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## Justice Delayed is Justice Denied: Holding Cash Bail Unconstitutional

Ashli Giles-Perkins

The United States has a criminal justice system premised on “innocent until proven guilty,” yet many of those accused of a crime but not yet found guilty are detained in jails for long periods of time, simply because of their inability to post bail.<sup>1</sup> Across the country, activists, judges, legislators, families, and legal organizations have been calling for bail reform, and in the past decade, strides have been made. Certain states have moved “to close the gap between what criminal justice advocates claim are two tiers of the justice system: one where people can effectively buy themselves out of police custody and another where those arrested for low-level offenses are stuck in jail because they lack the financial means to bond themselves out.”<sup>2</sup>

The original premise of bail comes from England during the Anglo-Saxon period; its purpose was to peacefully solve disputes and some scholars would deem the process as “perhaps the last entirely rational application of bail.”<sup>3</sup> No money was required to be released; the accused was required to find someone to serve as a surety, and if the defendant fled, the surety would pay the settlement if needed.<sup>4</sup> This process continued for hundreds of years until the 1900s. Then, as industrialization took place, it became harder to find relatives to act as surety and easier to leave town.<sup>5</sup> When England passed the Bail Act of 1898, it focused on more effective means to ensure people showed up for court and prevent crimes from happening in the first place.<sup>6</sup> In 1898, the first bondsmen opened shop in the United States and the lucrative business spread; courts required payment in full and more and more people turned to bondsmen out of necessity.<sup>7</sup> Even at bail’s inception, it became clear that those who

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<sup>1</sup> Louis Casiano, *States Recently Enacted Bail-Reform Laws*, MSN FOX NEWS (Feb. 23, 2020), <https://www.msn.com/en-us/news/crime/these-states-recently-enacted-bail-reform-laws/ar-BB10hDU8>.

<sup>2</sup> *Id.*

<sup>3</sup> June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517 (1983).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

had the means to pay had a different path than those who couldn't afford bail or a bondsmen.

The differing paths therefore led to differing outcomes. “Originally, bail was supposed to make sure that people returned to court to face whatever charges are pending against them. But instead, the money bail system has morphed into mass incarceration for the poor,” says Dan Korobkin, Deputy Legal Director of the ACLU of Michigan.<sup>8</sup>

The American Bar Association and other leaders in the field have condemned money bail both because it has not been shown to increase public safety and because it does not prevent failures to appear.<sup>9</sup> Further, cash bail does not prevent crime. The United States and the Philippines are the only two countries with a cash bail system, and neither country is in the top 60 as one of the world's safest countries.<sup>10</sup> One non-profit, Brooklyn Bail Fund, which posted bail for more than 4,000 people who could not afford it, also reported that those who were released were three times as likely as those who weren't to have favorable outcomes to their cases.<sup>11</sup> Cash bail has also been shown to lead to devastating effects for those who are poorest and commit crimes. People with money to bail themselves out can get back to their lives and fight their case from the outside, while those too poor to post bail may lose their jobs, housing and even custody of their children as they wait.<sup>12</sup> People held in jail pre-trial are also more likely to plead guilty and to receive longer sentences.<sup>13</sup>

For too many, bail is set for low-level offenses and the impacts often snowball. Lizzie Johnson was stopped by police for a traffic violation when police learned there was a warrant out for her arrest for forging a check and took her

<sup>8</sup> Sarah Cwiek, *Lawsuit seeks to end “unnecessary, unconstitutional, and costly” cash bail in Detroit*, MICHIGAN RADIO NAT'L PUB. RADIO (April 15, 2019), <https://www.michiganradio.org/post/lawsuit-seeks-end-unnecessary-unconstitutional-and-costly-cash-bail-detroit>.

<sup>9</sup> *Id.*; Sydney Gold, *New York state cash bail ban solves systemic impartiality*, THE DAILY ORANGE (Jan. 15, 2020), [dailyorange.com/2020/01/new-york-state-cash-bail-ban-solves-systemic-impartiality/](https://www.dailyorange.com/2020/01/new-york-state-cash-bail-ban-solves-systemic-impartiality/); Marc Getzoff, *Safest Countries 2019*, GLOBAL FINANCE (Jan. 23, 2019), <https://www.gfmag.com/global-data/non-economic-data/worlds-safest-countries-2019>.

<sup>10</sup> Getzoff, *supra* note 9.

<sup>11</sup> Roxanna Asgarian, *The Controversy over New York's bail reform law, explained*, VOX (Jan. 17, 2020), <https://www.vox.com/identities/2020/1/17/21068807/new-york-bail-reform-law-explained>.

<sup>12</sup> Carolina Hidalgo, *The Bail Project strives for cash bail to be ‘the exception, not the rule’ in St. Louis*, NPR: ST. LOUIS PUB. RADIO (Sept. 12, 2018), <https://news.stpublicradio.org/post/bail-project-strives-cash-bail-be-exception-not-rule-st-louis#stream/0>.

<sup>13</sup> Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, UNIV. OF PENN L. SCH. FACULTY SCHOLARSHIP, 1745 (Mar. 13, 2017), available at [http://scholarship.law.upenn.edu/faculty\\_scholarship/1745](http://scholarship.law.upenn.edu/faculty_scholarship/1745).

to jail.<sup>14</sup> Lizzie was unable to afford \$1,000 bond so, while inside the local jail known as “The Workhouse,” she dealt with roaches, mold, lockdowns, and hopelessness.<sup>15</sup> It took weeks for her to be assigned a public defender – by the time a bond reduction hearing was scheduled, she had spent a month in jail. The judge eventually released her on no bond, but it was too late – both her job and her apartment were already gone.<sup>16</sup> “Going to that place and sitting there all because I didn’t have money to bail out really cost me everything I had out in the real world,” she said. “I came home to basically nothing.”<sup>17</sup> Lizzie was able to get herself back on track, but others are far less fortunate.

On May 15, 2010, police responded to a 9-1-1 call regarding a stolen backpack containing a camera, \$700, a credit card, and an iPod touch taken two weeks earlier.<sup>18</sup> Police apprehended Kalief Browder and a friend as they were walking home and searched them.<sup>19</sup> No backpack was ever found that night, or ever.<sup>20</sup> Kalief was taken to the 48th precinct under the impression he would be allowed to go home, but instead was fingerprinted, held in a cell, and processed for booking.<sup>21</sup> Seventeen hours later, he was interrogated, and the following day, Kalief was charged with robbery, grand larceny, and assault.<sup>22</sup> “Unable to pay his \$3,000 bail, he spent three years in jail, two of them in solitary confinement, as his trial date was repeatedly postponed.”<sup>23</sup> As Kalief’s sister recalled, “My mother blamed herself for Kalief’s detention because she couldn’t afford the \$3,000 bail money.”<sup>24</sup> The charges were finally dropped in 2013, after prosecutors could not find the person who claimed to have been robbed.<sup>25</sup>

<sup>14</sup> Hidalgo, *supra* note 12.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Jesse McKinley & Ashley Southall, *Kalief Browder’s Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal*, THE NEW YORK TIMES (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/nyregion/kalief-browder-cash-bail-reform.html>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Deion Browder, *My mom died trying to preserve the legacy of her son. Keeping kids out of solitary will preserve hers*, USA TODAY (Apr. 23, 2019), <https://www.usatoday.com/story/opinion/policing/spotlight/2019/04/23/kalief-browder-suicide-solitary-confinement-venida-browder-policing-the-usa/3540366002/>.

<sup>25</sup> McKinley, *supra* note 18.

In the absence of bail reform, seemingly innocent men and women like Kalief anguish in jails, waiting on money that may never come, and on resolutions of cases that may take years. While in solitary confinement, Kalief attempted suicide multiple times. In February 2012, Kalief “ripped his bedsheet into strips, tied them together to create a noose, and tried to hang himself from the light fixture in his cell.”<sup>26</sup> Even six months after Kalief was finally released, he tried hanging himself from his mother’s bannister, and was taken to a psychiatric hospital.<sup>27</sup> Kalief stopped attending Bronx Community College. He was confined to the psych ward of Harlem Hospital again during Christmas 2013, and was released just to be re-hospitalized again a day later.<sup>28</sup> Kalief spent two weeks in-patient and was “gaunt, restless, and deeply paranoid.”<sup>29</sup>

Kalief’s story began to spread, and was so influential that Mayor Bill de Blasio, Rand Paul, Rosie O’Donnell, and even Jay-Z were compelled to share it.<sup>30</sup> On June 6, 2015, when he was just 22 years old, Kalief committed suicide.<sup>31</sup> Just a little over a year following his death, his mother, Venida Browder, died of heart failure at just 63 years old.<sup>32</sup> Kalief’s sister blamed a combination of fighting for justice, and pain over her son’s death, that it “literally broke my mother’s heart.”<sup>33</sup> The heartbreaking story, now a TIME documentary, sent cries for change throughout the Bronx, New York, and across the nation.

Many would cite the Kalief Browder tragedy as the catalyst that drove a nation into action. Governor Cuomo of New York, along with the legislature, eliminated the imposition of cash bail for most misdemeanor and non-felony crimes, effective January 2020.<sup>34</sup> The law also eliminated judicial discretion in these types of cases.<sup>35</sup> In 2017, New Jersey’s Criminal Justice Reform Act overhauled the state’s bail system by eliminating cash bail.<sup>36</sup> A 2019 report from the State Court’s Administrative Office concluded that those released

<sup>26</sup> Jennifer Gonnerman, *Kalief Browder, 1993-2015, Kalief Browder’s Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal*, THE NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Gonnerman, *supra* note 26.

<sup>32</sup> Browder, *supra* note 24.

<sup>33</sup> *Id.*

<sup>34</sup> Bernadette Hogan & Carl Campanille, *New York’s Chief Judge Demands Judges Have Leeway in No-Bail Law*, NEW YORK POST (Feb. 26, 2020), <https://nypost.com/2020/02/26/new-yorks-chief-judge-demands-judges-have-leeway-in-no-bail-law/>.

<sup>35</sup> *Id.*

<sup>36</sup> Casiano, *supra* note 1.

under the reform law committed no new crimes while awaiting trial, at similar low rates as those who were fortunate enough to post bail.<sup>37</sup> In other words, the fear that releasing more people without bond, would lead to an increase in crime was proving to be unwarranted and untrue.<sup>38</sup>

In Detroit, Michigan in 2019, a number of bipartisan bills were introduced to make the following reforms regarding bail.<sup>39</sup> These include eliminating the requirement to pay bail *before* they see a judge for parents who owe back child support, as well as requiring judges to issue personal recognizance bonds instead of cash bail instead of cash bail – unless the defendant is a danger or flight risk.<sup>40</sup> Even if they are, the judge should still consider the person’s financial status when setting the cash bail amount.<sup>41</sup> Crime in the state has reached a 50-year low, but the number of residents locked up in county jails has nearly tripled since the 1970s.<sup>42</sup> county jails and related expenses, cost taxpayers roughly \$500 million in 2017 alone.<sup>43</sup> A statewide task force recommends significant revisions to Michigan’s bail laws to bring the state closer to reforms in places such as New Jersey, New Mexico and Washington, D.C., all of which have either eliminated cash bail or significantly reduced its use.<sup>44</sup>

Former California Governor Jerry Brown signed Senate Bill 10 (“SB 10”) initially in August 2018 to end cash bail for qualifying individuals accused of nonviolent felonies and give judges greater power to decide who should remain in jail until trial.<sup>45</sup> Decades earlier, Governor Brown criticized the State’s bail procedures, calling it a “tax on poor people in California.”<sup>46</sup> He went on to say that “thousands and thousands of people languish in the jails of this state even

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Cheyna Roth, *Lawmakers Want to Overhaul Cash Bail in Michigan*, MICHIGAN RADIO NPR (Mar. 13, 2019), <https://www.michiganradio.org/post/lawmakers-want-overhaul-cash-bail-michigan>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Angie Jackson, *18 Ways Michigan Could Change its Criminal Justice Process*, DETROIT FREE PRESS (Jan. 14, 2020), <https://www.freep.com/story/news/local/michigan/2020/01/14/michigan-jail-reform-criminal-justice/4434827002/>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight*, NAT’L. PUB. RADIO, (Aug. 28, 2018), <https://www.opb.org/news/article/npr-california-becomes-first-state-to-end-cash-bail/>.

<sup>46</sup> *In re Humphrey*, 19 Cal.App.5th 1006, 1013 (App.Ct. 2018), citing Cal. Governor’s State of the State Address (Jan. 16, 1979).

though they have been convicted of no crime. Their only crime is that they cannot make the bail that our present law requires.”<sup>47</sup> Needing 365,880 signatures by registered voters within 90 days, a coalition called Californians Against the Reckless Bail Scheme picked up more than 575,000 signatures in 70 days to put SB 10 on the November 2020 ballot.<sup>48</sup> Now, SB 10 will make its way to the November 2020 California ballot as a referendum to become law.

Nationwide reforms don’t end there. In San Francisco, California, a class action lawsuit was filed against the city, arguing the cash bail system is unconstitutional.<sup>49</sup>

“Under the present bail system in California, when a person is arrested and taken to jail that person has two choices to obtain release from jail:

1. Pay the entire amount of the bail to the court. If bail was \$100,000 the person arrested or someone on his behalf would be required to post \$100,000 with the court, and this can only be done during regular court business hours. At the end of the case, however; the entire amount minus an administrative fee, is returned to the person who posted the bail. This option is very rarely used.

2. Pay a bail bonds company to post a bail bond with the court. The bail bond can be posted with the court at any time of the day or night, and once posted the arrested person is released within a few hours. The bail bonds company typically charges 10%, if the bail is set at \$100,000, the person arrested or someone on his behalf would owe the bail bonds company \$10,000. Bail bonds companies typically charge 8% for members of unions and for a person who has or soon will retain a private attorney rather than use a public defender.”<sup>50</sup>

Others are using for the judicial system to demand bail reform. Petitioner Kenneth Humphrey was detained prior to trial solely due to his inability to post bail and alleged the California bail system systematically denied his rights guaranteed by the Fourteenth Amendment.<sup>51</sup> Humphrey brought suit and alleged wrongdoing because bail was set by the court “without inquiry or findings concerning either his financial resources or the availability of a less

<sup>47</sup> *Id.*

<sup>48</sup> Michael McGough, *The fate of California’s cash bail industry will now be decided on the 2020 ballot*, THE SACRAMENTO BEE (Jan. 29, 2019), <https://www.sacbee.com/news/california/article224682595.html>.

<sup>49</sup> Hammerschmidt Law Corp., *Class Action Lawsuit Filed to End Cash Bail System* (Jan. 23, 2016), <https://hammerlawcorp.com/class-action-lawsuit-filed-to-end-cash-bail-system/>.

<sup>50</sup> *Id.*

<sup>51</sup> *In re Humphrey*, 19 Cal.App.5th at 1014.

restrictive nonmonetary alternative condition or combination of conditions of release.”<sup>52</sup> The First District Court of Appeals of California ultimately held that when the lower court failed to make findings and inquiries regarding his financial ability to post bail and explore less restrictive conditions of release, they violated Mr. Humphrey’s rights to due process and equal protection.<sup>53</sup> The decision to set bail amount based solely on bail schedule, rather than individualized inquiry, was improper.<sup>54</sup> The court reasoned that “in our constitutional democracy the reductions cannot be at the expense of presumptively innocent persons threatened with divestment of their fundamental constitutional right to pretrial liberty,” and reversed the bail determination and remanded the case back.<sup>55</sup> The court specifically noted that “the prosecutor presented no evidence that nonmonetary conditions of release could not sufficiently protect victim or public safety.”<sup>56</sup> It further stated that “the trial court found petitioner suitable for release on bail,” and that “by setting bail in an amount, it was impossible for petitioner to pay, effectively constituting a *sub rosa* detention order lacking the due process protections constitutionally required to attend such an order.”<sup>57</sup>

In coming to this ruling, the California court relied on a quartet of Supreme Court precedent: *United States v. Salerno* (1987); *Bearden v. Georgia* (1983); *Tate v. Short* (1971); and *Turner v. Rogers* (2011).<sup>58</sup> These cases were what compelled the court to reach the “conclusion that a court which has not followed the procedures and made the findings required for an order of detention must, in setting money bail, consider the defendant’s ability to pay and refrain from setting an amount so beyond the defendant’s means as to result in detention.”<sup>59</sup>

A recent case out of St. Louis, MO, *Dixon v. City of St. Louis*, went a step further: it attacked cash bail on its face and highlighted precedent where the Supreme Court has directed judges that pretrial detention should be a “carefully limited exception” in our legal system.<sup>60</sup> In St. Louis, the complaint al-

<sup>52</sup> *Id.* at 1015.

<sup>53</sup> *Id.* at 1044.

<sup>54</sup> *Id.* at 1045.

<sup>55</sup> *Id.* at 1049.

<sup>56</sup> *Id.* at 1014.

<sup>57</sup> *Id.*

<sup>58</sup> See *United States v. Salerno*, 481 U.S. 739 (1987); see also *Bearden v. Georgia*, 461 U.S. 660 (1983); see also *Tate v. Short*, 401 U.S. 395 (1971); see also *Turner v. Rogers*, 564 U.S. 431 (2011).

<sup>59</sup> *In re Humphrey*, 19 Cal.App.5th at 1037.

<sup>60</sup> *Salerno*, 481 U.S. at 755.

leges that individuals arrested and charged in St. Louis are subject to an unconstitutional system where they are denied any process to argue for their liberty.<sup>61</sup> In fact, the first hearing on release conditions only occurs when an individual obtains counsel, and the appointment of a public defender typically takes four to five weeks.<sup>62</sup> Therefore, those too poor to pay the monetary release conditions or to hire a private attorney are subjected to extended pretrial incarceration before they have any opportunity to contest their release conditions.<sup>63</sup> Beyond the legal complaint, the daily impact is noticeable and negative; over 85% of individuals in St. Louis jails are there because they are unable to pay for their release.<sup>64</sup> There are eight times as many black detainees as white detainees in the jail, even though the black population makes up only 47% of St. Louis.<sup>65</sup> Worse, defendants have long been aware that their policies and procedures violate St. Louis City detainees' equal protection, substantive due and procedural due process rights, but have failed to take action.<sup>66</sup> This is despite a 1990 order from the Eastern District of Missouri stating:

[St. Louis City] detainees are not convicts; they are waiting for trial. Therefore, neither the State of Missouri nor the City of St. Louis can impose penal punishment upon any individual not yet proven guilty, *in the absence of a specific judicial finding* denying the individual defendant bail.<sup>67</sup>

*Dixon* names the City of St. Louis, the sheriff, five judges in their official capacity, and the St. Louis Commissioner of Corrections as Defendants. The complaint outlines the experiences of four male Plaintiffs who were accused of crimes but too poor to post bail, and mentions the sick family members, newborn babies, children and even lifesaving medication to which they did not have access.<sup>68</sup> The complaint alleges that “the City of St. Louis violates Plaintiffs’ constitutionally protected rights by contributing to a system where arrestees are imprisoned without adequate process, including no assessment of their ability to pay, and no determination that pretrial detention is necessary to

<sup>61</sup> Class Action Complaint at 4, *Dixon v. City of St. Louis*, (E.D. Mo. January 17, 2019) (No. 19-CV-00112).

<sup>62</sup> *Id.* at 2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 7.

<sup>65</sup> The Advancement Project, *Lawsuit Filed to Challenge St. Louis City’s Unconstitutional Cash Bail System* (Jan. 28, 2019), <https://advancementproject.org/news/stl-cash-bail-lawsuit/>.

<sup>66</sup> Complaint, *Dixon v. City of St. Louis*, at 12.

<sup>67</sup> *Tyler v. United States*, 737 F.Supp. 531, 537 (E.D. Mo. 1990), citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); *Campbell v. Cauthron*, 623 F.2d 503, 505 (8th Cir. 1980) (emphasis added).

<sup>68</sup> *Id.* at 15-18.

advance a compelling government interest.”<sup>69</sup> The complaint alleges that Defendant judges of the 22nd Judicial Circuit Court further violated Plaintiffs’ rights “by (1) setting arbitrary release conditions without any investigation into an individual’s ability to pay financial release conditions, (2) issuing de facto detention orders without determining whether detention is necessary to advance a compelling government interest or if there exist less restrictive alternatives available, and (3) doing all of the foregoing without providing any process at all to the incarcerated individual to contest their jailing until weeks or months have passed and an attorney enters an appearance.”<sup>70</sup> Count One alleges the Defendants violate Plaintiffs’ Fourteenth Amendment Rights to equal protection and due process through a policy or practice that jails individuals based on their poverty under 42 U.S.C. § 1983;<sup>71</sup> Count Two alleges defendants violate plaintiffs’ Fourteenth Amendment substantive due process right to liberty under 42 U.S.C. § 1983;<sup>72</sup> and Count Three alleges Defendants violate Plaintiff’s Fourteenth Amendment Right to Procedural Due Process under 42 U.S.C. § 1983.<sup>73</sup>

There are eleven requests for relief in the complaint, ranging from a declaratory judgement “that the Sheriff and Commissioner of Corrections must not enforce any order requiring secured money bail or a monetary release condition that was imposed prior to an individualized hearing,” to an “order permanently enjoining Defendants from operating and enforcing a system of wealth-based detention,” to a “temporary restraining order requiring the Sheriff and Commissioner of Corrections to release the Named Plaintiffs,” as well as a thoroughly outlined process to follow going forward on issues of notice, an ability to be heard, and an opportunity for an individualized hearing.<sup>74</sup> In the 2019 ruling in the Eastern District Court of Missouri, the Defendants agreed that “excessive bail is unconstitutional, that a person cannot be imprisoned solely due to indigence, and that federal and state law require a prompt and individualized determination of pre-trial release conditions”, however, “existing procedures are constitutionally adequate both as written in the Missouri Rules of Civil Procedure and as practiced.”<sup>75</sup>

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<sup>69</sup> *Id.* at 2-3.

<sup>70</sup> *Id.* at 6.

<sup>71</sup> *Id.* at 22.

<sup>72</sup> *Id.* at 23.

<sup>73</sup> *Id.* at 24.

<sup>74</sup> *Id.* at 25-27.

<sup>75</sup> *Dixon v. City of St. Louis*, 2019 U.S. Dist. LEXIS 97327, at \*34 (E.D. Mo. June 11, 2019).

Ultimately, the Eastern District granted Plaintiff's motion for a preliminary injunction and denied the Defendant's motion to dismiss the case. The request for a preliminary injunction, in addition to enjoining Defendants from operating a "wealth-based detention", it specifies that they cannot do so *without first* making "an inquiry or findings concerning their ability to pay, alternative release conditions, and the necessity of detention. Secondly, Plaintiffs requested an order permanently enjoining Defendants from operating and enforcing pretrial detention without constitutionally valid process as described above.<sup>76</sup> The court further enjoined the Jail Commissioner from enforcing monetary conditions of release that "results in detention solely by virtue of an arrestee's inability to pay, unless the order is accompanied by a finding that detention is necessary because there are no less restrictive alternatives to ensure the arrestee's appearance or the public's safety."<sup>77</sup> Even more narrowly, on June 11, 2019, the appellate court further held:

"The order must reflect that:

- (1) a hearing was held on the record within 48 hours of arrest or, for those currently detained, within seven days of this order;
- (2) the arrestee had an opportunity to present and rebut evidence as to whether detention is necessary, with the government bearing the burden of proof; and
- (3) if financial conditions of release are imposed, the court made specific findings regarding the arrestee's ability to pay and found, by clear and convincing evidence, that no alternative conditions would reasonably assure the arrestee's future court appearance or the safety of others."<sup>78</sup>

On February 28, 2020, the 8th Circuit heard the *Dixon* case on appeal and reversed, granting interlocutory appeal of the preliminary injunction for review on whether the appellate court abused their discretion. The 8th Circuit held that, given the recent changes to the Missouri rules, the preliminary injunction must be vacated.<sup>79</sup> Further, the court found the district court utilized an "extraordinary remedy" of a preliminary injunction without giving adequate consideration to the new rules and its implementation.<sup>80</sup> When the appellate court granted that preliminary injunction, "it interjected the power of the federal government into the Missouri Supreme Court's attempt to police its own lower courts, without contemplating what this would mean for federal-

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at \*43-44.

<sup>79</sup> *Dixon v. City of St. Louis*, 950 F.3d 1052, 1054 (8th Cir. 2020).

<sup>80</sup> *Id.* at 1056, citing *Winter v. NRDC*, 555 U.S. 7, 24 (2008).

state relations,” found the 8th Circuit.<sup>81</sup> In the end, this failure of consideration constituted an abuse of the district court’s discretion, and while the 8th Circuit did not decide “whether the district court should have abstained from hearing the case altogether, but only that it improperly omitted from its analysis “a relevant factor that should have been given significant weight.”<sup>82</sup>

St. Louis County Prosecutor Wesley Bell, who won a historical election ending the 28-year reign of long-term Prosecutor Robert McCulloch, was able to comment on bail reformation. Mr. Bell, who took office in 2019, campaigned on a promise to end cash bail for nonviolent offenders, and stated on that on day one of his administration, the office began reformation.<sup>83</sup> Internally, the office put new policies into place, which stated that if the accused was not a threat to the community, a flight risk, charged with any serious crimes, or a danger to a victim, prosecutors would not seek a cash bond in the first place.<sup>84</sup> This internal policy was then strengthened and supported when the Missouri Supreme Court passed new bail reform policies.<sup>85</sup> The Missouri bail reform policies echo and expand the holding of *In re Humphrey* by requiring courts to begin with non-monetary conditions of release.<sup>86</sup> Courts also must only assign bail if needed, and bail must not be higher than necessary; courts must further guarantee a “speedy trial” to defendants detained pretrial.<sup>87</sup>

Currently, the jail population is at the lowest it has been since the early 2000s, with about a 20-30% overall decrease over the past year.<sup>88</sup> Mr. Bell said “while judges have the final say,” prosecutors have a lot of power and the limited recommendations for cash bail on the front end has translated into

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; see *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 893 (8th Cir. 2013).

<sup>83</sup> Joel Currier, *Wesley Bell Ousts Longtime St. Louis County prosecuting attorney*, ST. LOUIS POST-DISPATCH (Aug. 8, 2018), [https://www.stltoday.com/news/local/govt-and-politics/wesley-bell-ousts-longtime-st-louis-county-prosecuting-attorney/article\\_5b2134b8-f204-5e20-9572-c59cacbb0aed.html](https://www.stltoday.com/news/local/govt-and-politics/wesley-bell-ousts-longtime-st-louis-county-prosecuting-attorney/article_5b2134b8-f204-5e20-9572-c59cacbb0aed.html); Interview with Wesley Bell, Prosecuting Attorney St. Louis County (Feb. 24, 2020).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*; Alana LaFlore, *New Missouri bail reform means some defendants can't be held in jail if they can't pay*, Fox4 (July 3, 2019), <https://fox4kc.com/news/new-missouri-bail-reform-means-some-defendants-cant-be-held-in-jail-if-they-cant-pay/>; Elizabeth Lowman, *Missouri Supreme Court Announces Bail Reform*, JURIST (Jan. 31, 2019), <https://www.jurist.org/news/2019/01/missouri-supreme-court-announces-bail-reform/>.

<sup>86</sup> Lowman, *supra* note 85.

<sup>87</sup> *Id.*

<sup>88</sup> Bell, *supra* note 83.

results on the back end.<sup>89</sup> This is especially important in a city where about “96% of people charged with a crime in St. Louis City are assigned bail amounts higher than state and national averages.”<sup>90</sup>

“The Constitution was intentionally vague,” Mr. Bell believes, in reference to the challenges of constitutionality of cash bail in *Dixon v. City of St. Louis*.<sup>91</sup> “Some things, such as “freedom and liberty, were higher on the priority scale.”<sup>92</sup> Because of that, “if we are going to take someone’s liberty, we had better make sure that we have checked all the boxes, to make sure that individual needs to be behind bars.”<sup>93</sup>

The Fourteenth Amendment, in part, states that:

*“ . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”*<sup>94</sup>

Put another way, “if the presumption of innocence is going to mean anything, you should be able to have your life unless you’re a danger and support your family before you have a conviction, or until you have a conviction.”<sup>95</sup> Some opponents of reforming cash bail are worried about the bail bond industry and the jobs that might be lost as cash bail is utilized less and less.<sup>96</sup> However, Mr. Bell believes that the protection of liberty outweighs the interests of the bail bond industry.<sup>97</sup> “If that means there are going to be jobs that are changed. . . then so be it. What is most important is protecting one’s liberty.”<sup>98</sup> As a prosecutor, this is the main function of the job: “If you take someone’s property, they can get it back. If you take someone’s liberty, well, you can’t get that back.”<sup>99</sup> At the end of the day, “the goal has to be what is just.”<sup>100</sup> This is echoed not just in St. Louis County, but across the country. For example, Dan Korobkin, Deputy Legal Director of the ACLU of Michigan, stated, “Except in truly extraordinary circumstances, people accused of crimes who are pre-

<sup>89</sup> *Id.*

<sup>90</sup> The Advancement Project, *supra* note 65.

<sup>91</sup> Bell, *supra* note 83.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> U.S. Const. Amend. 14 (emphasis added).

<sup>95</sup> LaFlore, *supra* note 85.

<sup>96</sup> Romo, *supra* note 45.

<sup>97</sup> Bell, *supra* note 83.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

sumed innocent should be going home to their families, not sitting in jail because they're too poor to pay bail."<sup>101</sup> In order to attain this goal, there are two routes. First, reformers can advocate for reverting back to the original implementation of bail from Anglo-Saxon England. Second, we can "start with a genuine presumption of release and have pretrial detention be the exception, not the rule."<sup>102</sup>

This second premise is crucial for protecting an individual's liberty, our Constitution, the Founding Fathers' intentions, and ultimately, American democracy. Currently, "innocent until proven guilty" is being rendered effectively useless without cash bail reform. "Cash bail systems like the one in place in St. Louis criminalize poverty. Not only are these systems unconstitutional, they tend to cause serious harm to people who are presumed innocent without contributing to public safety."<sup>103</sup> Courts across the nation are beginning to define minimum standards for cash bail, and finding in some cases, cash bail procedures may even rise to a level of unconstitutionality.<sup>104</sup> Courts, activists, politicians, and legislators have taken notice that the cash bail system has become overly punitive and destructive, and have started to work together to bring about new solutions, as discussed above. This change has been happening on the state and federal level, through law and legislation, to protect the presumption of innocence, the Fourteenth Amendment, and a fair and just criminal system.

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<sup>101</sup> Cwiek, *supra* note 8.

<sup>102</sup> Hidalgo, *supra* note 12.

<sup>103</sup> The Advancement Project, *supra* note 65.

<sup>104</sup> *In re Humphrey*, 19 Cal. App. 5th 1006 (2018); *Dixon v. City of St. Louis* (2019); Lowman, *supra* note 85.