

# The American Bail System



Fall 2024  
Wednesdays 3:10–5:00  
Yale Law School

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| <b>INSTRUCTOR</b>  | Kellen Funk, Florence Rogatz Visiting Professor of Law, <a href="mailto:kellen.funk@yale.edu">kellen.funk@yale.edu</a>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <b>CLASSROOM</b>   | SLB 111                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| <b>OFFICE</b>      | M23 or Zoom; email for appointment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| <b>CREDIT</b>      | 2 credit research seminar; final paper                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <b>DESCRIPTION</b> | On any given day, more than 500,000 Americans are detained in jails 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 the day-to-day practices churning defendants through the criminal courts. |

Students are invited to range widely in a final research paper that may draw on methods from legal history, sociology and economics, moral philosophy, or black-letter doctrine. Landmark reforms and high-profile litigations in the last 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 Canvas or will be otherwise accessible online.

**POLICIES** Students should be prepared each week to discuss the questions posted after each set of readings below. In lieu of “suggested readings,” a separate bibliography is enclosed with materials that enlarge on the topics covered each week.

Credit is based entirely on a final paper. The paper project can take many forms and may be completed individually or in collaboration with classmates. Successful efforts in past seminars have included:

- A paper of around 25 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.

Once a semester is under way, I’ll host an after-hours zoom workshop to consult on final projects. The final project is due on **December 20**.

Laptops are permitted but discouraged. Students with documented disabilities should [register](#) with Student Accessibility Services (SAS) to request reasonable disability-related accommodation. Supporting [documentation](#) will be required. If approved, SAS will work with the Registrar’s Office to implement accommodations. More information for can be found [online](#).

Please notify me of absences in advance when possible. Due to the sensitive nature of our discussions and the instructor’s participation in ongoing litigation involving the commercial bail system, classes will not be routinely recorded or disseminated.

## Aug. 28 Introduction

**SUMMARY** No readings assigned for our first week. We'll open the class with a look at the bail system of Dallas County, Texas, recently the subject of a series of en banc cases decided by the Fifth Circuit.

## Sep. 04 Bailment in People and Wealth-Based Detention in U.S. History

**SUMMARY** We begin with the history of American bail, such as it is. Recent work by Funk and Mayson unearths archival evidence about early bail practices. 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 Schnacke's work 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 (on the separate bibliography) are highly recommended.

**READINGS** Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. 1816 (2024).  
 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 these historical materials favor one side or the other in the Eleventh Circuit case?

## Sep. 11 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 the late nineteenth century.

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 has).

**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. How do these reviews describe a good bondsman?

## Sep. 18      **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. Even this modest bail reform touched off a firestorm of controversy in New York and has led to multiple proposals for both expansion and repeal.

Our readings this week will fill in the technical details of New York bail reform and catch us up to the latest developments. We will hear from two public defenders in New York who started their careers at the advent of these reforms and have seen their implementation—and contestation—on the ground since then.

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

**READINGS**      New York Consolidated Laws – CPL § 510.30 (2019).  
 Peter Sterne, *A Brief Guide to New York's Bail Reform Evolution*, CITY & STATE NEW YORK (May 5, 2023).  
*Bail Reform in New York: Legislative Provisions and Implications for New York City*, CTR. FOR COURT INNOVATION (April 2019).  
 Nick Pinto, *Making Bail Better*, VILLAGE VOICE, Oct. 10, 2012.  
 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.  
 Gov. Kathy Hochul & Lt. Gov. Brian Benjamin, *Don't Blame Bail Reform; Do Improve It*, N.Y. DAILY NEWS, Mar. 23, 2022.  
 René Ropac & Michael Rempel, *Does New York's Bail Reform Law Impact Recidivism? A Quasi-Experimental Test in New York City*, Data Collaborative for Justice at John Jay College (March 2023).

**QUESTIONS**      1)      Later this semester we will read an article comparing the radicalisms of attempts at bail reform. But at this point, how radical does it seem New York's approach is? What essentially was the reform, and what alternatives were rejected?

2)      What lessons do you draw from New York's legislative reform of bail in 2019 and partial reversal in 2020? Does it incline you to think bail reform might be better handled by the judiciary? Was the backlash inevitable no matter which institution led the change?

## Sep. 25 Bailees

**SUMMARY** This week we turn to 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?

**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* 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?

## Oct. 02      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 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. Can any of them really make a strong causal claim about the effects of pretrial detention?

**GUEST**            **Claudine Constant, Vera Institute of Justice**

**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:

Howard Bodenhorn, *Cash Bail and Trial Outcomes in an Early Twentieth-Century Police Court*, Working Paper, National Bureau of Economic Research (Feb. 15, 2024).

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

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).

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

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).

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).

- QUESTIONS**
- 1) 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? What are the strengths and weaknesses of the methodology?
  - 2) What can these studies do for us that, say, reporting on the Sandra Bland case can't do?

## Oct. 09      **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) impositions of bail 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 by the post-Warren 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 a “critical stage” triggering the Sixth Amendment right to counsel.

**READINGS**      Christine S. Scott-Hayward & Sarah Ottone, *Punishing Poverty: California’s Unconstitutional Bail System*, 70 STAN. L. REV. ONLINE 167 (2018).  
*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.  
Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017).

Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUSTICE 23 (2016).

- 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 by adopting 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? Do you think lawyers would make a real difference at the Harris County hearings, or would they just cover the railroading of defendants with a veneer of "due process"?

## Oct. 16 Risk Assessments

**SUMMARY** We now turn to one leading edge of (at least self-acclaimed) 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 system.

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?

- 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.
- Public Safety Assessment: Risk Factors & Formula*, LAURA & JOHN ARNOLD FOUNDATION (2016).
- Sean Hill, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910 (2021).
- Sandra G. Mayson & Megan T. Stevenson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709 (2022).
- Chelsea Barabas et al., *Interventions over Predictions: Reframing the Ethical Debate for Actuarial Risk Assessment*, 81 PROCEEDINGS OF MACHINE LEARNING RESEARCH 1 (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 (which is quickly becoming the universal tool of bail assessment)?

- 2) How should pretrial systems account for the difference between a risk of dangerousness and a risk of flight? Can the Mayson-Stevenson argument about risk of danger be equally cashed out for risk of failure to appear?

## Oct. 23      **Wealth, 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 are helpful to know to answer the question as a matter of law?

Constitutional challenges to money bail have found three apparently equally viable routes through the Fourteenth Amendment: 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?

**READINGS**      Daniel Richman, *The Story of Salerno: The Constitutionality of Regulatory Detention*, in CRIMINAL PROCEDURE STORIES (Steiker, ed., 2006).  
*United States v. Salerno*, 481 U.S. 739 (1987).  
 Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098 (2019).  
 Brandon Garrett, *Wealth, Equality, and Due Process*, 61 WILL. & MARY L. REV. 397 (2020).  
 Michael K.T. Tan & Michael Kaufman, *Jailing the Immigrant Poor: Hernandez v. Sessions*, 21 CUNY L. Rev. 69 (2017).

**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?

## Oct. 30 Race & Equal Protection

**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 citizens 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?

**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).  
 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).  
 Jessica M. Eaglin, *Racializing Algorithms*, 111 CAL. L. REV. 753 (2023).

**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) Can U.S. courts as they are presently constituted handle the arguments our readings present about race and the racialization of jail and prison? What consequences does your answer have for considering arguments about race and racialization to be *legal* arguments?

## Nov. 06 Federalism

**SUMMARY** Whether its race or wealth or even an Excessive Bail claim, few federal courts reach the merits of constitutional claims against systemic bail abuses because of an overlapping set of federalism doctrines that warn federal judges to hold back when state courts are competent to hear claims or state executives to supervise their employees. Damages claims run into immunities; equitable relief runs into abstention doctrine. Our first set of readings asks how this could happen given the Reconstruction precedents that seem so obviously applicable to bail.

Our second set of readings take us to Texas. In 2017, a landmark injunction was issued against the misdemeanor bail system of Harris County, Texas, ultimately resulting in a hard-fought consent decree. You are welcome to read the full trial

court opinion finding its way through all the federalism barriers, but it is quite lengthy (there are many barriers!). When the Harris County litigators turned their attention to Dallas County—and raise the stakes by attacking the felony bail system as well—the en banc Fifth Circuit ultimately stepped in with the broadest possible rule insulating county bail systems from federal review.

- READINGS** Martha Mills, *LAWYER, ACTIVIST, JUDGE* (2015), 305–19.  
*O’Shea v. Littleton*, 414 U.S. 488 (1974).  
 Kellen Funk, *Equity’s Federalism*, 97 NOTRE DAME L. REV. 2057 (2022), 2080–90.  
*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).  
*Daves v. Dallas County*, 64 F.4th 616 (5th Cir. 2023) (en banc).  
 Fourth Report of the Court-Appointed Monitor, *ODonnell v. Harris County*, Mar. 3, 2022. (read closely the executive summary and skim the rest at your discretion)
- QUESTIONS**
- 1) How do you assess federal litigation as an avenue to bail reform? Do you, as Professor Siegel put it last week, “believe in courts”? Is belief possible after *Daves*?
  - 2) Is the *ODonnell* consent decree the ideal bail reform? What other improvements might you want? Could it be extended to felony defendants? How difficult does it seem it would be to secure something like the consent decree *without* federal litigation?

## Nov. 13 Abolition

- 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. Various restorative justice and abolitionist initiatives seek to bring victims’ voices back into focus—but so also do vindictive proponents of law-and-order politics. Our first set of readings explores this tension in seeking victims’ views in pretrial detention.
- Our second set of readings ventures further into prison abolition to ask whether bail reform can ever accomplish the aims of abolitionists. Is all bail reform fated to be “reformist reform”? Or so long as one, however incrementally, starves the system of carceral resources, can one be an abolitionist bail reformer?

**GUEST** Alec Karakatsanis, Civil Rights Corps

**READINGS** Danielle Sered, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019), ch. 1.  
 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.  
 Alec Karakatsanis, *The Punishment Bureaucracy*, 128 YALE L.J.F. 849 (2019).  
 Dwayne Betts, REDACTION (2019).  
 Daniel Farbmán, *A Commons in the Master's House*, 90 FORDHAM L. REV. 2061 (2022).

- 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 or publicly controlled incapacitating force to make an alternative regime to incarceration workable?

## **Nov. 20      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 has abolished cash bail entirely, while New York has abolished it for most low-level charges. Google and Facebook restrict 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).  
*After Money Bail*, LAW & POLITICAL ECONOMY PROJECT SYMPOSIUM, Feb. 15, 2020.  
*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.
- 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?

**Dec. 20      Deadline to Submit Final Project**