



State Money-Bail Systems: Differing Approaches

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Should state money-bail systems exist? This question has prompted both legislative interest and litigation concerning the constitutionality of such systems. While the use of money-based bail systems, whereby a criminal defendant deposits money with the court to enable or expedite his release from custody pending trial, has been a common feature of state and local criminal justice systems, several jurisdictions have ended the practice. For example, the Governor of California recently signed a [bill](#) to eliminate California’s money-bail system. On the judicial level, courts have heard legal challenges regarding whether state or local money-bail systems comport with the Constitution’s due process and equal protection requirements. A central question in these challenges is whether jurisdictions may set uniform money-bail requirements for a particular offense, or whether money-bail systems must consider an individual defendant’s ability to pay. Though some of these challenges have been successful, the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) recently [vacated](#) a district court’s issuance of a preliminary injunction barring a Georgia city from enforcing its money-bail schedule.

State Money-Bail Systems

Bail is often used to support releasing an arrested individual subject to his promise to appear at subsequent judicial criminal proceedings. Depending on a jurisdiction’s rules, bail may be secured by monetary payments or court-imposed property liens or unsecured with a defendant pledging to make payments if he does not comply with the conditions of his release from incarceration. At the federal level, judicial officers have considerable discretion over conditions for a defendant’s pretrial release, though federal law expressly provides that a “[judicial officer may not impose a financial condition that results in the pretrial detention of the person.](#)” Conversely, some state and local money-bail systems allow defendants to be released from jail after posting a bond according to a fee schedule, which is typically based on the pending charges rather than the individual defendant’s characteristics. Defendants unable to pay bail may remain detained pending trial. Other money-bail systems provide indigent defendants an opportunity—usually within 48 hours of arrest or arraignment—to present information regarding their ability to pay.

[Proponents](#) of money-bail systems assert that such systems are grounded in tradition, protect communities, and assure a defendant’s appearance at subsequent judicial proceedings. Arguably, money-

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bail systems allow for expeditious release of many individuals, which may reduce administrative costs of individualized bail hearings. Conversely, critics of state and local money-bail systems assert, among other things, that fee structures place an [undue burden](#) on indigent defendants, who may have more difficulty paying bail, including relatively low bail fees associated with misdemeanor offenses, than non-indigent defendants accused of similar offenses. During the latter years of the Obama Administration, the Department of Justice (DOJ) filed a [statement of interest](#) in litigation challenging the constitutionality of local bail systems. In 2016, the DOJ filed an [amicus brief](#) in a civil rights lawsuit challenging bail amounts based solely on the offense, calling such systems unconstitutional because of their impact on indigent defendants. Most recently, [California](#) joined [Colorado](#) and [New Jersey](#) in altering their money-bail systems to determine bail by assessing a defendant's flight risk rather than his charged offenses.

Constitutional Considerations

Indigent defendants have brought a number of legal challenges regarding the constitutionality of various state and municipal bail systems. These challenges have focused on the [Eighth Amendment's](#) Excessive Bail Clause and the [Fourteenth Amendment's](#) Due Process and Equal Protection Clauses. In reviewing these claims, courts have considered whether bail systems with arguably particularized effects on indigent defendants should be reviewed under a heightened standard of scrutiny, similar to the standard used to review policies classifying persons by race or sex, or under a more deferential standard.

Excessive Bail

The Supreme Court has interpreted the Excessive Bail Clause to prohibit imposing bail higher than an amount reasonably likely to ensure the defendant's presence at trial. Whether bail is excessive depends, in part, on the particular facts at issue. For example, in [Stack v. Boyle](#), the Court found bail of \$50,000 to be excessive, given the defendants' limited financial resources and the lack of evidence that they were a flight risk. But while the Eighth Amendment expressly prohibits excessive bail, the Supreme Court has not interpreted it to establish an absolute right to bail. While the Supreme Court declared that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning" in [Stack](#), it recognized in [United States v. Salerno](#) that Congress did not violate the Excessive Bail Clause by restricting bail eligibility for "compelling interests" such as public safety, and observed that the Clause "says nothing about whether bail shall be available at all" in a particular situation. In addition, the Supreme Court has never squarely ruled that the Excessive Bail Clause applies to the states, though some lower courts [have assumed](#) that states are subject to its requirements through the Fourteenth Amendment. Later this term, the Supreme Court is to [consider](#) whether the Eighth Amendment's Excessive Fines Clause applies to states, and its decision may possibly inform future judicial deliberations on whether the Excessive Bail Clause applies to states and localities.

Due Process

Constitutional claims relating to indigent defendants often involve both [equal protection and due process principles](#). In [Bearden v. Georgia](#), the Court identified how to determine which constitutional principle is most relevant, [stating](#) that "we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question of whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause."

Due process may be procedural or substantive. Based on the "fundamental fairness" principle, procedural due process requires [notice](#) and an [opportunity to be heard](#) before a [neutral party](#). Whether a particular money-bail system comports with due process turns on what would reasonably assure a defendant's appearance at trial. [Upholding](#) a master bond schedule which "provid[ed] speedy and convenient release

for those who have no difficulty in meeting its requirements,” the Fifth Circuit concluded providing a bail hearing where the judge considered relevant factors was constitutionally sufficient. By comparison, in *Rhem v. Malcolm*, the Second Circuit Court of Appeals [stated](#), in another context, that “the laws of due process prohibit depriving pre-trial detainees of the rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail”

Generally, substantive due process “forbids the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” In *Salerno*, the Court declared that “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” Nonetheless, the Court rejected a due process challenge to the Bail Reform Act, which allows the government to hold federal defendants charged with certain serious offenses without bail if it demonstrates in an adversarial hearing that the defendants pose a threat to individual or community safety that release conditions cannot dispel. The Court reasoned that the government’s compelling and regulatory interest in preventing crime outweighs the individual’s fundamental liberty interest. While *Salerno* did not address a money-bail system, it may inform the constitutionality of such systems. Some courts have recognized that imposing unattainable bail “is the functional equivalent of a pretrial detention order,” which “must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty” articulated in *Salerno*. In *Brangan v. Commonwealth*, for example, the Supreme Judicial Court of Massachusetts held that judges must consider a defendant’s financial ability before establishing bail, suggesting that money-bail systems that provide procedural safeguards for indigent defendants, such as hearings to consider the ability to pay and payment alternatives, may be less susceptible to constitutional challenges than systems without such features.

Equal Protection

Some litigants have also challenged money-bail systems on equal protection grounds, claiming they inappropriately discriminate against indigent defendants. Under the Constitution’s equal protection principles, government actions that distinguish between classes of people are subject to different degrees of scrutiny depending on the classification involved. For example, certain classifications, such as [race](#), are subject to strict scrutiny, under which government action must further a compelling government interest and be narrowly tailored to achieve that interest. Government policies employing non-suspect classifications are reviewed more leniently, typically withstanding equal protection challenges if they are rationally related to a legitimate government interest, while other classifications are reviewed under an [intermediate](#) standard between rational basis and strict scrutiny.

In a [series of cases](#), the Supreme Court used equal protection principles (often in conjunction with due process considerations) to hold that imprisonment solely because of indigence amounts to invidious discrimination and is constitutionally impermissible. For example, reasoning that there is “no meaningful distinction” between denying indigent defendants the right to appeal based on their inability to pay for transcripts and denying them a trial in *Griffin v. Illinois*, the Court stated that “[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.”

More recently, courts appear to disfavor using equal protection principles to review claims involving indigent persons. In *Bearden v. Georgia*, the Court held that a sentencing court could not automatically revoke a defendant’s probation for failing to pay a fine and restitution unless such failure was willful. In determining whether revocation was constitutionally permissible, the Court retreated from its traditional equal protection framework, analogizing the indigent defendants’ equal protection arguments in the criminal justice system to the due process “fundamental fairness” principle. According to the Court, “we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of

defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.” Rather than using traditional tiers of scrutiny to review an indigent defendant’s equal protection claim, the *Bearden* Court considered several factors including the “nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose....” Accordingly, courts may review indigent defendants’ equal protection claims challenging the criminal justice system differently from other equal protection claims.

Recent Judicial Developments

While the Supreme Court has recognized some indigent-related constitutional claims raised by persons unable to pay court-related fees and fines in sentencing and post-conviction contexts, the Court has not weighed such claims in the bail context. Lower courts have taken different views on this issue. Some have held that money-bail practices that do not make exceptions for indigent individuals are constitutionally deficient. For example, in *Pierce v. City of Velda City*, a federal district court in Missouri issued a declaratory judgment stating that “no person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond.” In this case, the parties entered a [settlement agreement](#) on a new bail policy for the jurisdiction, which eliminated secured money bail for arrestees, who are released on their own recognizance or an unsecured bond, unless they pose a danger to a person or the community.

Conversely, some courts have viewed excessive bail challenges based solely on indigence to be unconvincing. In *Katona v. City of Cheyenne*, a Wyoming federal district court rejected an indigent arrestee’s assertion that \$35 was excessive bail. While noting that excessive or denying bail may trigger equal protection concerns, the court identified “rational basis” as the appropriate standard to review such claims. Because bail is to ensure that nonresidents pay a fine or appear for trial, the court determined that the appropriate inquiry was whether the bail “rationally and reasonably” did so.

More recently, in a 2-1 decision in *Walker v. Calhoun*, the Eleventh Circuit held that the City of Calhoun’s (City) use of a money-bail system for misdemeanor offenders is constitutional and vacated a district court’s issuance of a preliminary injunction, ordering the City to consider an arrestee’s indigence in its post-arrest procedures. Arrested and charged with a misdemeanor, the plaintiff spent six nights in jail because he could not pay the \$160 cash bond under the money-bail schedule. He filed a class action suit alleging the City had violated his Fourteenth Amendment rights by jailing him and other class members “because of their inability to pay a generically set amount of money to secure release after an arrest.” The lower court found that the City’s bail schedule “violates the Constitution insofar as it permits individuals who have sufficient resources to post a bond (or to have one posted for them) to be released immediately, while individuals who do not have those resources must wait forth-eight hours for a hearing.”

In reviewing the lower court’s decision, the appellate court weighed whether Eighth Amendment, due process, or equal protection principles applied to the money-bail system and what, if any, level of scrutiny applied. Considering the Eighth Amendment Excessive Bail Clause, the appellate court stated that the Eleventh Circuit had “implicitly held that bail is not excessive under the Eighth Amendment merely because it is unaffordable” and that, under this standard, the petitioner “would have a difficult time showing that his \$160 bail was unconstitutional.” The court further noted that the plaintiff did not challenge the bail amount or conditions, but the implementation of the bail schedule. Finding the bail schedule to harm indigents, the appellate court analogized the issue in *Bearden* where the Supreme Court held that the Fourteenth Amendment “prohibits a State from revoking an indigent defendant’s probation for failure to pay a fine or restitution.”

On the equal protection and due process claims, the appellate court ruled that the district court erred in applying heightened scrutiny to wealth-based classifications. Relying on the Supreme Court’s

San Antonio Independent School District v. Rodriguez decision, where the Court upheld a challenge to a state public education finance system alleged to favor affluent school districts, the appellate court identified the relevant issue as whether the plaintiff suffered “an absolute deprivation” or a “mere diminishment” of a benefit. According to the Eleventh Circuit, “differential treatment by wealth is impermissible only where it results in a total deprivation of a benefit because of poverty.” Because the plaintiff was not deprived entirely of pretrial release but had to wait 48 hours at most to “receive the same benefit as the more affluent,” the appellate court found the district court was wrong to apply heightened scrutiny under the Equal Protection Clause. In partial dissent, Judge Martin argued that any imprisonment constitutes a total deprivation within the meaning of *Rodriguez* since incarceration may result in constitutionally significant consequences such as loss of employment, housing, and/or transportation.

Congressional Developments

The federal government does not employ a money-bail system, and debate about the efficacy and constitutionality of such systems has primarily occurred at the state and local levels or in the courts. Nonetheless, Congress may attempt to influence the state and local use of such systems and some Members of Congress have shown interest in addressing the issue of state money-bail systems by introducing several bills ([S.3271](#), [H.R. 1437](#), [S.1593/H.R. 4019](#)), which would provide grants to states and Indian tribes to encourage replacing money-bail systems with individualized risk assessment tools.

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