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Kacey Henning
Indiana University Maurer School of Law, kahenni@iu.edu

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Inconsistencies in Bail Determinations: An Analysis of Judicial Decision-Making

Kacey Henning*

INTRODUCTION

All across the United States, arrestees sit in jail awaiting adversarial proceedings. These individuals, who are innocent until proven guilty, may wait days before standing in front of a judge for their bail determination. Following the bail decision, arrestees are often pressured to take plea deals as a result of their inability to pay the bail amount or are forced to make the tough decision to remain incarcerated to receive a fair shake at trial. Arbitrary bail guidelines, combined with the lack of guidance from the U.S. Supreme Court on setting bail, has created a rampant trend of excessive bail and, in response, a large push for bail reform. Part I of this Note gives a backdrop on the Eighth Amendment's Excessive Bail Clause and Supreme Court rulings on this clause. Part II provides insight into the different interpretations of this clause from judges and legislators across the United States. Part III points out the issues with the current state of bail setting in the United States and focuses on the gray area of judicial decision-making in bail determinations. Part IV provides possible solutions to reduce judicial bias and mitigate the excessive bail problem.

I. BACKGROUND: THE RIGHT TO BAIL

The Eighth Amendment of the U.S. Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" and applies to the states through the Fourteenth Amendment.[1] While a right to bail is not explicitly stated in the Eighth Amendment, many scholars and courts have found this right to be implied.[2] The Eighth Amendment's Excessive Bail Clause was not interpreted by the Supreme Court until 1951.[3] In *Stack v. Boyle,* the Court held that individuals were entitled to bail determinations based on their particular circumstances relevant to assuring their appearance at trial.[4]

Following a subsequent Supreme Court decision in *Carlson v. Landon,* in which the Court muddled its earlier interpretation of the Excessive Bail Clause,[5] Congress attempted to provide a clearer standard for setting bail via the Bail

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* J.D., 2022, Indiana University Maurer School of Law; B.S. Legal Studies & B.B.A Management, 2018, Grand Valley State University.

1 U.S. CONST. amend. VIII; *see* Schilb v. Kuebel*,* 404 U.S. 357, 365 (1971).

2 Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, 10 ALA. C.R. & C.L. L. REV. 115, 118 (2019).

3 Stack v. Boyle, 342 U.S. 1 (1951).

4 *Id.* at 5.

5 Carlson v. Landon, 342 U.S. 524, 544 (1952) (stating that bail must be "in a reasonable amount", but providing no explanation for how to calculate this); James A. Allen, Note, "*Making Bail": Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive" Bail*, 25 J.L. & POL'Y 637, 646 (2017).

Reform Act ("BRA") of 1966.[6] The BRA established that, when setting bail, judges should take into consideration the following:

> the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.[7]

The BRA was later revised in 1984 to include concern for public safety as a factor for determining bail.[8]

The BRA of 1984 was quickly challenged in 1986; in *United States v. Salerno,* petitioners claimed the Act "was a violation of their Due Process rights and their Eighth Amendment right to be free from the denial of bail based on considerations other than the possibility of flight."[9] The Court ultimately held that it is permissible for the judge in a bail determination to consider the risks of flight and public safety, among other concerns.[10] Courts have also found that bail is not available for capital crimes, citing danger concerns as a reason for this distinction.[11]

While *Salerno* answered some lingering questions regarding the right to bail, the case failed to adequately delve into the issue of when pretrial detention would become "excessive."[12] This uncertainty produced the issue with bail-setting that exists today, as courts moved away from an "implied right to pretrial release" and toward the use of arbitrary and more restrictive bail conditions on defendants.[13]

II. BAIL DETERMINATION PROCESSES ACROSS JURISDICTIONS

The process of determining bail amounts persists as an extremely important step in the criminal justice system, as bail is the one device that governs the release or detention of defendants before trial.[14] It is imperative that judges get bail determinations right, as getting it wrong could produce serious risks.[15] Some of these concerns include preventing or postponing justice; endangering society or

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6 *Id.* at 648.

7 *Id.* (quoting Bail Reform Act of 1966, Pub. L. 89-465 § 3146, 80 Stat. 214).

8 Bail Reform Act of 1984, Pub. L. No. 98-473, § 3142(b), 98 Stat. 1976, 1977 (codified at 18 U.S.C. § 3142).

9 Allen, *supra* note 5, at 649 (citing Brief for Respondent at 1–3, U.S. v. Salerno, 481 U.S 739 (1987) (No. 86-87)).

10 *Salerno*, 481 U.S. 739, 754–55 (1987).

11 Connelly & Linthorst, *supra* note 2, at 120–21.

12 *See Salerno,* 481 U.S. 739, 754 (1987); Allen, *supra* note 5, at 652.

13 *Id.* at 652–53.

14 John S. Goldkamp & Michael R. Gottfredson, *Bail Decision Making and Pretrial Detention: Surfacing Judicial Policy*, 3 L. & HUM. BEHAV. 227, 228 (1979).

15 Peter B. Krupp, *A Call for More Focused Advocacy: Setting Bail After Brangan*, 61 BOS. BAR J. (Feb. 2, 2018), https://bostonbarjournal.com/2018/02/02/a-call-for-more-focused-advocacy-setting-bail-after-brangan/.

creating a public risk by releasing a violent or unstable defendant; and creating lasting, negative effects on the defendant if an unaffordable bail is set.[16]

Existing laws and guidelines surrounding the use of bail as a pretrial detention device areused inconsistently from state to state.[17] In some states, bail schedules are used in an attempt to standardize bail determinations.[18] Bail schedules, sometimes referred to as bail schemes, are

> procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the characteristics of an individual defendant. These schedules might formally be promulgated through state law, or informally employed by local officials. They may be mandatory or merely advisory, and may provide minimum sums, maximum sums, or a range of sums to be imposed for each crime.[19]

While these bail systems are quick and easy to use, they have been unsuccessful in providing more even-handed bail determinations.[20] Instead, bail schedules have worked to strengthen a "wealth-based detention system"[21] that results "in a greater adverse impact on indigent individuals."[22]

In other states, guidance for judges in setting bail consists of nothing more than the requirement of the right to bail or a list of factors to be considered.[23] Bail determinations here are left to judicial discretion, leaving judges to weigh different subjective conditions to determine a defendant's risk of flight and risk to public safety.[24] The criteria considered in these states often include the following:

> (1) the nature of the current charge; (2) the weight of the evidence and the likelihood of conviction; the possible criminal penalty; (3) the defendant's prior criminal history (including in three states, juvenile history); (4) prior record of appearance in court; (5) whether the defendant was on probation, parole or pretrial release in connection with an earlier offense; (6) age; (7) length of residence in, and ties to the community; (8) employment; (9) financial resources; (10) character, reputation and mental condition; (11) past general conduct;

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16 *Id.*

17 Allen, *supra* note 5, at 655.

18 *Id.* at 665.

19 Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 12, 13 (2011).

20 *See* Allen, *supra* note 5, at 664–65.

21 *Id.* at 665 (quoting Odonnell v. Harris Cty., No. H-16-1414, 2017 WL 1735456, at *63 (S.D. Tex. Apr. 28, 2017) (internal quotations omitted)).

22 *Id.* at 656.

23 John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 8–9 (1985).

24 *See id.* at 8–10; Muhammad B. Sardar, *Give Me Liberty or Give Me . . . Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1434 (2019).

> (12) the availability of persons to assist the person in attending court; and (13) whether the person is an alcoholic or a drug addict.[25]

With this type of ambiguous bail analysis, inconsistencies arise as judges are free to ignore whichever factors they deem unnecessary and can instead focus solely on the defendant's current charge and criminal record.[26] Combined with the diverging views on the purpose of bail, some judges use their discretion as a method of detention, assigning bail at a "level deliberately beyond the defendant's likely ability to afford it."[27]

Beyond inconsistent methods for setting bail, the types of bond and additional pretrial conditions allowed vary from location to location.[28] The most typical types of bond are (1) cash bonds, where the defendant must pay the full amount of their bail prior to being released; (2) surety bonds, where a bail bondsman posts the bond for the defendant in exchange for a certain premium or collateral; (3) property bonds, where a claim is placed on property; and (4) personal recognizance bonds where no form of cash bail is required and defendants are released on the promise that they will return for future proceedings.[29] Some state laws reference conditions that may be set in addition to money bail or recognizance bonds to reduce the defendant's risk to the public or of flight.[30] These additional conditions can include the following:

> (1) custody by a pretrial services or other public agency; (2) custody to a third party or organization; (3) regular reporting to or supervision by a pretrial services, probation or law enforcement agency; (4) restrictions on residence, travel, associations and activities; (5) prohibitions against possessing weapons, alcohol or drug usage; (6) requirements that employment be found or maintained, that educational or vocational programs be initiated or continued; (7) requirements that a defendant participate in counseling, drug or alcohol treatment programs; and (8) part-time custody.[31]

These conditions can be very useful to judges as they help to strike a balance between the concerns about public safety and the risk of flight while ensuring an arrestee is not unnecessarily detained pretrial.[32] Additional conditions are not currently being used in this way, however, and cash bail continues to be prevalent.[33]

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25 *Id.* at 9.

26 *Id.* at 10.

27 *Id.*

28 *Id.* at 12–13.

29 *See* Clive Johnson, *Different Types of Bail Explained,* UNDERSTANDING BAIL BONDS, https://understandingbailbonds.com/different-types-bail/ (last visited Nov. 6, 2020).

30 Goldkamp, *supra* note 23, at 12.

31 *Id.* at 13.

32 *See* Connelly & Linthorst, *supra* note 2, at 150–51.

33 *See* Liana M. Goff, Note, *Pricing Justice: The Wasteful Enterprise of America's Bail System*, 82 BROOK L. REV. 881, 903 (2017).

This persistent reliance on a cash bail system presents most defendants with two options: post the entire bail amount (an impossible barrier for poor defendants) or use a commercial bail bondsman to pay the bail amount.[34] Bail bonds companies, typically centered in "low-income communities of color," contract with defendants to pay their bail amount and often use deceptive and predatory practices.[35] The process typically involves a defendant paying a nonrefundable percentage of the total bail to a bail bonds company, "which then writes a bond for the full bail amount promising that it will be paid if the person doesn't appear for court."[36]

This guarded process leads to many continued issues for defendants and their support system since many defendants must rely on their family and friends to both come up with the money and contract with the bail bondsman.[37] These issues include losing the money they have provided to the bail-bonds company and continuing to owe loan installments and fees long after the resolution of the defendant's case.[38] Additionally, if the defendant does not appear at trial, it becomes the bondsman's burden to locate the defendant and return them to custody.[39] If the bail bonds company is unsuccessful in locating the defendant, "it becomes liable to the court for the whole amount; faced with the prospect of lost profits, bondsmen turn to the individuals who signed the bond, and 'take whatever actions are necessary to recover their costs.'"[40] This provides bail bonds companies with an inordinate amount of power over the justice for—and freedom of—low-income defendants, directly in opposition to due process protections that exist to ensure the "equitable administration of justice."[41]

A. State-Specific Litigation and Legislation

California's bail-setting procedure incorporates bail schedules.[42] "These bail schedules typically provide a maximum bail amount, but do not assign minimums, leaving the final assigned amount to the judicial officer's discretion."[43] To add further ambiguities in setting bail, one California court of appeals held that a defendant may not be imprisoned due to poverty and that "rigorous procedural

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34 *See id.* at 892.

35 Mallory Harmon, *Unconvicted and Behind Bars: The Discriminatory Nature of Cash Bail,* SHARED JUSTICE (July 31, 2019), http://www.sharedjustice.org/domestic-justice/unconvicted-and-behind-bars.

36 *Id.* (quoting Gillian B. White, *Who Really Makes Money Off of Bail Bonds?*, ATLANTIC (May 12, 2017), https://www.theatlantic.com/business/archive/2017/05/bail-bonds/526542/ (internal quotations omitted)).

37 *See id.*

38 *See id.*

39 Goff, *supra* note 33, at 902.

40 *Id.* (quoting Tracy Velázquez, Melissa Neal & Spike Bradford, *Bailing on Justice: The Dysfunctional System of Using Money to Buy Pretrial Freedom*, PRISON LEGAL NEWS (Nov. 15, 2012), https://www.prisonlegalnews.org/news/2012/nov/15/bailing-on-justice-the-dysfunctional-system-of-using-money-to-buy-pretrial-freedom/.

41 *Id.* at 903–04.

42 Allen, *supra* note 5, at 658; CAL. PENAL CODE § 1275 (West 2016).

43 *Id.*

safeguards" should be used to ensure that any determination on the defendant's dangerousness or risk of flight is accurate.[44] In an attempt to resolve the state's muddled and inconsistent bail system, a proposition was on the ballot in the 2020 election cycle that would replace the cash bail system.[45] This proposition included a law establishing a risk assessment structure designed to determine whether a defendant should be released and, if so, on what conditions.[46] This proposition was opposed by many bail reform groups, including the ACLU, as they claimed this proposed process gave judges too much discretion and was susceptible to racial bias.[47] The citizens of California ultimately did not pass this proposition, leaving bail reform activists back at square one in the state.[48]

In 2021, cash bail reform was considered once again by the California Supreme Court in *In re Humphrey*.[49] There, the court held that California's cash bail practices were unconstitutional and that California state courts must consider less restrictive alternatives to detention.[50] Additionally, the court reiterated United States Supreme Court precedent in *United States v. Salerno* that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[51] While this was a great step forward for California defendants, the ruling left many unanswered questions as it did not provide a clear bail determination process.[52]

In Texas, the United States Fifth Circuit Court of Appeals in *ODonnell v. Harris County* held that Harris County's procedure for setting bail without individual assessment violated the Equal Protection Clause and that judges must consider monetary resources when setting cash bail.[53] The court held that Harris County's procedures resulted in "an absolute deprivation" of the defendant's "most basic liberty interests—freedom from incarceration."[54] Following this case, the county entered into a consent decree with the plaintiffs.[55] This case, however, was overturned by *Daves v. Dallas County* in 2022 on abstention grounds without

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44 *In re* Humphrey, 228 Cal. Rptr. 3d 513, 538 (Cal. Ct. App. 2018).

45 Taryn A. Merkl & Leily Arzy, *California's Referendum to Eliminate Cash Bail, Explained,* BRENNAN CTR. FOR JUST. (Oct. 2, 2020), https://www.brennancenter.org/our-work/analysis-opinion/californias-referendum-eliminate-cash-bail-explained.

46 *Id.*

47 Patrick McGreevy, *Prop. 25, Which Would Have Abolished California's Cash Bail System, is Rejected by Voters,* L.A. TIMES (Nov. 4, 2020, 8:49 AM), https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-25-results.

48 *Id.*

49 *Humprey*, 482 P.3d at 1012 (2021).

50 *Id.* at 1012–13.

51 *Id.* at 1021 (quoting U.S. v. Salerno, 481 U.S. 739, 755 (1987)) (internal quotations omitted)).

52 *See id.* at 1021–22.

53 ODonnell v. Harris County, 892 F.3d 147, 161 (5th Cir. 2018).

54 *Id*. at 162.

55 Andrew Schneider & Paul DeBenedetto, *The Bail Bond Industry Hopes a Recent Court Ruling Kills Harris County's Reforms. Supporters Don't See That Happening*, HOUS. PUB. MEDIA (Jan. 17, 2022, 6:00 AM), https://www.houstonpublicmedia.org/articles/news/criminal-justice/2022/01/17/417173/a-federal-appeals-court-ruling-may-endanger-harris-countys-misdemeanor-bail-reform-settlement/.

reaching the excessive bail issue.[56] Because this case did not address the constitutionality of bail-setting procedures, it is unclear how *Daves v. Dallas County* will impact the consent decree in the ODonnell case, making bail-setting waters murky once again in Texas.[57]

Additionally, in *Holland v. Rosen*, the Third Circuit Court of Appeals held that there is no federal constitutional right to monetary bail.[58] Here, the court was not persuaded by the petitioner's argument that the Eighth Amendment required the least restrictive release condition available and reiterated that for bail conditions to violate the Excessive Bail Clause of the Eighth Amendment, they must be "excessive in light of the perceived evil."[59]

In New York, legislation surrounding bail initially looked promising to combat the issue of excessive bail as "[c]ourts are mandated to consider factors such as a defendant's employment status and financial resources, criminal record, and record of non-appearances in court."[60] This law has not been effective, however, as judges continue neglecting to consider financial resources of the accused and pretrial detention numbers remain high.[61]

Similarly, in *Brangan v. Commonwealth*, a Massachusetts case, the court "collected and clearly articulated the foundational principles underlying bail, re-centering judges and advocates on what matters and what does not."[62] In this decision, the court stressed the importance of an individualized bail decision requiring the judge to set bail at an amount sensibly calculated to ensure the defendant returns to court.[63] While this court decision gave some clarity to the Commonwealth, lawyers' difficulty in obtaining adequate preparation before bail determination hearings continues to hurt arrestees.[64] Without appropriate documentation on the defendant's monetary position, mental health status, and prior court experiences, the court is unable to perform a well-rounded inquiry when determining bail.[65]

While all of these outcomes are examples of courts and legislatures looking to clarify the standards for setting bail, the different conclusions only add layers of complexity to the bail determination issue. The lack of bright-line rules leaves judges to either follow problematic bail schedules or to draw from their own individual experiences and biases when setting a bail amount they find reasonable.

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

57 Schneider & DeBenedetto, *supra* note 55.

58 Holland v. Rosen, 895 F.3d 272, 278–79 (3d Cir. 2018).

59 *Id.* at 291 (quoting *Salerno*, 481 U.S. at 754 (1987) (internal quotations omitted)).

60 Connelly & Linthorst, *supra* note 2, at 145; *see also* N.Y. CRIM. PROC. LAW § 510.30(1)(a) (McKinney 2020).

61 *See* Connelly & Linthorst, *supra* note 2, at 145–46.

62 Krupp, *supra* note 15, at 3 (summarizing Brangan v. Commonwealth, 80 N.E.3d 949 (Mass. 2017)).

63 *Id.*

64 *See id.* at 4–5.

65 *See id.*

III. CURRENT ISSUES WITH TODAY'S BAIL DETERMINATION INCONSISTENCIES

A. Inconsistency with Due Process

The current bail-setting atmosphere is concerning for multiple reasons. First, pretrial detention seems to be inconsistent with the due process principle that individuals are innocent until proven guilty.[66] As a factor to determine bail amounts, judges are expected to evaluate a defendant's risk to the public.[67] Oftentimes, the limited information judges have to evaluate whether defendants are dangerous is the current record of the crime, of which they have not yet been found guilty; past convictions; court records; and basic identifying information.[68] This essentially forces a judge to shortcut due process and act as a fact-finder of the circumstances surrounding the alleged crime.[69]

Second, after deciding that a cash bail is necessary, in jurisdictions without bail schedules, judges choose arbitrary amounts using their own subjective factors.[70] This process could in fact trigger discrimination of a defendant before trial depending on the defendant's monetary resources.[71] For example, consider two defendants: Defendant 1 and Defendant 2 both commit the same crime at the same place, and all circumstances are identical except for the Defendants' monetary resources. Defendant 1 works full-time at a factory and lives in the suburbs, whereas Defendant 2 is unemployed and homeless. If a judge were to make a cash bail determination of $5,000 using a bail schedule or other factors with no regard to monetary resources—as judges often do—Defendant 1 would likely be able to afford this amount. Defendant 1 would be released from jail pending trial and could resume his life as usual. Defendant 2, on the other hand, would not be able to post bail. Instead, Defendant 2 would internalize the social cost of being incarcerated and be pressured to take a less favorable plea bargain.[72] In effect, judges that find defendants suitable for cash bail but do not consider multiple factors, including defendants' financial situations, can effectively deny release altogether.[73]

B. Judicial Decision Making and Social Psychology

With the lack of direction and law, how are judges currently making these bail determinations? This question may be answered using social psychological concepts such as judgment heuristics, naïve realism, affective states, and implicit bias.

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66 Goldkamp & Gottfredson, *supra* note 14, at 228.

67 *See id.* at 229, 247.

68 *See* Goldkamp, *supra* note 23, at 9.

69 *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO STATE L.J. 723, 754 (2011).

70 Allen, *supra* note 5, at 654–55, 661.

71 *See* Goldkamp & Gottfredson, *supra* note 14, at 228.

72 Goff, *supra* note 33, at 900.

73 *See* Connelly & Linthorst, *supra* note 2, at 128.

Availability, representativeness, and affect heuristics all likely come into play when a judge considers factors relevant to setting bail. Availability is the idea that an individual evaluates "the likelihood of an event by . . . recall[ing] examples of similar instances."[74] Judges may think of previous cases they have had where similar crimes were alleged and set bail solely on what was done before. Representativeness is the idea that a person makes a judgment on the probability that a person, object, or event belongs to a specific category.[75] Judges may use representativeness when assessing a defendant's risk to safety based solely on whether that defendant matches the judge's idea of a dangerous person. Affect heuristic occurs when an individual makes a judgment based on emotional gut instinct.[76] A judge may estimate a defendant's risk to safety founded on the judge's emotional response to the alleged crime or gut feeling about the defendant standing in front of them in court.

Additionally, naïve realism and false consensus likely also shape a judge's determination when setting bail. Naïve realism is the idea that we fail to grasp how much our opinions are affected by our own knowledge and expectations and instead believe that we see things as they really are.[77] Naïve realism has many implications, including the false consensus effect or the feeling that others would see the same if they were attentive and rational individuals.[78] False consensus also causes individuals to overestimate the commonness of their perspectives and reactions.[79] Accordingly, individuals believe their decisions are standard and less indicative of their own beliefs and influences.[80] Judges likely are influenced by these phenomena when justifying their bail determinations. To these judges, their ultimate bail determination is a reasonable choice, regardless of the circumstances that led them to make this decision. These judges are also more likely to justify their decisions as typical for their court or jurisdiction and fail to appreciate how much their determinations are influenced by their own experiences and beliefs.

A judge's emotional state or mood may also sway the way the judge makes their determinations. A study on Israeli judges showed that judges became more disengaged in the decision-making process when making repetitive rulings, stating that "when judges make repeated rulings, they show an increased tendency to rule in favor of the status quo."[81] This tendency to follow the default was minimized

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74 JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 72–73 (2012).

75 *Id.* at 73.

76 *Id.* at 75.

77 *Id.* at 21.

78 *See id.* at 23.

79 *Id.*

80 *Id.*

81 Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCIS. U.S. 6889, 6889, 6892 (2011).

when judges had recently taken a break and eaten a meal, suggesting that outside factors that affect judges' moods can influence the way they make decisions.[82]

Further, studies show that individuals' moods can change their perceptions and judgments consistent with the mood they are experiencing, known as the mood congruency effect.[83] Moods, in general, can also change the information judges pay attention to and recall.[84] Individuals experiencing positive moods generally recall more positive information, known as affect-congruent recall, that results in more positive and lenient judgments.[85] Conversely, those experiencing negative moods recall more negative information and have a pessimistic view on past and future events, leading to more critical judgments.[86] The lack of direction provided to judges in making bail determinations leaves a wide space for judges' determinations to be influenced by ever-changing moods and emotions.

Stereotyping and biases also pervade judicial decisions. Racial biases can affect decisions even when actors are intentionally trying to avoid being biased.[87] The Implicit Association Test ("IAT"), developed to demonstrate implicit bias and stereotypes, has been researched and published in more than one hundred academic studies showing that implicit, or unconscious, bias exists.[88] This test can be done in many forms but typically works by presenting participants with a sorting task requiring the participants to pair words with good or bad associations and black and white faces.[89] Results from these studies have overwhelmingly discovered that white participants display a "white preference," associating white faces with positive words and Black faces with negative words.[90]

To better understand how the bias exposed by IATs affects the criminal justice system, a study was performed looking at judges' IAT scores and the way their biases affect their decisions.[91] This study found that judges, like everyone else, hold implicit biases about race and that those biases can affect their decisions.[92] The study also found that judges were able to minimize this bias when they were aware of a need to.[93] These results demonstrate the necessity for judges to both understand their biases and work to minimize how their baises can affect judicial outcomes.

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82 *See id.* at 6892.

83 ROBBENNOLT & STERNLIGHT, *supra* note 74, at 50.

84 *See id.*

85 *Id.*

86 *Id.*

87 B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS PSYCH. SCI. 287, 288 (2006).

88 *See* Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1200-01 (2009).

89 Anthony G. Greenwald & Linda Hamilton Krieger*, Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 952–53 (2006).

90 Rachlinski et al.*, supra* note 88, at 1199–1200.

91 *See id.* at 1207–08.

92 *See id.*

93 *See id.* at 1221.

In another implicit bias study, participants were flashed human faces before being shown photos of both guns and hand tools.[94] Participants were told to identify the item flashed and to ignore the faces shown.[95] The results showed a "weapon bias," as white participants distinguished guns faster for Black faces than for white.[96] This demonstrates that the influence of bias can still exist even when individuals are working to restrain their biases. Even if judges intend to use unbiased criteria to make their decisions regarding a defendant's risk, biases may still persist in their decisions, especially when making these determinations quickly on the bench without looking to all available information.

Research on priming also confirms that racial stereotypes can become activated quickly and easily by using specific words. In a criminal justice-related priming study, police officers and probation officers were primed by flashing sets of words at the participants, one set of which contained words associated with African American people and one set with a nonracial context.[97] The participants were then shown two crime reports and asked to make judgments on the reports.[98] Results showed that participants primed with the African American-related set of words made tougher judgments on the hypothetical crimes.[99]

Courtrooms and judges are not immune from the stereotypes and biases shown in these studies. The lack of information available to and considered by judges when making bail determinations reinforces these stereotypes and leaves room for biases, a concept judges cannot avoid even if consciously attempting to. To combat this complex concern, it is imperative that the Supreme Court of the United States and legislatures set a clear bail-setting process that ensures judges take into account an individual's ability to pay, along with other factors to minimize biases, in alignment with the requirements of the Eighth Amendment. But until then, judges must acknowledge that this bail inconsistency exists and work to override stereotypes and biases.

IV. POSSIBLE SOLUTIONS TO CURE BAIL DETERMINATION INCONSISTENCIES AND REDUCE BIAS

A. Judicial Testing, Training, and Auditing

One possible step in the right direction for curbing judicial bias in bail decisions and other determinations is to provide benchmark testing. Before taking judicial office, judges could be administered IATs or similar tests to helpt the judges

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94 Payne, *supra* note 87, at 287.

95 *Id.*

96 *Id.* at 288.

97 *See* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 488–89, 494–95 (2004).

98 *See id.* at 488, 490, 495.

99 *See id.* at 493, 496.

examine and confront their biases.[100] Results of these tests could help new judges to tangibly see their biases and make them aware of the need to actively work against their biases when making decisions from the bench.[101] IAT results could also provide better insight into the types of bias training needed for judges.[102]

Diversity training for judges could also be a useful starting point in changing a court's culture.[103] When court leadership, and the court system as a whole, supports an egalitarian culture, others in the court system will be influenced to do so as well, and implicit bias will be reduced.[104] Specifically, this diversity training should move away from the color-blind approach that ignores race in an attempt to reduce bias and instead move toward a sensitivity approach that acknowledges and appreciates differences in individuals.[105] This training should be a part of a broader diversity and inclusion strategy accompanied by an actual change in the policies and operations of the court system to help facilitate and sustain change beyond the judge's own goodwill.[106]

Court systems could also implement auditing programs to evaluate the existence of biases in judgments. For example, an auditor could provide data on a judge's patterns in bail-setting or other discretionary determinations to increase judges' accountability[107] and highlight areas where legislatures could provide more guidance in the courtroom. Instituting impartial "feedback mechanisms can be powerful tools in promoting more egalitarian attitudes" and equal judgments from judges as they "could prompt those with egalitarian motives to do more to prevent implicit bias in future decisions and actions."[108] This feedback should come from a legitimate authority and provide tangible recommendations to improve the judge's decision-making process.[109] It is also important that the audit be non-threatening as coercive pressure can provoke opposition from some individuals and lead to counterproductive outcomes.[110]

B. Bail Algorithms

Bail algorithms, or computer programs designed to determine appropriate bail amounts based on objective factors, could be a step in the right direction to

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100 Rachlinski et al.*, supra* note 88, at 1227–28.

101 *Id.* at 1228.

102 *See id.*

103 *See* NAT'L CTR. FOR STATE CTS., ADDRESSING IMPLICIT BIAS IN THE COURTS 6, https://www.nccourts.gov/assets/inline-files/public-trust-12-15-15-IB_Summary_033012.pdf?q_DMMIVv0v_eDJUa1ADxtw59Zt_svPgl (last visited Dec. 5, 2020).

104 *See id.*

105 *Id.* at 5.

106 Evelyn R. Carter, Ivuoma N. Onyeador & Neil A. Lewis, Jr, *Developing & Delivering Effective Anti-Bias Training: Challenges & Recommendations*, 6 BEHAV. SCI. & POL'Y 57, 60 (2020).

107 Rachlinski et al.*, supra* note 88, at 1230.

108 NAT'L CTR. FOR STATE CTS., *supra* note 103, at 11.

109 *See id.*

110 *See id.*

limit excessive bail and curb judicial biases.[111] These programs often work to understand the defendant's likelihood to flee or reoffend by asking questions about the defendant's criminal history and personal background.[112] This new process for setting bail is not without fault, though, as some scholars have criticized the programs for the types of factors taken into account and the negative consequences that may develop from their use.[113] For example, in 2014, Eric Holder, then the U.S. Attorney General, voiced his concerns regarding bail algorithms, stating:

> [a]lthough these [risk assessment] measures were crafted with the best of intentions, I am concerned that they may inadvertently undermine our efforts to ensure individualized and equal justice . . . . exacerbat[ing] unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society.[114]

Conversely, with advanced artificial intelligence, algorithm programs could work without incorporating bias.[115] It is possible to create a computer algorithm program that follows a process without deviation and discards all irrelevant factors.[116] This type of program could "prevent socio-economic disadvantaged offenders or offenders of different races from suffering harsher penalties."[117] Theoretically, achieving this goal would be far easier when relying on computers than when relying on human judgment, as we often do now for bail determinations.[118] Bail algorithms could also "decrease[] the . . . power the bail bonding industry has over defendants" by bringing the administration of justice for these defendants "back into the scope of the public justice system."[119]

The success of bail algorithms, however, lies within the details used in their creation. If these algorithms incorporate societal biases and inequalities in the data used to make predictions, these programs would make it even more likely for biases to be exacerbated and emerge in decisions.[120] Factors need not be explicitly biased to produce discriminatory results as "[b]ias may result from pretrial release factors serving as proxies for other criteria."[121] For example, asking a defendant whether they have a working cellphone is not inherently prejudicial but could serve as a

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111 *See* Allen, *supra* note 5, at 667.

112 *See* Jason Tashea, *Risk-Assessment Algorithms Challenged in Bail, Sentencing and Parole Decisions*, 103 ABA J. 54, 56, 58 (2017).

113 *See* Allen, *supra* note 5, at 668.

114 Tashea, *supra* note 112 (statement of Eric Holder) (internal quotations omitted).

115 *See* Mirko Bagaric, Dan Hunter & Nigel Stobbs, *Erasing the Bias Against Using Artificial Intelligence to Predict Future Criminality: Algorithms are Color Blind and Never Tire*, 88 U. CIN. L. REV. 1037, 1070 (2020).

116 *Id.*

117 *Id.* at 1070–71.

118 *See id.* at 1071.

119 Richard F. Lowden, Note, *Risk Assessment Algorithms: The Answer to an Inequitable Bail System?,* 19 N.C. J.L. & TECH. 221, 244 (2018).

120 *See id.* at 244–45.

121 *Id.* at 245.

proxy for poverty.[122] The potential bias that could be perpetuated by using bail algorithms can be limited, however, by ensuring that the software itself is free from biased proxies.[123] This can be done through extensive testing to find patterns of false categorization of defendants.[124]

While bail algorithms are not yet a perfect solution to the excessive bail problem, courts' willingness to use algorithm "recommendations . . . in conjunction with their own experience and understanding of the law" when making bail determinations could be a vital step toward increasing the usefulness of these algorithms.[125] As technology develops, algorithms receive more data and bias is removed from the process,[126] bail algorithms could become a sustainable and faultless process for making equal bail determinations.

C. Pretrial Services

Pretrial Service Agencies (PSAs) are arguably the most successful bail reform technique currently available. These governmental agencies work as aids to judges and attorneys by providing a case-by-case analysis of defendants after conducting interviews and risk assessments.[127] PSAs have historically led to more accurate bail determinations, reduced the issue of excessive bail, and even "lowered the cost of pretrial inmate detention."[128]

PSAs can provide an outside perspective, making predictions based on past similar cases and circumstances.[129] Outside third-party perspectives are especially useful to make more accurate and consistent judgments, as third parties are more objective about situations and naturally "take the outside view."[130] Additionally, expert third parties are in the best position to draw on past experience to improve accuracy.[131] Using the average of multiple individual predictions or determinations, known as the "wisdom of crowds," ultimately leads to improved judgments[132] and could be applied evenly across bail determinations by PSAs.

Full implementation of PSAs as intended would simplify bail determinations by identifying conditions appropriate for each arrestee and would also better identify arrestees who cannot be safely released on any conditions.[133] To do this,

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122 *Id.*

123 *See id.* at 246.

124 *See id.*

125 *See id.* at 248.

126 *See id.*

127 *See* Allen, *supra* note 5, at 668-69.

128 *See* Allen, *supra* note 5, at 669.

129 *See* ROBBENNOLT & STERNLIGHT, *supra* note 74, at 79.

130 *See id.* at 80.

131 *See id.*

132 *See id.*

133 Betsy Kushlan Wanger, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320, 338 (1987).

Congress should hold oversight hearings on the Act establishing PSAs.[134] Oversight hearings could provide valuable data necessary to determine how to allocate funds to carry out quality PSA performance.[135] States should also consider creating a standard use of PSAs in order to benefit from higher trial appearance rates, lower pretrial detention costs, and ensure that excessive bail amounts are not imposed.

D. Supreme Court Involvement

As noted in Part III.B, states and jurisdictions have all been left to their own devices in determining the best strategy for setting bail, lacking clarity from Supreme Court decisions.[136] Litigation continues in an attempt to push for more progressive bail reform and define the meaning of the Excessive Bail Clause.[137] While all of this is being sorted out, defendants unable to post bail are either left sitting in jail awaiting trial or turn to bail lenders, who typically lend on highly unfavorable terms. Without a well-defined Supreme Court ruling laying out the parameters on excessive bail, "courts throughout the country will continue to interpret this clause arbitrarily at worst, and inconsistently at best."[138]

The Supreme Court should grant certiorari in an excessive bail case to provide updated guidance on the Eighth Amendment's Excessive Bail Clause. The Court should rule that bail schedules and similar bail-setting procedures are a violation of the Eighth Amendment under Justice Jackson's concurrence in *Stack v. Boyle*, in which he declared that it was a clear violation of Federal Rule of Criminal Procedure 46(c) if a court "fixed a uniform blanket bail" based on the "nature of the accusation" and without considering "the difference in circumstances between different defendants."[139] Instead, the Court should require a process similar to the PSA system to determine what constitutes excessive bail on an independent basis and to limit judicial bias. Among other factors, an arrestee's financial situation should be a required consideration in any bail determination analysis.

CONCLUSION

The meaning of the Eighth Amendment's Excessive Bail Clause has shifted throughout time. That shifting has created a mess in the bail-setting process. Historically, bail was "simply meant to ensure a defendant's appearance at trial and maintain his liberty interests prior to."[140] We have since gone away from this meaning as a country and instead have started a practice of using bail to keep

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134 *Id.* at 339.

135 *Id.*

136 *See supra* Part III.B.

137 *See* Allen, *supra* note 5, at 672–73.

138 *Id.* at 673.

139 Stack v. Boyle, 342 U.S. 1, 9 (1951) (Jackson, J., concurring)).

140 Connelly & Linthorst, *supra* note 2, at 155–56.

indigent defendants detained before trial.[141] The cause of this shift could be drawn from many changes in bail legislation and a push to be tougher on crime but ultimately is made worse by the lack of direction from the Supreme Court and inconsistent processes from court to court.[142]

This lack of uniformity in guidelines often leaves judges to create their own decision-making processes for setting bail.[143] Different life experiences and biases of these judges coupled with the arbitrary factors considered result in inconsistent and unconstitutional bail determinations.[144] To address this issue, states should work to minimize the impact of judges' individual biases on their decisions and adopt holistic bail setting procedures such as PSAs. Furthermore, the Supreme Court should hand down a definitive interpretation of the Eighth Amendment Excessive Bail Clause.

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141 *See id.* at 156–57.

142 *See id.* at 156.

143 *See* Goldkamp & Gottfredson, *supra* note 14, at 229.

144 *See id.* at 229.