

The American Bail System



Spring 2021 Syllabus
Thursdays 4:20–6:10
Columbia Law School

- INSTRUCTOR** Kellen Funk, Associate Professor of Law, krf2138@columbia.edu
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- CLASSROOM** JGH 546
- OFFICE** Room 901
Wed. 3:30– 4:30, otherwise by appointment
- CREDIT** 2 credit research seminar
three reading responses & final paper
- DESCRIPTION** Three-quarters of the incarcerated population in America is awaiting trial, while commercial bail continues to be a thriving \$2 billion-a-year industry. This seminar will examine in depth the United States’ virtually unique reliance on commercial sureties as the leading alternative to detention before trial. We will examine the history of wealth-based detention, the socioeconomic and racial impacts of pretrial release and detention, and the many levels at which bail and bond is regulated, from state and local municipal codes to Supreme Court doctrine. Mainly we will focus on bail as a system, considering how American federalism,

legislation, law enforcement, commercial incentives, and charitable interventions combine to create day-to-day practices churning defendants through the criminal courts. Students are invited to range widely in their research papers and draw on methods from legal history, sociology and economics, moral philosophy, or black-letter doctrine.

Landmark reforms and high-profile litigations in the last half-decade have placed bail at the leading edge of access to justice, poverty law, and a host of constitutional issues relating to the rights of the criminally accused. The required readings aim to familiarize you with the universe of pretrial policy and potential bail reforms. As you hone in on a research topic, you should plan to read deeply the suggested readings that relate to your topic (and the sources they cite).

TEXTBOOK No textbook is required for this course. All course materials will be posted to Courseworks or will be otherwise accessible online.

POLICIES Grades are based on class participation (10%), three reading responses (40%), and a final paper (50%). Class participation is broadly defined and includes office hours and email conversations.

Reading responses consist of 2-page double-spaced (maximum) essays answering one (and only one) of the discussion questions listed for the week in the syllabus below. Reading responses are due (by e-mail to our TA) **at noon Wednesday before the class** for which they are assigned. You may choose your essay questions during a sign-up period on September 11.

The final project can take several forms, and may be completed individually or in collaboration with classmates:

- A paper of around 15 pages drawing on course materials and original research to provide a thoughtful analysis on any topic related to bail.
- An intensive data gathering project, such as interviewing commercial bail bondsmen or compiling bail mortgage data from real estate records.
- A statistical or empirical analysis. Large data sets have recently been made available for Harris County, Texas (Houston), Boulder County, Colorado, and the State of New Jersey.
- A regulatory comment or letter advising state or local policymakers.

A workshop on alternative final projects will be held the last week of February. Students should commit to a project or paper topic by **March 2**. The final project is due on **May 13**.

Each class consists of a recorded lecture that should be viewed at the outset of your preparation for the week's discussion, a set of required readings, suggested

readings for those interested in further research, and response questions for those writing essays for the week. Response essays will be circulated to the whole class on Wednesday evenings to facilitate class discussion the next day.

Please notify me and our teaching assistant of absences in advance when possible. All class sessions will be recorded and posted to Courseworks. Please do not distribute recordings in any way or form outside of class.

Jan 20 Introduction

SUMMARY No readings or lectures assigned for our first week. We'll open the class with a look at the bail system of Dallas County, currently the subject of a major case pending before the en banc Fifth Circuit.

Jan. 27 Bailment in People and Wealth-Based Detention in U.S. History

SUMMARY We begin with the history of American bail, such as it is. Bruce Mann focuses on imprisonment for (civil) debt, but he helpfully describes the procedural structure that remains in place for criminal bail, including crucial distinctions between secured and unsecured bonds. Bail reformer Tim Schnacke offers an overview history of American bail, focusing in particular on the 1960s turning points.

Our readings conclude with history in action as litigators deploy some of the materials we just read in legal argument before the Eleventh Circuit. *Walker* involved a class action challenge to the municipal pretrial system of Calhoun, Georgia. The plaintiffs contend that detaining misdemeanor defendants who cannot pay a prescheduled bail amount violates federal due process and equal protection guarantees. If you feel you need to know more of the legal history to assess the constitutional arguments, the Goebel and Gilfoyle supplemental readings are highly recommended.

LECTURE Bail Is Custody

READINGS Bruce Mann, *Republic of Debtors* (2010), Intro., Ch. 1, Ch. 3.
 Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, Pretrial Justice Institute (Sept. 2010).
 Brief for Amici Curiae American Bail Coalition, Ga. Assoc. of Professional Bondsmen & Ga. Sheriffs' Assoc., *Walker v. City of Calhoun*, 2016 WL 3452938 (11th Cir. 2016).
 Brief for Amici Curiae the Cato Institute, *Walker v. City of Calhoun*, 2016 WL 4364152 (11th Cir. 2016).

- QUESTIONS**
- 1) If you were offering a brief synopsis of the history of the American bail system—say to a judge, a law firm partner, or a family member—would you emphasize continuity or change over time? Are there stakes for reform in how you choose to frame the history?
 - 2) What role should history play in legal argument about the constitutionality of bail practices? Do our historical materials favor one side or the other in the Eleventh Circuit case?

Feb. 3 Bailors and Bounty Hunters

SUMMARY Although Anglo-American bail regimes have relied on a surety system literally since time immemorial, *commercial* sureties—those who stand surety because they are tied to a bailee by payment rather than kinship—have a much more recent history. Most common law jurisdictions (and indeed, the entire civilian world) have consistently outlawed commercial surety systems. The first commercial sureties were authorized in the United States in 1898.

In this class we will examine the world of the bondsman—a world constructed largely of state licensing and regulation. We will first look at the triangle formed by the bondsman, the state, and bond insurers. We will start in North Carolina, where the insurance lobby has had clear success in extracting favorable regulation. We then turn to the lived—if somewhat mythical—experience of bondsman exercising their powers granted by state law, as well as their struggles when the state strips those powers away (as New Jersey is currently attempting to do).

LECTURE Bail Is Contractual

READINGS *Bail Bondsmen and Runners*, N.C. GEN. STAT. ANN., Art. 71.
 Joe Killian, *Veteran NC Judges: State's Bail System is a "Scam," "Immoral," and in Need of "Massive Change,"* N.C. POL'Y WATCH, Apr. 4, 2018.
 Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES (May/June 2014).
 First Amended Complaint, *Egana v. Blair's Bail Bonds*, Civil No. 17-5899 (E.D.La. Sep. 12, 2017).
 DOG THE BOUNTY HUNTER, *Do Unto Others* (Season 3, Episode 2, aired Apr. 4, 2006).
 Comment of Mario Garza, President, Harris County Bondsmen Association, Harris County Commissioners Court, July 30, 2019.
 Lisa W. Foderaro, *New Jersey Alters Its Bail System and Upends Legal Landscape*, N.Y. TIMES, Feb. 6, 2017.
 Brent Johnson, *"Dog the Bounty Hunter" Sues Chris Christie*, NJ.COM, July 31, 2017.

- QUESTIONS**
- 1) Which two or three regulations in the North Carolina insurance code do you find most problematic? Do they raise problems of oversight? Incentives? Enforcement? Something else?
 - 2) Mr. Garza says of bail bonding, “This job is good for my soul.” Can the system make room for a *good* (howsoever defined) bail bondsmen? Look up Yelp or Google reviews for your hometown bail bondsmen. What accounts for positive reviews?

Feb. 10 Bailees

SUMMARY This week we turn from bailors to examine the experiences of bailees, those who are actually released from pretrial detention on bond. We start with an argument about bailees’ rights to monitoring. On the one hand, the growth of public pretrial services programs may represent dramatic progress in the reform of money bail—especially contrasted to the abusive practices of private bondsmen as detailed in the *Egana* litigation law week. But as you read, think about what problems these reforms may be introducing.

Charitable bail funds are becoming increasingly popular, setting up an argument that formal popular constitutionalism scholarship should take account of how bail funds might actually change the meaning of core constitutional commitments. On this point we’ll consider evidence from the Bronx Bail Fund, which has been enormously successful at appearance rates despite conscientiously minimal supervision. Note, however, that the Bronx fund is highly selective in choosing the relatively small number of cases in which it gets involved. Can the model be generalized?

LECTURE Bail Is Conditional

READINGS Samuel Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1118 (2014).
 Complaint, *Holland v. Rosen*, Civil No. 17-4317 (D.N.J. June 14, 2017), *pre. inj. denied*, Sep. 21, 2017, *affirmed*, July 9, 2018.
 Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 58 (2017).
 Alan Feuer, *Bronx Charity Founder Wants to Pay Bail for Poor Defendants Nationwide*, N.Y. TIMES, Nov. 13, 2017.
 Kristin Toussaint, *The Controversy Over How the Minnesota Freedom Fund Is Spending Its Donations, Explained*, FAST COMPANY, June 18, 2020.
 Dara Lind, *“Defendant Shall Not Attend Protests”: In Portland, Getting Out of Jail Requires Relinquishing Constitutional Rights*, PROPUBLICA, July 28, 2020.

Madison Alder, *Legal Scholars Skeptical of Court-Ordered Defendant Vaccination*, BLOOMBERG LAW NEWS, Aug. 8, 2021.

- QUESTIONS**
- 1) Is pretrial monitoring best thought of as a *right* or as another kind of surveilled *detention*? Even if the latter, is private surveillance (with all the potential costs and data harvesting that entails) better, or more liberty-protecting, than government surveillance?
 - 2) Recall from *Egana* last week that the bondsmen imposed (through contract) conditions the court itself did not see the need to order. Is that bail nullification? Can you distinguish between Professor Simonson's reform-oriented popular constitutionalism and the consistent and widespread acquiescence with the bail industry's practices over time?

Feb. 17 Stakeholders

SUMMARY For most of legal history, crime was a personal wrong with social implications, and victims had a large role in prosecuting crime and seeking restoration (such as it was) through the criminal process. Modern American criminal law was premised on the idea that crime was purely a social wrong with social remedies. Today, bail reform is often presented as having to satisfy a series of "stakeholders" in the criminal justice system, which may or may not include victims, police departments and prosecutors, commercial bondsmen, judges, local officials and other representatives of "the community."

In this class we will range widely across these interests. Who are the stakeholders in the American bail system, what do they want, and what languages appeal to them? Some movements speak in theologies of redemption while others offer proposals of economic efficiency. Pay attention to where the fissures might lie between proponents of progressive reform. This class also gives us an opportunity to dive deep into the possibilities and problems of reforming bail in California. We will hear from an appellate litigator about recent case law on habeas and bail.

LECTURE Bail Is a Narrative

GUEST ROSE MISHAAN, LAW OFFICES OF MARSANNE WEESE, SAN FRANCISCO

READINGS California Constitution, Article I, Section 28.
 Sophie Quinton, *Marsy's Law Protections for Crime Victims Sound Great, but Could Cause Problems*, PEW RESEARCH, Oct. 12, 2018.
 Paul G. Cassell, *Crime Victims' Rights*, in ACAD. FOR JUSTICE: REP. ON SCHOLARSHIP (2017).

John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis* (forthcoming).

Danielle Sered, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019), ch. 1.

Survivors' Statements, *The Abolition Organizing Toolkit*, *CRITICAL RESISTANCE* 98–102 (2012).

- QUESTIONS**
- 1) What are the tensions between valuing victim participation in pretrial proceedings and what you understand to be the other goals served by the pretrial process? Are you inclined to involve victims more, or less, because of these tensions?
 - 2) Abolitionist proposals tend to run on parallel tracks: Some focus on abolishing cash bail or pretrial detention, while others focus on abolishing the post-conviction “punishment bureaucracy.” Are the two movements compatible? Do alternatives to incarceration require some kind of custodial backdrop to make an alternative regime workable?

Feb. 24 Detainees

SUMMARY From bailees—those released on bond—we turn to detainees—those unable to make bond. We start with the case of Sandra Bland (well worth reading up on if you weren't aware of the case as it was unfolding in 2015) to remind ourselves of the very high and very personal stakes of pretrial detention for failure to pay bail. The bulk of our reading is much more impersonal—but important. There has been an explosion in sociological literature in the past two years documenting the effects of pretrial detention on case outcomes, future criminal activity, and quality of life for criminal defendants and their dependents. These studies are becoming key evidence in legislative hearings and litigation against secured money bail systems. You're welcome to read them all, particularly if you have a background in statistics or sociology, but you are required to read only one in depth. One can't conduct a truly randomized experiment on a prison population (that would be an incredible violation of equal protection!), so how have these authors thought their way around that problem? Can any of them really make a strong causal claim about the effects of pretrial detention? How should that shape the course of reform?

LECTURE Bail Is Leverage

GUESTS **Dot Weldon, New York County Defender Services; Nicandro Iannucci, Queens Defenders**

READINGS Margaret Talbot, *Watching Sandra Bland*, *NEW YORKER*, July 29, 2015.

U.S. Dep't of Justice, U.S. Att'y for S.D.N.Y., *Report on the New York City Dep't of Corr. Jails on Rikers Island* (Aug. 4, 2014).

One of:

David Arnold, Will Dobbie & Peter Hull, *Measuring Discrimination in Bail Decisions*, HKS Working Paper No. RWP20-014, Univ. of Chi. (Apr. 22, 2020).

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

Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 *J. OF LEG. STUDIES* 471 (2016).

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

Emily Leslie and Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignment*. 60 *J. of L. & ECON.* 529–57 (2017).

Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 *AM. ECON. REV.* 201 (2018).

QUESTIONS For response papers this week, review one of the sociology papers (coordinate with our teaching assistant, so we don't have six reviews of the same piece). Provide a synopsis of the jurisdiction, timeframe, and number of cases in the study. What are the main findings and key takeaways in terms of percentages and statistics? How (briefly) does the study arrange its methods to make causal claims? What can these studies do for us that, say, reporting on the Sandra Bland case can't do?

Mar. 3 Bail Schedules & Hearings

SUMMARY Bob Bone once observed in the *Columbia Law Review* that “[e]ach generation of procedure reformers, it seems, diagnoses the malady and proposes a cure only to have the succeeding generation’s diagnosis treat the cure as a cause of the malady.” We will see that cycle this week as we consider bail schedules and hearings, by far the dominant apparatus for making bail determinations in the majority of American jurisdictions. Bail schedules were at one time the leading edge of progressive reform, promising to discipline wildly variant (and racially discriminatory) bail settings that had been left to judicial discretion. A formalized hearing to determine probable cause and set bail arose as one of the last great criminal due process rights to be established despite the retrenchment of the

Burger Court. So we will ask why—culturally, legally, economically—have bail schedules and hearings become the new malady?

Our study will land us squarely in Harris County, Texas, home to the City of Houston, the nation’s third largest jail, and one of the signal litigation victories challenging money bail. We will review recordings of misdemeanor bail hearings entered into evidence in the federal litigation. As you watch, think about how you would remedy any problems that you see. One possible solution is to appoint counsel at these bail hearings. We will end by considering the literature and the case law debating whether bail hearings should count as “critical stage” triggering the Sixth Amendment right to counsel.

LECTURE Bail Is an Individualized Mass Process

READINGS *Stack v. Boyle*, 342 U.S. 1 (1951).
Gerstein v. Pugh, 420 U.S. 103 (1975).
Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978) (en banc).
 Harris County Bail Hearing Videos, Plaintiffs’ Exhibit 3.I., Preliminary Injunction Hearing, *ODonnell v. Harris Cty., Tex.*, Civil No. 16-1414 (S.D. Tex. Mar. 2017).
 Meagan Flynn, *For Decades, Harris County’s Bail System Trapped the Poor. Is that Finally Changing?*, HOUSTON PRESS, June 27, 2017.
 Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUSTICE 23 (2016).
 Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017).

QUESTIONS

- 1) What strikes you as the strongest argument against the constitutionality of bail schedules? Could you imagine a scheduling system that avoided the problem(s), for instance Professor Colgan’s day-fine idea?
- 2) Technically, it is still an open question whether bail hearings are a “critical stage” for *Gideon*’s requirement of appointed counsel. (Do you see why that is, given *Gerstein*?) Should they be? How much of a delay in proceedings would be acceptable for a public defender to prepare for a bail hearing? Can you see ways to mitigate such delays?

Mar. 10 Risk Assessments

SUMMARY We now turn to the new leading edge of progressive reform, the adoption of algorithm-based risk assessments designed to guide and “de-bias” judicial decisionmaking. We will read from the Laura & John Arnold Foundation, the non-profit leader in developing and promoting risk-assessment tools. We then look at

a set of algorithm-skeptic pieces (not all specifically related to bail) and consider whether they provide valuable warnings for the bail context.

Our key question for this week arises from the discussion last week: is this cure destined to become the new malady? If not, what will help risk assessment tools achieve their aim—a legal change? A cultural one?

LECTURE Bail Is Prediction

READINGS Timothy Schnacke, *The Third Generation of Bail Reform*, in Nat’l Ctr. for State Courts, *Fines, Fees, AND BAIL PRACTICES: CHALLENGES AND OPPORTUNITIES* (2017): 8–13.

Sean Hill, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, __ UCLA L. REV. __ (2022).

Public Safety Assessment: Risk Factors & Formula, LAURA & JOHN ARNOLD FOUNDATION (2016).

Chelsea Barabas et al., *Interventions over Predictions: Reframing the Ethical Debate for Actuarial Risk Assessment*, 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH 1 (2018).

Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 507–45 (2018).

QUESTIONS

- 1) Despite their serious shortcomings, are algorithmic risk assessment tools better than relying on judicial instinct? Is there any particular improvement you would advise for a jurisdiction adopting the Arnold Tool?
- 2) How should pretrial systems account for the difference between a risk of dangerousness and a risk of flight? Does Professor Mayson’s argument in “Dangerous Defendants” have implications for assessing risk of flight?

Mar. 24 Due Process & Equal Protection

SUMMARY This week begins a series of classes dedicated to the doctrinal structure of the American bail system. What, substantively, does the Constitution proscribe about money bail? Would a “wealth-based detention system” be unconstitutional? What facts on the ground do you need to know to answer the question as a matter of law?

Constitutional challenges to money bail have found three apparently equally viable routes: equal protection, substantive due process, and procedural due process. We will review the major precedents in these areas as well as legal arguments applying the precedents specifically to money bail. Think back to the Harris County hearing videos or the abusive bailor practices we’ve seen. Our key question now is, what remedy becomes available under each of these doctrinal

approaches? Does that make one approach more attractive—pleading requirements aside—or is it better, as some would have it, to try to conflate these approaches into a hybrid doctrine uniquely suited for wealth-based detention?

LECTURE Bail Is More Than the Eighth Amendment

GUEST **Alec Karakatsanis, Civil Rights Corps**

READINGS *United States v. Salerno*, 481 U.S. 739 (1987).
 Daniel Richman, *The Story of Salerno: The Constitutionality of Regulatory Detention*, in CRIMINAL PROCEDURE STORIES (Steiker, ed., 2006).
 Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098 (2019).
 Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor: Hernandez v. Sessions*, 21 CUNY L. Rev. 69 (2017).
 Alec Karakatsanis, *The Punishment Bureaucracy*, 128 YALE L.J.F. 849, 849–52, 909–35 (2019).
 Dwayne Betts, REDACTION (2019).

QUESTIONS

- 1) Which constitutional argument strikes you as the strongest against the modal American bail system? What are the advantages and disadvantages of using constitutional litigation to reform bail systems compared to other approaches (e.g., legislative lobbying, administrative reform through court rules, democratic appeals to voters)? If you could only advocate for one approach, which would you prioritize?
- 2) Was *Salerno* rightly decided? Progressives regretted the decision at the time but have come to embrace it as a leading precedent. Who has the better view?

Mar. 31 Race

SUMMARY So far we have thought about constitutional doctrines related to wealth-based detention. This week we will explore the confluence of race and class, first by looking at sociological literature demonstrating how indigent incarceration highly correlates with the confinement of black and brown bodies. But we remain in the midst of our doctrinal study, so we want to ask: Is there a route to turn this literature into a legal argument? If the Reconstruction Amendments and the original § 1983 meant anything, they surely stood for the proposition that (especially southern) jurisdictions could not jail black bodies on a mere accusation and evade federal court review. Why then has the desultory case law on *poverty* but not *racial* discrimination become the vehicle for attacking money bail?

- LECTURE** Bail Is Bondage
- READINGS** Brief for Amici Curiae NAACP Legal Defense and Educational Fund in Support of Plaintiffs’ Motion for Preliminary Injunction, *ODonnell v. Harris Cty., Tex.*, Civil No. 16-1414, ECF No. 265 (S.D. Tex. 2017).
 Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018).
 Monica Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1 (2018).
 Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in McCleskey v. Kemp—and Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018).
- QUESTIONS**
- 1) What are the obstacles to constructing an argument against money bail as impermissibly discriminatory on the basis of race? Are these obstacles any trickier than the wealth-based discrimination precedents?
 - 2) For whom is Professor Smith writing, and for whom Professor Bell? Which approach do you prefer, and which do you think likeliest to reform bail practices on the ground?

Apr. 7 Recent Developments: Harris County & Dallas County, Texas

SUMMARY In April 2017, Alec Karakatsanis’s litigation team won a major injunction against the misdemeanor money bail system of Harris County Texas, home to the nation’s second-largest jail. A rather conservative panel of the Fifth Circuit mostly affirmed the injunction, and the local news relied on the injunction to keep up a steady drum beat for reform. Ultimately the defendant judges were swept from the bench in the election of 2018 and the new office holders negotiated a consent decree.

Litigation efforts then concentrated on Dallas County and were extended in two ways: The Dallas suit included felony arrestees and it squarely raised claims of substantive due process (sidestepped in *ODonnell*). In January, the en banc Fifth Circuit overruled much of its *ODonnell* decision and has invited the district court to revisit long-settled abstention doctrines. Both the victories and defeats of bail challenges in the Fifth Circuit prompt us to ask what can and cannot be achieved through federal litigation.

READINGS *ODonnell v. Harris County*, 892 F.3d 147 (2018).
Why We’re Calling for a Judicial Sweep in the Misdemeanor Courts, HOUSTON CHRON. Oct. 16, 2018.
 Consent Decree, *ODonnell v. Harris Cty., Tex.*, Civil No. 16-1414 (S.D. Tex. Nov. 4, 2019).

Fourth Report of the Court-Appointed Monitor, Mar. 3, 2022. (read closely the executive summary and skim the rest at your discretion)

Daves v. Dallas County, 341 F.Supp.3d 688 (N.D. Tex. 2018).

Daves v. Dallas County, 22 F.4th 522 (5th Cir. 2022) (en banc).

- QUESTIONS**
- 1) Is the *ODonnell* consent decree the ideal bail reform? What other improvements might you want? Can it be, and should it be, extended to felony defendants?
 - 2) How do you assess federal litigation as an avenue to bail reform? Do you, as Professor Siegel put it, “believe in courts”?

Apr. 14 **What Comes Next**

SUMMARY Throughout the term we’ve seen many potential cures for the maladies of pretrial detention result in unexpected and often detrimental consequences. So far, both bail schedules and discretionary risk assessments, individual rights to bail and state rights to order preventive detention, commercial bondsmen and public pretrial services have all continued to recapitulate or perpetuate a system of widespread pretrial incarceration little different from the studies of the eighteenth century we read in the opening week.

But the system is undoubtedly changing in many jurisdictions. The landmark case of *ODonnell v. Harris County* has wound down to a consent decree, while the Tenth Circuit has affirmed the dismissal of challenges to New Mexico’s bail reform. Illinois is set to abolish cash bail, after the presiding judge of the Cook County court system promulgated rules restricting the use of cash bond. Google and Facebook no longer run advertising for bailbonding agents. Do these changes represent a cultural shift on bail? Where might that shift take us? Whether secured money bail is reformed or abolished, what takes its place? If mass incarceration is not simply going to continue on in new forms, what are the resources—cultural, legal, economic—that are going to break the cycle?

- READINGS**
- American Bail Coalition, *The Future of Bail: The Fourth Generation of Bail Reform in America* (Nov. 2018).
- Texas S.B. 6, signed Sept. 17, 2021.
- Shifting Sands: An Investigation into the First Year of Bond Reform in Cook County*, COALITION TO END MONEY BOND, Sep. 18, 2018.
- Google and Koch Industries Team Up To Deny Access to Constitutional Right to Bail*, AM. BAIL COALITION, May 8, 2018.
- Evan Symon, *One Year Away from Statewide Vote, Bail Bondsmen Are Doing Everything to Keep Their Industry Alive*, CAL. GLOBE, Oct. 24, 2019.

Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN, Aug. 24, 2017.

Daniel Farbman, *A Commons in the Master's House*, 90 FORDHAM L. REV. 2061 (2022).

- QUESTIONS**
- 1) It is a truism that America's bail system is "broken." If you were asked to explain what precisely it is about the bail system that is broken, what would you say?
 - 2) What, realistically, do you think comes next for the American bail system? Is your five-year outlook that more jurisdictions will look like Harris County, or the ABC's Fourth Generation? Something else entirely?

Apr. 21 Recent Developments: New York Bail Reform

SUMMARY In 2019 Governor Cuomo signed into law a bill eliminating the use of cash bail in most misdemeanor and low-level felony cases, then swiftly reversed course as the 2020 pandemic set in. A number of related efforts and counter-efforts have also passed or been proposed at the city level. Charitable bail funds, formerly restricted by law to bailing misdemeanor defendants, must now reassess their missions. Debate about further rollbacks continues to today—literally. In class we will look at whatever the latest New York senate proposal is on bail eligibility.

GUESTS **Insha Rahman & Jullian Harris-Calvin, Vera Institute of Justice**

READINGS New York Consolidated Laws – CPL § 510.30 (2019).
 Nick Pinto, *Making Bail Better*, VILLAGE VOICE, Oct. 10, 2012.
Bail Reform in New York: Legislative Provisions and Implications for New York City, CTR. FOR COURT INNOVATION (April 2019).
 Statement of the Brooklyn Community Bail Fund, Sept. 27, 2019.
 James Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came*, POLITICO, Apr. 23, 2020.
 Jeff Coltin, *DAs Trained How to Keep People in Jail Despite New Bail Law*, CITY & STATE, Oct. 28, 2019.
 Emma Whitford, *A Closer Look at Albany Democrats' Compromise on Bail Reform*, GOTHAM GAZETTE, April 5, 2019.
 Gov. Kathy Hochul & Lt. Gov. Brian Benjamin, *Don't Blame Bail Reform; Do Improve It*, N.Y. DAILY NEWS, Mar. 23, 2022.
 Review Sean Hill, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, pages 78–92.

- QUESTIONS**
- 1) What lessons do you draw from New York's legislative reform of bail in 2019 and reversal in 2020? How favorably does it compare to states where reform is led by the state supreme court (New Jersey or New Mexico)?
 - 2) We've now seen lots of reform models: top-down judicial and legislative imposition, bottom-up popular constitutionalism, bail funds working within the system, abolitionists seeking to restructure the system—what model(s) do you instinctively incline towards when confronted with an urgent crisis like the pandemic?

May 12 Deadline to Submit Final Project