that will nearly eliminate cash bail in the state. See, e.g., Lisa W. Foderraro, *New Jersey Alters Its Bail System and Upends Legal Landscape*, N.Y. Times (Feb. 6, 2017), <http://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html> (on file with the *Columbia Law Review*). Bail appeal procedure itself will likely require legislative action, but on a smaller scale than a reworking of the entire bail system. This Note argues merely that the relative modesty of the bail appeal, given states’ familiarity with its basic premise, suggests that bail appeals will be generally easier and faster to implement than other reforms.

280. One such “futuristic” option includes increased use of algorithmic risk assessments, which bring an entirely new set of pitfalls and challenges into play. See, e.g., Ellora Thadanev Israni, *Opinion, When an Algorithm Helps Send You to Prison*, N.Y. Times (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/opinion/algorithm-compass-sentencing-bias.html> (on file with the *Columbia Law Review*); see also *supra* notes 227–237 and accompanying text (describing California’s new bail regime, which will rely heavily on automated risk assessments). See generally Q&A: Profile Based Risk Assessment for US Pretrial Incarceration, Release Decisions, Human Rights Watch (June 1, 2018), <https://www.hrw.org/news/2018/06/01/q-profile-based-risk-assessment-us-pretrial-incarceration-release-decisions> [<https://perma.cc/E333-S6R8>] (providing background on the dangers of pretrial risk tools).

281. See *supra* notes 125–126 and accompanying text.

282. See Robertson, *supra* note 123, at 1274.

283. 342 U.S. 1, 4 (1951).

284. *Id.* at 6.

This Note offers the bail appeal as another creative solution to the ever-evolving bail problem. By adopting judicial review frameworks similar to the one suggested in section III.A, local justice systems can fill in dangerous gaps in their laws and reduce the financial and human costs of pretrial detention. In so doing, states will also recommit to a more just vision of pretrial procedure: When defendants have a meaningful opportunity to challenge bail determinations, liberty can be the “norm”<sup>285</sup> not just on paper, but in practice.

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285. See *United States v. Salerno*, 481 U.S. 739, 755 (1987) (establishing that any pretrial detention must be “carefully limited” in the light of the fact that “[i]n our society liberty is the norm”).

