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Punishing Poverty: *Robinson* & the Criminal Cash Bond System

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I. Introduction

In 2010, Kalief Browder, a sixteen-year-old boy, was charged with stealing a backpack.[1] Because of Browder's inability to pay a $3000 bond, the teenager languished for three years at Rikers Island[2] awaiting trial.[3] Rikers Island is located in New York City, and many inmates and even corrections officers notoriously refer to the jail as a "hellhole." [4] This facility's reputation stems from the immense brutality and corruption inside its walls.[5] Browder spent more than 1000 days in pre-trial custody at Rikers, including 800 days in solitary confinement.[6]

Maintaining his innocence, Browder refused attractive plea offers given by the prosecution.[7] The most alluring of these offers was a time-served sentence in exchange for the sixteen-year-old to

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1. *See* Jennifer Gonnerman, *Before the Law: A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life.,* NEW YORKER (Oct. 6, 2014) https://www.newyorker.com/magazine/2014/10/06/before-the-law (explaining the accusation that led New York state prosecutors to charge Browder with robbery, grand larceny, and assault) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

2. Rikers is a 400-acre island in the East River across from La Guardia Airport that serves as the principal jail complex for New York City. There are 10 jails on Rikers Island, including facilities for women and adolescents, as well as an infirmary, power plant and bakery . . . . Rikers has always been a place of exceptional violence. During the crack epidemic in the late 1980s and early 1990s, the inmate population was nearly twice as large as it is today, weapons were abundant and rival gangs ruled the cellblocks. Slashings and stabbings among inmates at times exceeded 1,000 annually.

What is Rikers Island?, N.Y. TIMES (Dec. 15, 2014), https://www.nytimes.com/2017/04/05/nyregion/rikers-island-prison-new-york.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

3. *See* Gonnerman, *supra* note 1.

4. John Surico, *How Rikers Island Became the Most Notorious Jail in America*, VICE (Jan. 11, 2016), https://www.vice.com/en_us/article/dp59yq/how-rikers-island-became-the-most-notorious-jail-in-america (on file with Washington & Lee Journal of Civil Rights & Social Justice).

5. *See id.* ("The jail's problems are well-known and longstanding: [B]ureaucratic brutality, corruption, pain and injury inflicted upon inmates who have not even been convicted of committing a crime.").

6. Gonnerman, *supra* note 1.

7. *Id.*

plead guilty to two misdemeanors.[8] Still, Browder maintained his innocence, and in doing so spent more than three years behind bars awaiting his day in court.[9] Browder's day in court never happened.[10] In 2013, the State dropped charges against Browder, charges Browder's defense attorney referred to as "meritless."[11] What could not be undone was the impact of Browder's pre-trial detention. During his time at Rikers, Browder experienced severe abuse from prison officials and older inmates.[12] Browder struggled with severe mental health issues while behind bars and following his release.[13] In 2014, drowning in mental health issues, the teenager tied an air conditioning cord around his neck and killed himself.[14] Browder's family credits Browder's pre-trial detention with driving the young boy to commit suicide.[15] The teenager spent three years locked away from the outside world, solely because Browder's family was poor and could not afford bond.[16]

Kalief Browder's story is not uncommon. Over 500,000 individuals every year remain incarcerated because they cannot afford bail.[17] Unlike the board game Monopoly, there is no Get Out of Jail Free card in the criminal justice system. How much money an individual has is central to their ability to combat a criminal

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *See* Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (Jun. 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015 (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

14. *Id.*

15. *See id.* ("When you go over the three years that he spent [in jail] and all the horrific details he endured, it's unbelievable that this could happen to a [teenager] in New York City. He didn't get tortured in some prison camp in another country. It was right here!").

16. *See* Gonnerman, *supra* note 1 (noting that Browder's mother was unable to afford the $3000 bail set at the time of his preliminary hearing and his opportunity to post bail was later revoked because Browder was on probation at the time of the alleged crime).

17. *See* Nicole Hong & Shibani Mahtani, *Cash Bail, a Cornerstone of the Criminal Justice System, Is Under Threat*, WALL STREET J. (May 23, 2017), https://www.wsj.com/articles/cash-bail-a-cornerstone-of-the-criminal-justice-system-is-under-threat-1495466759 (highlighting the number of individuals who are incarcerated but cannot afford bail) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

charge.[18] Sadly, for poor individuals charged with crimes, the scales of justice are not weighed with law or fact; rather, they are tipped by money.[19]

The current cash bail system works in a way that punishes poverty. In *Robinson v. California*,[20] the Supreme Court held that it is unconstitutional under the Eighth Amendment[21] to punish an individual for a status or condition.[22] Poverty is a status.[23] The cash bail system is unconstitutional under *Robinson* and the Eighth Amendment because it punishes the status of poverty. Similar to drug addiction, poverty "may be contracted innocently or involuntarily or it might even take hold from the moment of a person's birth."[24] Kalief Browder had no control over his family's financial position.[25] Yet, this financial position kept him locked away for more than 1000 days.[26] An affluent individual in Browder's position would have been able to afford the $3000 cash bail, and thus, would have been released from pre-trial custody.

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18. *See id.* ("One study showed that people who spend even three days in pretrial detention are more likely to plead guilty, lose their jobs, detach from their families and commit crimes in the future.").

19. *See* Lisa Foster, Remarks at ABA's 11th Annual Summit on Public Defense (Feb. 6, 2016) (transcript available at http://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit) (quoting President Lyndon Johnson to describe the concern over current bail practices) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

20. *See* Robinson v. California, 370 U.S. 660, 660, 667 (1962) (holding as unconstitutional a California statute making it a crime to "be addicted to the use of narcotics" (internal quotation marks omitted)).

21. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

22. *See Robinson*, 370 U.S. at 667. (extending the no "[e]xcessive bail" responsibility to states through the Fourteenth Amendment)

23. *See* Edward J. Walters*, No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1619–20 (1995) (providing that poverty, like homelessness, is not an act, but a status).

24. *See* Erik Luna, *The Story of* Robinson*: From Revolutionary Constitutional Doctrine to Modest Ban on Status Crimes*, CRIM. L. STORIES, 47, 62 (Donna Coker & Robert Weisburg eds., Foundation Press 2013) (comparing poverty as a status to drug addiction, which was addressed in *Robinson*).

25. *See* Gonnerman, *supra* note 1.

26. *Id.*

Because of this reality, the current bail system functions in a way that punishes defendants on the basis of their economic status.[27]

This Note demonstrates that the current cash bail system criminalizes the economic status of poverty. Because of this, the criminal cash bail system violates the Eighth Amendment's prohibition on cruel and unusual punishment[28]. Throughout this Note, the terms "bail" and "bond" are used interchangeably. Part I of this Note examines the Eighth Amendment, as well as the current structure and statistics surrounding the United States criminal bond system. Part II examines *Robinson v. California*, *Powell v. Texas* [29], and the effect of these two decisions on Eighth Amendment jurisprudence. Finally, Part III analyzes the constitutionality of the criminal cash bail system under *Robinson*.

II. The Eighth Amendment and the United States Criminal Bond System

A. The Eighth Amendment and the Evolving Standards of Decency

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[30] What is "cruel and unusual" is a continuously evolving standard.[31] This standard is based largely upon shifting societal norms, values, and decency over time.[32]

The Cruel and Unusual Punishment Clause of the Eighth Amendment is frequently used in a way to constitutionalize

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27. *See* Hong & Mahtani, *supra* note 17 ("Nearly 500,000 people are awaiting trial in U.S. jails, most of whom are there because they cannot afford bail . . . .").

28. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

29. *See* Powell v. Texas, 392 U.S. 514, 535–36 (1968) (plurality opinion) (affirming the conviction of a chronic alcoholic who was convicted for being drunk in public).

30. U.S. CONST. amend. VIII.

31. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (highlighting the evolving nature of what constitutes cruel and unusual).

32. *See id.* ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

substantive criminal law.[33] Most notably, there is an abundance of Eighth Amendment case law surrounding the constitutionality of the death penalty.[34] In the last four centuries, there have been noticeable shifts in the societal standards of decency surrounding capital sentencing.[35] What was once deemed acceptable and normative methods of punishment, such as cutting off limbs, boiling, hanging, beheading, and the use of firing squads, are now largely rejected.[36]

The evolving standards of decency under the Eighth Amendment not only apply to methods of punishment, but also to the persons upon whom punishment is inflicted.[37] Two recent and impactful changes to the constitutionality of the death penalty pertained to the most vulnerable individuals in society.[38] In *Roper v. Simmons*[39] and *Atkins v. Virginia*,[40] the Supreme Court held that the implementation of the death penalty on children and mentally retarded individuals is cruel and unusual, and thus, unconstitutional under the Eighth Amendment.[41]

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33. *See* Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 HARV. L. REV. 635, 635 (1966) ("[R]ecent decisions of the Supreme Court have suggested the possibility that the eighth amendment's 'cruel and unusual punishment' clause might be used to exert substantial judicial influence on federal and state criminal law.").

34. *See Introduction to the Death* Penalty, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/part-i-history-death-penalty (last visited Sept. 26, 2018) (providing background on the history of the death penalty and the constitutional challenges to it) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

35. *See id.* (discussing the evolving standard of cruel and unusual).

36. *See id.* (same).

37. *See* Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J. OF L. & SOC. PROBS. 293, 308 (1996) (discussing the evolution of criminal status under the Eighth Amendment).

38. *See id.* (discussing development of death penalty jurisprudence).

39. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the Eighth and Fourteenth Amendments prohibit imposing the death penalty on convicts who had not yet reached age 18 when they committed the crimes).

40. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment prohibits ordering the execution of mentally retarded criminals).

41. *See Roper*, 540 U.S. at 578 (prohibiting execution of juvenile offenders); *see also Atkins*, 536 U.S. at 321 (prohibiting execution of mentally retarded criminals).

Although the majority of Eight Amendment challenges surround the death penalty, the reach of the Eighth Amendment extends beyond capital punishment.[42] The Eighth Amendment touches issues surrounding fundamental features of the American criminal justice system, and the evolving standards of decency dictate what is "cruel and unusual" in these areas of criminal law.[43]

B. The Criminal Cash Bond System

There are two principal purposes that underlie the criminal bond system: To ensure a defendant appears to court and to support the safety of the public.[44] In theory, bond is supposed to ensure that these two purposes are met, and is not intended to be punitive.[45] Bail conditions are supposed to be substantially based on the assessment of these two purposes with regard to a particular defendant.[46] There is also a third aim that underlies bond, yet is rarely discussed in its analysis: The release of a defendant.[47] As a whole, bail is intended to "afford [the] release of

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42. *See* Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J. L. & SOC. PROBS., 293, 308 (1996) ("[C]ourts further expanded the reach of the Eighth Amendment and invalidated various types of incorporeal punishment, such as banishment, expatriation, and the failure of prisons to provide adequate medical attention.").

43. *See id.* ("If consensus is necessary for a punishment to be cruel and unusual, then 'like no other constitutional provision, [the clause's] only function would be to legitimize . . . opinions already the conventional wisdom.'") (quoting Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970)).

44. *See* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 849–50 (2016) (noting that the Bail Reform Act of 1984 instructs judicial officers to determine pretrial release based on a defendant's flight risk and dangerousness).

45. *See How Courts Work*, ABA DIVISION FOR PUB. EDUC., https://www.americanbar.org/groups/public_education/resources/law_related_education_network/hoh_courts_work/bail.html (last visited Sept. 26, 2018) ("Bail is not a fine. It is not supposed to be used as punishment. The purpose of bail is simply to ensure that defendants will appear for trial and all pretrial hearings for which they must be present.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

46. *See* Gouldin, *supra* note 44, at 850 (discussing bail's purpose: To ensure that the accused shows at trial).

47. *See* Gouldin, *supra* note 44, at 863 (describing the attempt to keep defendants locked up as a misuse of the bail system).

a defendant while reasonably assuring court appearance and public safety."[48]

For criminal defendants charged with a crime, bail is the process of pre-trial release with conditions.[49] There are three principle types of bond: A secured bond, an unsecured bond, and a personal recognizance bond.[50] A secured bond requires a defendant to pay a specified cash amount, or to comply with certain conditions in order to be released from pre-trial detention.[51] The most common condition of a secured bond is the requirement that a defendant pay a specified cash amount to be released.[52] Throughout this Note, this type of bond will be referred to as a secured cash bond. Non-monetary conditions can also be imposed on a defendant, either in lieu of a financial condition or in addition to one.[53] These non-financial conditions can include reporting requirements, electronic monitoring, house arrest, no contact orders, or travel restrictions.[54]

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48. *Bail Bond*, PRETRIAL JUST. INST., https://university.pretrial.org/glossary/bailbond (last visited Sept. 26, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

49. *See* Kelly Allen, *The Evolution of Money Bail Throughout History*, BURNS INST. FOR JUST., FAIRNESS, & EQUITY (Apr. 18, 2016), https://www.burnsinstitute.org/blog/the-evolution-of-money-bail-throughout-history/ (conditioning a defendant's pre-trial release is "meant to ensure that the defendant appears in court and to prevent new crime.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

50. *See What is the Difference Between a Secured and Unsecured Bond?*, BEEHIVE BAIL (May 29, 2013) http://beehivebailbonds.blogspot.com/2013/05/what-is-difference-between-secured-and.html (last visited Sept. 26, 2018) (naming the two overarching types of bonds and what they mean for the defendant) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

51. *See Taking Bail Bonds*, ADVANCED CRIMINAL PROCEDURE FOR MAGISTRATES, UNIV. OF N.C. AT CHAPEL HILL SCH. OF GOV'T (Nov. 2013) https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/13-outline-taking_bonds-Nov%202013.pdf (explaining the differences between secure and unsecure bonds, as well as common conditions of release on one's own recognizance) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

52. *See What is the Difference Between a Secured and Unsecured Bond?*, *supra* note 50 (explaining the different types of bonds).

53. *See, e.g.*, PA. R. CRIM. P. 524 ("The decision as to what type or combination of types of release on bail is appropriate for an individual defendant is within the discretion of the bail authority.").

54. *See* HUM. RTS. WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY, 54 (Dec. 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf

An unsecured bond allows a defendant to get out of pre-trial custody without paying; however, if the defendant fails to appear a financial penalty is imposed.[55] For an unsecured bond, there is no payment or other form of security deposit required for a defendant to be released.[56]

Similar to an unsecured bond, a personal recognizance bond, commonly referred to as a release on your own recognizance or ROR bond, does not require that a defendant pay any monetary amount in order to be released.[57] A personal recognizance bond only requires that a defendant sign an agreement to show up to future court dates and comply with any additional conditions, if imposed.[58]

Depending on the jurisdiction, secured cash bonds are imposed through two distinct systems.[59] The first, and most common, is through judicial discretion.[60] In these jurisdictions, bail amounts are set by judges based on what they believe is sufficient.[61] In these jurisdictions, bail is often imposed with a large amount of judicial discretion.[62] These judges typically have few guidelines and limited information about the defendant, the offense, and the evidence in the case.[63]

The second process of setting bail amounts is through a fixed bail schedule.[64] A fixed bail schedule is a list that sets forth a dollar

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(listing examples of non-financial conditions of bail judges sometimes impose) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

55. *See* PA. R. CRIM. P. 524(C)(3) (defining unsecured bonds).

56. *See id.* (same).

57. PA. R. CRIM. P. 524(C)(1).

58. *See id.* (same).

59. *See* Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 1 (2011), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsp11_bail.authcheckdam.pdf (comparing bail schedules to judicial discretion) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

60. *See id.* (considering whether bail schedules displace judicial discretion).

61. *See id.* (describing generally the role of judicial discretion in the bail system).

62. *See id.* (same).

63. *See id.* (same).

64. *See The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH, 4 (Dec. 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (addressing the pre-trial incarceration of nonviolent offenders in New York City

amount of bail for every crime.[65] For a fixed bail schedule, the only consideration for a cash bail amount is the offense.[66] In some jurisdictions with bail schedules, judges have the ability to lower the amount demanded by the schedule; however, in most, judges are bound by this list.[67] This method of setting bail amounts is largely criticized.[68] The American Bar Association (ABA) flatly rejects this practice, and has stated that "[t]he practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor [to afford bail] . . . ."[69]

Today, the use of secured cash bonds and preventative detention is at an all-time high.[70] Every year, the United States locks up over half a million individuals because they are unable to afford their secured cash bond amount.[71] In the last two centuries, the proportion of felony charged defendants released on an unsecured bond has decreased by twelve percent and the average secured cash bond amount has increased from $24,000 to $55,400.[72] A secured cash bond appears to be the default, not a limited exception.[73]

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and providing previously unpublished data related to New York City's bail reforms) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

65. *See id.* (explaining bail schedules).

66. *See id.* (same).

67. *See Bail Schedule Law and Legal Definition,* USLEGAL.COM, https://definitions.uslegal.com/b/bail-schedule/ (last visited Dec. 12, 2018) (explaining how bail schedule lists operate and providing examples of related local court rules) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

68. *See* Carlson, *supra* note 59 (raising a concern that fixed schedules are arbitrary).

69. *Id.* (citing ABA Standard 10-5.3 (e) at 113).

70. *See Pretrial Release and Detention: The Bail Reform Act of 1984*, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., 1, https://www.bjs.gov/content/pub/pdf/prd-bra84.pdf (explaining how common secured cash bonds and preventative detention is) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

71. *See* Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment*, 108 AM. ECON. REV. 201, 201–02 (2016) (showing how many defendants are unable to afford their secured cash bond).

72. *See id.* (same).

73. *See id*. (describing generally the prevalence of secured cash bond).

Further, statistics suggest that the increased use of secured cash bonds and cash bond amounts, have not increased public safety nor court appearance.[74] In 2016, there were more than 646,000 people incarcerated in the United States local jails, and seventy percent of these people were in pre-trial custody.[75] "Because a system of money bail allows income to be the determining factor in whether someone can be released pretrial, our nation's local jails are incarcerating too many people who are likely to show up for their court date and unlikely to be arrested for new criminal activity."[76]

For many years, the American Bar Association (ABA) has voiced concerns over the current cash bail system, specifically the expansive use of secured cash bonds.[77] The ABA stated that a secured cash bond:

> [U]ndermines the integrity of the criminal justice system, is unfair to poor defendants, and is ineffective in achieving key objectives of the pretrial release/detention decision. The ABA's Standards for Pretrial Release mandate that financial conditions should be used only when no other conditions will provide reasonable assurance a defendant will appear for future court appearances. If financial conditions are imposed, the court should first consider releasing the defendant on an unsecured bond, and if that is deemed an insufficient condition of release, bail should be set at the lowest level necessary to ensure the defendant's appearance and with regard to his financial ability. Significantly, ABA Standard 10-1.4 prohibits bail that results in pretrial detention: 'The judicial officer should not impose a financial condition of release that results in the pretrial

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74. *See* Michael R. Jones, *Unsecured Bonds: The Most Effective and Efficient Pretrial Release Option*, PRETRIAL JUST. INST. (OCT. 2013), www.ncjrs.gov/App/publications/abstract.aspx?ID=269164 (arguing that unsecured bonds are just as effective as secured ones) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

75. Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycles of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

76. *Id.*

77. *See The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUMAN RIGHTS WATCH, 4 (Dec. 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf ("The American Bar Association (ABA) has long criticized money bail . . . .") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

> detention of a defendant solely due to the defendant's inability to pay."[78]

It is not only organizations such as the American Bar Association that have voiced concerns on this issue.[79] In addition to the American Bar Association (ABA), many defense attorneys, pro-defendant organizations, prosecutors, sheriffs, and correctional officers have made known their concerns with the mass incarceration of the poor through secured cash bonds.[80] Both sides of the criminal justice system acknowledge the issues that stem from the excessive use of secured cash bonds.[81]

Concerns over the criminal bond system stem largely from the alarming statistics surrounding criminal bond. In 2008, eighty-seven percent of individuals charged with misdemeanors in New York City were unable to afford a secured bond of $1,000 or less.[82] Of this eighty-seven percent, each defendant spent an average of sixteen days in jail because they could not pay for their release.[83]

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78. *Id.*

79. *See id.* (listing institutions that have restrained their cash bail systems).

80. *See* Steve Schmadeke, *Cash Bail Under Fire As Discriminatory While Poor Inmates Languish in Jail*, CHICAGO TRIBUNE (Nov. 15, 2016), http://www.chicagotribune.com/news/local/breaking/ct-cook-county-cash-bail-met-20161114-story.html (describing concerns over cash bail system) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* Michael Hardy, *In Fight Over Bail's Fairness, a Sherriff Joins Critics*, N.Y. TIMES (Mar. 9, 2017), https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html?_r=0 (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); Kent Faulk, *DOJ Reminds Judges They Can't Jail Poor Simply Because They Can't Pay Fines*, ALABAMA.COM (last updated March 16, 2016), http://www.al.com/news/birmingham/index.ssf/2016/03/doj_reminds_judges_they_cant_j.htm (same) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

81. *See* Schmadeke, *supra* note 80 ("The cash-bail system has increasingly come under fire nationally and in Chicago as discriminatory, stranding largely indigent, minority defendants for months as they await trial for nonviolent offenses.").

82. *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH, 2 (Dec. 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

83. *Id.*

In Maryland, more than 80,000 defendants were incarcerated pre-trial from 2011 to 2015 due to an inability to pay a monetary bond.[84] More alarming, 17,000 of these defendants were unable to pay a bond of $5,000 or less.[85] If these defendants in Maryland hired a bondsman, it is likely they would only have had to pay around $500 for their freedom, yet they were unable to meet even that financial burden.[86] To be released from jail, typically a defendant need only pay a bonding company around ten percent of the total bond and the company will pay the remainder.[87]

Additionally, in Cook County, Illinois, as many as 400 individuals remain locked up on any given day because they cannot pay a bond amount of $1,000 or less for non-violent crimes.[88] In 2016, the Cook County Jail reported that approximately 300 individuals remained locked up because they could not afford to pay a $100 bond.[89] Although a $100 secured cash bond may be considered "nominal" to some, for others, it is an impossible financial burden to meet.[90]

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84. Arpit Gupta, *The US Bail System Punishes the Poor and Rewards the Rich*, QUARTZ (Feb. 2, 2017), https://qz.com/900777/the-us-bail-system-punishes-the-poor-and-rewards-the-rich/ (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

85. Arpit Gupta, et al., *The High Cost of Bail: How Maryland's Reliance on Money Bail Jails the Poor and Costs the Community Millions*, MD. OFF. OF THE PUB. DEFENDER, 4 (Nov. 2016), http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

86. *See id.* (stating that going through a bondsman would mean only having to pay 10% of the total bond).

87. *See id.* at 8. (same).

88. Megan Crepeau, *Judges Ordered to Set Affordable Bonds for Defendants Who Pose No Danger*, CHI. TRIB. (July 17, 2017), http://www.chicagotribune.com/news/local/breaking/ct-cook-county-bail-reform-met-20170717-story.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

89. Steve Schmadeke, *Cash Bail Under Fire as Discriminatory While Poor Inmates Languish in Jail*, CHICAGO TRIBUNE (Nov. 15, 2016), http://www.chicagotribune.com/news/local/breaking/ct-cook-county-cash-bail-met-20161114-story.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

90. *See id.* (explaining the difficulty some face in meeting a $100 secured cash bond).

These statistics surrounding bond have recently been brought to the forefront in several lawsuits.[91] In a 2017 civil lawsuit against Harris County, Texas, the court assessed the constitutionality of bond practices in Harris County under Equal Protection and Due Process.[92] The Harris County Jail is the third largest jail in the country, and in Texas, three-fourths of all individuals incarcerated are in pre-trial detention due to an inability to pay a secured monetary bail.[93] The plaintiffs in the suit challenged what they referred to as a "wealth-based detention scheme."[94]

In support of their suit, the plaintiffs submitted approximately 300 written exhibits and 2,300 video-recordings of bail hearings.[95] In one of these video-recordings, a homeless defendant charged with illegally sleeping under a highway was given a secured cash bond of $5,000 by the judge.[96] From the video evidence in the lawsuit, it was clear that many Harris County judges and hearing officers who make the initial bail decision, imposed high bail amounts upon defendants, whom they knew would not be able to pay.[97] Further, many of these defendants were charged with non-violent misdemeanors.[98] Thus, their risk of flight or danger to public safety was likely very low.

After the District Court for the Southern District of Texas reviewed the evidence, read both parties' briefs, and listened to oral arguments, the court ruled in favor of the plaintiffs, and

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91. *See id*. (describing the various state lawsuits alleging that criminal court judges regularly set cash bail amounts that defendants cannot afford).

92. *See* O'Donnell v. Harris Cty., 251 F. Supp. 3d 1052, 1057–62 (S.D. Tex. 2017) (describing the constitutional issues and procedural posture in the case).

93. *Id.* at 1058.

94. *Id.*

95. *Id.* at 1061.

96. *See* Michael Hardy, *In Fight Over Bail's Fairness, a Sherriff Joins Critics*, N.Y. TIMES (March 9, 2017), https://www.nytimes.com/2017/03/09/us/houston-bail-reform-sheriff-gonzalez.html?_r=0 (describing the contents of the videos entered into evidence by the plaintiffs in the Harris County lawsuit) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

97. *See id.* ("Videos played in court this week showed hearing officers imposing bonds on mentally disturbed detainees, or telling homeless defendants they could be released without paying if only they had an address.").

98. *See id.* ("The class-action lawsuit contends that on any given night, several hundred people are in the Harris County jail on misdemeanor charges solely because they cannot make bail.").

granted a preliminary injunction.[99] The court held that because Harris County's bail practices detained individuals charged with misdemeanors by imposing secured money bail that they could not afford, it was unconstitutional.[100] The court stated: "[U]nder federal and state law, secured money bail may serve to detain indigent misdemeanor arrestees *only in the narrowest of cases*, and only when, in those cases, due process safeguards the rights of the indigent accused."[101] In June 2018, the Fifth Circuit affirmed the District Court's finding that the Harris County bail-setting procedures violated the due process clause and the equal protection clause; however, the court determined that the preliminary injunction imposed by the District Court was overbroad and remanded the case.[102]

The use of a secured cash bond is not keeping the most dangerous individuals in pre-trail confinement or ensuring that individuals who pose a flight risk come to court. Rather, it keeps many poor individuals charged with non-violent crimes locked up because of their lack of financial resources.[103] "In the truest sense, the ability to pay for bail is the ability to buy temporary freedom—and there is a wide disparity in America's ability to do so."[104] The use of these secured cash bonds as a means of punishing defendants, simply because of their financial status, is violative of the Eighth Amendment, and the principles set forth in *Robinson v. California.*[105]

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99. *See O'Donnell*, 251 F. Supp. 3d at 1167–68 (describing the evidence the court considered before granting a preliminary injunction in the matter).

100. *See id.* at 1057. (ruling that the Harris County bail practices were unconstitutional).

101. *Id.* (emphasis added).

102. *See* O'Donnell v. Harris Cty., 892 F. 3d 147, 163–164 (5th Cir. 2018) (affirming the lower court decision in part, but finding that the preliminary injunction was overbroad).

103. *See* Foster, *supra* note 19 (stating that the majority of individuals who are held in pre-trial custody are poor).

104. *See* Dan Kopf, *America's Peculiar Bail System*, PRICEONOMICS, (May 26. 2015) https://priceonomics.com/americas-peculiar-bail-system/ (showing the peculiarities of America's bail system by using the case of Freddie Gray and others as examples) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

105. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that a statute criminalizing narcotics addiction is unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment).

III. Robinson*,* Powell*, and their Legacy on Eighth Amendment Jurisprudence*

A. Robinson v. California

In 1962, the Supreme Court held in *Robinson v. California*[106] that a statute which criminalized narcotics addiction was unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment.[107] "Lawrence Robinson was a twenty-five-year-old army veteran who lived in Los Angeles."[108] One night, as Robinson was driving home, he was stopped by an officer because his rear license plate was not illuminated.[109] When the officer approached the car, he noticed that Robinson had a "fresh needle mark" on his arm.[110] When questioned, Robinson admitted to being a heroine user.[111] Robinson was then arrested and charged with being "addicted to narcotics," a misdemeanor under California law.[112] At trial, the jury was instructed that the mere status of being a drug addict was sufficient to convict Robinson.[113] Ultimately, the jury found that Robinson was addicted to drugs, and convicted him under the California

106. *See id.* (same).

107. *See id.* at 666 ("But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

108. Luna, *supra* note 24, at 52.

109. *Id.*

110. *Id.*

111. *See id.* ("The officer also testified that the appellant under questioning had admitted to the occasional use of narcotics.").

112. *See id.* ("A misdemeanor complaint was filed against Robinson . . . charging him with using, being under the influence of, and being addicted to narcotics.").

113. Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J. L. & SOC. PROBS. 293, 310 (1996).

statute.[114] Robinson subsequently appealed to the United States Supreme Court.[115]

While the Supreme Court decided whether to grant certiorari in Robinson's case, Justice Harlan expressed concern over the California statute.[116] In his review of the trial record, Justice Harlan believed "given that Robinson appeared to have been punished not for his conduct but only for his status,"[117] there were serious constitutional concerns in this case.[118]

The Supreme Court ultimately granted certiorari, and reversed Robinson's conviction.[119] In a 6-2 decision, the Court held that a state law which criminalizes the "status" of being addicted to narcotics inflicted cruel and unusual punishment and violated the Eighth and Fourteenth Amendments.[120] Specifically, the Court found the portion of the statute referring to drug addiction was based on a condition or status, not an overt act, and therefore was unconstitutional.[121] Justice Stewart, writing for the majority, compared the criminalization of drug addiction to other conditions which are involuntary or contracted innocently:[122]

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . . But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be

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114. *See* Luna, *supra* note 24, at 56 ("'We, the jury in the above entitle cause, find the defendant guilty of the offense charged.' This general verdict provided no clue as to whether the jurors believed that Robinson had used drugs, was addicted to the use of drugs, or both.").

115. *Robinson,* 370 U.S. at 660.

116. *See* Luna, *supra* note 24, at 56 ("After examining the trial record, Harlan concluded that the California statute was 'capable of the most mischievous sort of abuse . . . .'").

117. *See id.* (same).

118. *See id.* ("Harlan concluded that . . . the 'case raised serious constitutional concerns.'").

119. *Robinson*, 370 U.S. at 666–68.

120. *See id.* at 666–67 (holding that a statute criminalizing narcotics addiction is unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment).

121. *See id.* at 666–68 (same).

122. *See id.* at 667 (comparing drug addition to other innocently contracted illnesses such as a cold, and finding that it would be cruel and unusual to criminalize these involuntary illnesses).

> universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[123]

By using these examples, Justice Stewart articulated that the punishment of a disease such as addiction, or an involuntary condition like a mental or physical illness, runs afoul to the evolving standards of decency under the Eighth Amendment.[124] In the concurring opinion, Justice Douglas appeared to agree with these sentiments, and stated that "the age of enlightenment cannot tolerate [the] barbarous action" of criminalizing addiction itself.[125] The majority opinion set forth the principle that it is unconstitutional under the Eighth Amendment for a state to punish an individual for their mere status or condition.[126] Thus, *Robinson* limited a state's ability to criminalize or punish certain crimes or acts.[127]

Justice White was the only dissenting Justice in *Robinson*.[128] Justice White disagreed with the majority finding that Robinson's addiction effectively worked as a disease, and found that there was insufficient evidence to show that Robinson had lost all ability to control his actions.[129] "Because Justice White did not consider Robinson to possess the status of a narcotics addict, he did not reach the issue of whether the Eighth Amendment prohibits the punishment of a status . . . ."[130] However, in the beginning of his dissent, Justice White stated: "If appellant's conviction rested upon sheer status, condition or illness or if he was convicted for being an addict who had lost his power of self-control, I would have

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123. *Id.* at 666.

124. *See id.* at 667 ("Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold.'").

125. *Id.* at 677. (Douglas, J., concurring).

126. *See generally* Robinson v. California, 370 U.S. 660 (1962) (asserting the unconstitutionality of a state imprisoning a person who has never touched a narcotic drug in said state, nor been guilty of any irregular behavior in that state).

127. *See id.* (finding "[a]lthough there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence," and this was unconstitutional).

128. *Id.* at 685 (White, J., dissenting).

129. *See id.* at 687 (White, J., dissenting) ("[T]here was no evidence at all that appellant had lost the power to control his acts.").

130. Smith, *supra* note 42, at 311.

other thoughts about this case."[131] From this statement, it appears Justice White may have joined the majority in their conclusion that the punishment of a status or involuntary condition is unconstitutional if Robinson had shown that his addiction to drugs had rendered him helpless to control his actions.[132]

B. Interpreting Robinson *& Its Legacy*

The legacy of *Robinson* seems to be surrounded by many questions but few affirmative answers.[133] The questions largely surround exactly how to interpret the Supreme Court decision and *Robinson's* impact on Eighth Amendment jurisprudence.[134] Many scholars have argued that there are multiple ways to interpret *Robinson* and disagree on the constitutional limits it has placed on a state's power to criminalize.[135] Although many commentators have struggled to articulate the constitutional principles of *Robinson*, the Harvard Law Review published a note in 1966 that identified several ways to interpret and apply the decision.[136] The note "suggested [that there are] three ways to apply *Robinson*: '[P]ure status,' 'a status one cannot change,' and 'involuntariness of the acquisition of the status.'"[137]

For the "pure status rationale," the theory is that *Robinson* established that a state cannot criminalize a status unless there is

131. *Id.* at 311–12.

132. *See id.* (describing how Justice White dissented because he disagreed with the underlying factual conclusion that Robinson was an addict; therefore, he did not consider whether the Eighth Amendment precludes punishment for a status crime).

133. *See* Luna, *supra* note 24, at 65 ("[T]he major issue was the decision's impact on criminal justice throughout the nation.").

134. *See id.* ("Part of the problem was the ambiguous rationale for the Court's judgment, providing ideal material for scholarship.").

135. *See* Kate Smith-Cabranes, *Criminal Law and the Supreme Court: An Essay on the Jurisprudence of Byron White*, 74 UNIV. OF COLO. L. REV. 1523, 1532 (2003) ("The opinion for the majority . . . is famously ambiguous, suggesting three possible limitations on a state's power to criminalize.").

136. *See* Smith, *supra* note 42, at 312 (suggesting three ways to apply the *Robinson* decision).

137. *Id.* (citing Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 646–55 (1966)).

an overt commission of a specific act.[138] The pure status theory is the narrowest of the three, and limits *Robinson's* reach.[139] The "status one cannot change" and "involuntariness" theories are broader in their applicability.[140] For "a status one cannot change," the principle thought is that under *Robinson*, a state cannot punish someone for a status that they have no ability to change.[141] This approach, which appears to, at least in part, be rejected by the Supreme Court in *Powell*,[142] places emphasis on the ability of a defendant to control his actions.[143] Under this approach, a drug addict cannot be punished for his actions pertaining to drugs because of his inability to control his addiction.[144]

The "involuntariness" rationale seems to overlap with "a status one cannot change," but this theory is focused more on acquisition.[145] Under this theory of volition, the determinate factor concerning if a defendant can be held criminally responsible for his actions is whether the acquisition of the status was voluntary.[146] If it was not voluntary, the acts compelled by the involuntary condition are "immune from punishment."[147] If it was voluntary, the principle in *Robinson* would not extend to this defendant.[148]

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138. *See* Note, *supra* note 33, at 650 ("This theory maintains that statutes which directly criminalize status (the 'pure status' crimes) violate the Eighth Amendment, while statutes that facially criminalize 'acts' are presumptively not suspect.").

139. *See id.* ("The clear implication of such a theory is that no law may criminally punish drug addiction. Unless addiction is defined to require the commission of acts.").

140. *See id.* at 650–55 (comparing the three theories).

141. *See id.* at 650–54 ("[T]he emphasis of this approach is on the inability of the individual to extricate himself from his condition . . . .").

142. *See* Powell v. Texas, 392 U.S. 514, 535 (1968) ("And in any event this Court has never articulated a general constitutional doctrine of *mens rea*.").

143. *See* Note, *supra* note 33, at 650–54 ("[T]he emphasis of this approach is on the inability of the individual to extricate himself from his condition . . . .").

144. *See id.* ("That laws punishing a drug addict for acts such as possession, use, purchase, and self-administration of narcotics are prohibited by Robinson . . . has been urged in a number of recent cases.").

145. *See id.* at 654. (stating that under the Involuntariness Rationale, there are distinctions between conditions that are acquired voluntarily and those that are acquired involuntarily).

146. *See id.* ("If the acquisition was involuntary, he would not be punishable; if voluntary, there would be no constitutional objection to punishment.").

147. *See id* (describing the 'involuntariness' rationale).

148. *See id.* ("If the acquisition was . . . voluntary, there would be no

Although there are opposing views on the reach of *Robinson*, there seems to be a consensus that *Robinson*, at a minimum, "stand[s] for the proposition that the government cannot punish individuals for their status—who they are, more or less—but only for what they do."[149] Thus, under *Robinson*, an individual cannot be punished for their mere status or involuntary condition.[150]

Overall, the influence of *Robinson* on Eighth Amendment jurisprudence has been relatively modest.[151] However, Eighth Amendment challenges using *Robinson* have been fairly successful in striking down vagrancy ordinances and other statutes which criminalize homelessness.[152]

In 1967, the Supreme Court of Nevada struck down an ordinance which made it a misdemeanor for an individual with a physical ability to work and no visible means of support, to be in a public place.[153] The Court found that the local vagrancy ordinance criminalized poverty, thus punished a mere status and was unconstitutional.[154] Quoting the Supreme Court in *Edwards v. California*, the Supreme Court of Nevada refused to uphold the vagrancy ordinance which punished poor individuals: "We should say now, and in no uncertain terms, that a man's mere property status . . . cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. 'Indigence' in itself is neither a source of rights nor a basis for denying them."[155]

In addition to the Supreme Court of Nevada, numerous other courts have cited *Robinson* in overturning statutes that

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constitutional objection to punishment.").

149. Luna, *supra* note 24, at 65.

150. *See id.* ("The word 'status' appeared throughout the various opinions, suggesting that the decision constitutionalized the status-conduct distinction.").

151. *See* Luna, *supra* note 24, at 82–83 ("Robinson now stands as a modest ban on status crimes and not much more."); *see also* Smith, *supra* note 42, at 317 ("The Robinson Doctrine's influence on the law has generally been 'modest.'").

152. *See* Luna, *supra* note 24, at 82–83 ("Robinson could be seen as the first step toward purging these crimes from American criminal codes, with later decisions completing the process through other means . . . .").

153. *See* Parker v. Mun. Judge, 83 Nev. 214, 215 (1967) (holding that the disorderly person ordinance was unconstitutional because it criminalized a status).

154. *See id.* at 215 (finding that the local vagrancy ordinance violated due process).

155. *Id.*

criminalize homelessness and poverty. In 1967, the Supreme Judicial Court of Massachusetts struck down a vagrancy statute.[156] In doing so, the court used *Robinson*, and found the statute to be "repugnant" because it effectively treated poverty as a criminal offense.[157] In continuance of this trend, in 1993, the United States District Court for the Southern District of Florida granted injunctive relief for a claim under § 1983 which challenged the constitutionality of Miami's vagrancy and anti-sleeping ordinances.[158] The court applied *Robinson*, and invalidated the ordinances because they unconstitutionally criminalized the status of being homeless.[159]

Although several courts have used *Robinson* to overturn vagrancy ordinances, others have refused to do so.[160] However, these decisions to criminalize homelessness have come with backlash.[161] In 1964, the District of Columbia Court of Appeals upheld a vagrancy statute, without any reference to *Robinson*.[162] The Supreme Court denied certiorari in the case.[163] Justice Douglas, in a passion-filled dissent, argued that "[he] did not see how economic or social status can be made a crime any more than being an addict can be."[164]

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156. *See* Alegata v. Mass. (and four companion cases), 353 Mass. 287, 297 (1967) ("Idleness and poverty should not be treated as a criminal offense.").

157. *Id.* at 295–97 ("We hold that challenged portions of § 66 are void on their face as repugnant to the due process clause of the Fourteenth Amendment . . . .").

158. *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1584 (1992) ("Plaintiffs' complaint alleges that the City of Miami . . . has a custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily life—including sleeping and eating—in the public places where they are forced to live.").

159. *See id.* at 1562, 1584 (finding Robinson to be the leading Supreme Court case concerning judicial prohibition of status-based abuse of police power under the Eighteenth Amendment).

160. *See* Luna, *supra* note 24, at 69 (describing unsuccessful challenges to vagrancy statutes using *Robinson*).

161. *See id*. (detailing several successful challenges to vagrancy statutes using *Robinson*).

162. *Id. See generally* Hicks v. District of Columbia, 197 A.2d 154 (D.C. 1964), *cert. dismissed as improvidently granted*, 383 U.S. 252 (1966) (holding that the statute was not unconstitutional because it only punished "those who lead an immoral or profligate life").

163. *Hicks*, 383 U.S. at 252.

164. *Id.*

Though the *Robinson* Doctrine has had success invalidating anti-sleeping and vagrancy laws,[165] challenges using *Robinson* to invalidate statutes which pertain to alcoholism and similar addictions, have been less successful.[166]

C. Powell v. Texas

In 1968, the Supreme Court, in a 5–4 decision, refused to extend *Robinson* to a Texas statute criminalizing public intoxication.[167] In *Powell v. Texas*, Powell was arrested and convicted under a Texas Statute which criminalized public intoxication.[168] Powell appealed his conviction, and argued that because he was a chronic alcoholic, his disease made it impossible for him to voluntarily control his drinking.[169] Further, Powell argued that because his appearance in public while intoxicated was due to an involuntary condition, to punish him under the Texas Statute would violate *Robinson* and the Eighth Amendment.[170]

The Court rejected Powell's argument.[171] Justice Marshall, writing the plurality opinion, recognized that under *Robinson*, a state cannot criminalize a status; however, a chronic alcoholic punished for being drunk in public was not synonymous.[172] The

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165. *See* Smith, *supra* note 42, at 319–20 (detailing several successful challenges to vagrancy statutes using *Robinson*).

166. *See* Luna, *supra* note 24, at 69–70 (comparing outcomes of *Robinson* challenges on vagrancy ordinances against statutes pertaining to addition).

167. *See* Powell v. Texas, 392 U.S. 514, 536 (1968) (holding *Robinson* did not apply to the public intoxication statute, because the act of drinking or being drunk in public in this specific case was voluntary).

168. *Id.* at 517 ("In late December 1966, appellant was arrested and charged with being found in a state of intoxication in a public place, in violation Vernon's Ann. Texas Penal Code, Art. 477 (1952). . . .").

169. *See id.* ("His counsel urged that appellant was 'afflicted with the disease of chronic alcoholism,' that 'his appearance in public (while drunk) was not of his own volition,' and therefore that to punish him criminally for that conduct would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments . . . .").

170. *See id.* (same).

171. *Id.*

172. *See id.* at 531(holding that Powell's case was different than *Robinso*n because Powell was being punished for a voluntary act).

plurality used the dissent from *Robinson* and argued that a status differs from a condition.[173] Additionally, Justice Marshall stated that it was unclear that chronic alcoholism was per se an involuntary condition, and rejected the notion that free will is not involved in an individual's choice to consume alcohol.[174] The Court found that although Powell's alcoholism influenced his decisions to drink, his alcoholism was not completely overpowering, and thus was not involuntary.[175] Therefore, for *Robinson* to apply, the condition must be involuntary, and here the Court stated it was not.[176]

Further, the Court found that Powell had the requisite actus reus to be charged and convicted of a crime.[177] The crux of the plurality opinion attempted to limit "*Robinson's* thrust to actus reus concerns rather than to the more expansive mens rea issues entailed in Powell's claim that he was not criminally responsible" due to his chronic alcoholism.[178] Justice Marshall noted that unlike Robinson, the defendant in this matter had committed some act, or been engaged in a specific type of behavior.[179] The Court interpreted *Robinson*:

> The entire thrust of Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be

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173. *See id.* at 535 (same).

174. *See id.* ("We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication.").

175. *See id.* (same).

176. *See id.* (holding that because Powell's condition was voluntary, *Robinson* did not apply).

177. *See id.* at 533 ("The entire thrust of Robinson's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus.").

178. Martin R. Gardner, *Rethinking* Robinson v. California *in Wake* of Jones v. Los Angeles*: Avoiding the "Demise of the Criminal Law" by Attending to "Punishment"*, 98 J. CRIM. L. & CRIMINOLOGY 429, 438 (2008).

179. *See id.* ("[U]nlike the defendant in Robinson, Powell was not convicted for a status. . . but for his 'act' of 'being [appearing] in public while drunk on a particular occasion.'").

> inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing . . . [and] has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' . . . .[180]

Through the Court's interpretation of *Robinson*, the plurality distinguished the Texas statute, which criminalized the *act of being* drunk in public, from the statute in *Robinson*, which punished *being* addicted to drugs.[181]

Justice Stewart, who wrote the majority opinion in *Robinson*, joined the dissent in *Powell*.[182] The dissent rejected the majority's interpretation of *Robinson* and understood *Robinson* to stand for the principle that criminal penalties cannot be inflicted upon an individual for a condition he is powerless to change.[183] Further, the dissent stated that *Robinson* and the Eighth Amendment prohibits the punishment of individuals for their status, and is not contingent upon whether the individual has committed a particular act.[184]

Although the Texas statute, as defined, differs from the California statute in *Robinson*, the dissent urged that "the constitutional defect" was the same.[185] Both defendants were punished for "being in" a condition which he "had no capacity to change or avoid."[186] The dissenting Justices examined the trial court record and found that the factual findings were integral to determine whether alcoholism is an involuntary condition, like the narcotics addiction found in *Robinson*.[187] "[T]he trial judge, sitting

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180. Powell v. Texas, 392 U.S. 514, 533 (1968).

181. *See id.* at 532 (emphasis added) ("The State of Texas has not sought to punish a mere status as California did in Robinson. . . .").

182. *Id.* at 554–70 (Fortas, J., dissenting).

183. *See id.* at 567 (Fortas, J., dissenting) ("But the essential constitution defect here is the same as in Robinson, for in both cases the defendant was accused of being in a condition which he had no capacity to change or avoid.").

184. *See id.* (Fortas, J., dissenting) ("Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.").

185. *See id.* at 568 (Fortas, J., dissenting) ("But the essential constitution defect here is the same as in Robinson, for in both cases the defendant was accused of being in a condition which he had no capacity to change or avoid.").

186. *Id.* (Fortas, J., dissenting).

187. *See id.* at 554–70 (Fortas, J., dissenting) (stating that the findings in the case with the background of the medical and social data lead to the conclusion

as a trier of fact, found upon medical and other relevant testimony that Powell was a chronic alcoholic,"[188] unable to resist the continuous urge to consume excess amounts of alcohol.[189] Because of this, the dissent argued that prosecuting Powell under the Texas statute constituted Cruel and Unusual Punishment under the Eighth Amendment because the statute punished him for an involuntary condition.[190]

D. Post-Powell: The Eighth Amendment & Robinson

Overall, Eight Amendment challenges using *Robinson* to invalidate statutes criminalizing intoxication have been an uphill battle.[191] The *Powell* decision appeared to limit the reach of *Robinson*, and left even more questions to be answered about *Robinson* and its legacy.[192] There was concern that Justice Stewart, who wrote the majority opinion in *Robinson*, disagreed with the majority interpretation of *Robinson* in *Powell*.[193] Furthermore, many scholars have found Justice White's concurrence, which gave the fifth vote to the plurality in *Powell*, to align more closely with the dissenting Justices' interpretation of *Robinson*.[194]

In his concurrence, Justice White agreed with the majority's conclusion, and found that Powell himself did not sufficiently demonstrate that his alcoholism made it so "he was unable to stay off the streets on the night in question"; however, Justice White

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that the statute in reference to Powell was unconstitutional).

188. *Id.* at 568 (Fortas, J., dissenting).

189. *Id.* (Fortas, J., dissenting) (stating that the trial court judge found Powell was a "chronic alcoholic").

190. *Id.* (Fortas, J., dissenting) ("I read these findings to mean that appellant was powerless to avoid drinking . . . .").

191. *See* Luna, *supra* note 24 at 68 (Describing *Robinson*-based constitutional challenges and that most failed).

192. *See id.* (same).

193. *See* Benno Weisburg, *When Punishing Innocent Conduct Violated the Eighth Amendment: Applying the Robinson Doctrine of Homelessness and Other Contextual Crimes*, 96 J. CRIM. L. & CRIMINOLOGY 329, 334–41 (2005) (describing Justice Stewarts' opinion in Robinson and how the opinion should be read).

194. *See* Gardner, *supra* note 178, at 440–41 ("White's opinion shares a much closer affinity with the dissent than to the plurality opinion.").

left open the possibility that the Texas Statute might violate *Robinson* if applied to another defendant.[195] Justice White stated,

> The fact remains that some chronic alcoholics must drink and hence must drink somewhere. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment–the act of getting drunk.[196]

After *Powell*, several courts and legislative bodies have adopted a volition requirements for criminal liability.[197] The Court of Appeals for the Fourth Circuit interpreted the principles of *Robinson* similarly to the dissenting Justices in *Powell* in determining volition.[198] The Fourth Circuit recognized alcoholism as a disease, and because of this, refused to uphold prosecutions under public intoxication statutes.[199] Using *Robinson*, the circuit court found that an individual who suffers from the disease of alcoholism would not have the necessary mens rea to be punished for the act of being drunk in public.[200]

After *Powell v. Texas*, there are more questions surrounding the actual impact of the *Robinson* decision.[201] Did *Robinson* give

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195. *See Powell*, 392 U.S. at 554 (White, J., concurring) ("Because Powell did not show that his conviction offended the Constitution [that he was unable to stay off the streets that night] I concur the judgment . . . .").

196. *Id.* at 551 (White, J., concurring).

197. *See* Luna, *supra* note 24, at 70 (describing post-*Powell* constitutional challenges).

198. *See id.* ("After recognizing alcoholism as a disease that compelled excessive drinking, the Fourth Circuit concluded that the defendant's presence in public was neither of his own will nor accompanied by a culpable mental state.").

199. *See id.* (same).

200. *See id.* (same).

201. *See id.* at 79 (listing questions that followed the *Robinson* and *Powell* decisions).

the Eighth Amendment any teeth? Or did the Supreme Court in *Powell* severely limit the decisions reach?

IV. Analyzing the Criminal Cash Bond System Under Robinson

A. Poverty as a Status

It is unconstitutional under the Eighth Amendment to criminalize a status.[202] A "status crime" is a crime defined by who a person is, not by what they do.[203] This is a crime for which an individual is "guilty by being in a certain condition or of a specific character."[204]

Poverty is a status, and to criminally punish an individual because of this financial status is unconstitutional under the Eighth Amendment. According to Merriam Webster, the definition of status is 1: "[A] position or rank in relation to others" or 3: "A state or condition with respect to circumstances."[205] The amount of money an individual has determines his rank or position in relation to all others in society.[206] The very words economic and status are frequently linked together to describe an individual's position.[207] Poverty is also a condition, one which statistics show is often immutable.[208] Merriam Webster defines condition as 4: "[A]

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202. *See* Robinson v. California, 370 U.S. 660, 662 (1962) ("To be addicted to the use of narcotics is said to be a status or condition and not an act" and statute prohibiting such status violates U.S. CONST. amend. XIV).

203. *See* Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1620–22 (1995) (defining status crime).

204. *Status Crime*, BLACK'S LAW DICTIONARY (10th ed. 2014).

205. *Status*, MERRIAM WEBSTER ONLINE DICTIONARY (2018) https://www.merriam-webster.com/dictionary/status (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

206. *See* Tori DeAngelis, *Class Differences*, AM. PSYCHOL. ASS'N (Feb. 2015), http://www.apa.org/monitor/2015/02/class-differences.aspx ("In a 2012 paper in *Psychological Review* . . . posit that social class—which they define as 'a social context that individuals inhabit in enduring and pervasive ways over time'—is a fundamental lens through which we see ourselves and others.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

207. *See id.* (describing the overlap between social and economic status).

208. *See* Marc Stuart Gerber, *Equal Protection, Public Choice Theory, and LearnFare: Wealth Classifications Revisited*, 81 GEO. L.J., 2141, 2162 (1993) (characterizing wealth as quasi-immutable through statistics and describing the

state of being, or social status."[209] Money is the biggest determinate on societal hierarchy and status.[210] It is also the biggest determinate of where an individual charged with a crime will spend their time before trial.[211]

Like a disease,[212] an individual's economic status is a condition that is typically contracted involuntarily and is unlikely to change.[213] "Children who are born into a low-class family have only a one percent chance of reaching the top five percent of the income distribution, while children of the rich have about a twenty-two percent chance."[214] This creates an unequal playing field and the issue of poverty is one that has persisted throughout American history.[215]

In 2016, the U.S. Census Bureau estimated that 43.1 million Americans live in poverty.[216] In 2017, the estimated federal poverty level for a family of four was $24,600, and for a family of two was $16,240.[217] This amount is barely enough to afford the

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rare conditions in which economic status may change).

209. *Condition*, MERRIAM Webster Online Dictionary (2018), https://www.merriam-webster.com/dictionary/condition (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

210. *See* DeAngelis, *supra* note 206 (describing the convergence between wealth and social status).

211. *See The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH, 194 (Dec. 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (describing the system of monetizing pretrial freedom) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

212. *See* Robinson v. California, 370 U.S. 660, 666 (1962) ("[A] law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

213. *See* Shayan H. Modarres, *The Fourteenth Amendment Isn't "Broke": Why Wealth Should Be a Suspect Classification Under the Equal Protection Clause,* GEO. J.L. & MOD. CRITICAL RACE PERSP. 171, 175 (2011) (arguing that wealth should be a suspect class because of the convergence with race and poverty).

214. *Id.* at 176.

215. *See* James E. Clyburn, *Developing the Will and the Way to Address Persistent Poverty in America*, 51 HARV. J. ON LEGIS. 1 (2014) (describing the issues surrounding poverty and the history of poverty in the United States).

216. *What is the Current Poverty Rate in the United States*?, CTR. FOR POVERTY RES., U. OF CA., DAVIS (last updated Oct. 15, 2018), https://poverty.ucdavis.edu/faq/what-current-poverty-rate-united-states (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

217. *Federal Poverty Level*, HEALTHCARE.GOV (2018),

basic necessities of life. For an indigent family of two, a $1,000 bond is equivalent to one month's pay and $5,000 bond amount would constitute approximately thirty-one percent of their yearly income. In these circumstances, a defendant likely would not have the financial means to afford even a small secured cash bond; thus, would remain in pre-trial custody, for days, weeks, or months,[218] because of their financial status.

V. Applying Robinson

Eighth Amendment challenges using *Robinson* have largely been an uphill battle; however, the *Robinson* decision is not a dead letter and its principles are not solely applicable to particular crimes.[219] Under *Robinson*, an individual may not be punished based on their mere status, or an involuntary condition.[220] The current use of secured cash bonds to detain poor individuals punishes the status of poverty, and thus runs afoul of the fundamental principle in *Robinson*.

Although bond is imposed after an individual is charged with a crime, the effect of bond works in a way which is constitutionally synonymous to the issue in *Robinson*. While in *Robinson* the Court looked specifically at a statute which criminalized addiction,[221] bond operates in a way which criminalizes a status, like the California statute. Furthermore, although textually dissimilar to a vagrancy statute, the effects are synonymous. A homeless man

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https://www.healthcare.gov/glossary/federal-poverty-level-FPL/ (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

218. *See generally* Jamie Fellner, et al., *"Not in it for Justice,"* HUM. RTS. WATCH, https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly (last visited Oct. 31, 2018) (analyzing statistics surrounding the cash bond system and the effects of cash bond on poor defendants) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

219. *See* Luna, *supra* note 24, at 50 ("[I]t's promise would go unfulfilled, as the case was downscaled from a revolutionary spark to a modest principle.").

220. *See* Robinson v. California, 370 U.S. 660, 662–67 (1962) ("To be addicted to the use of narcotics is said to be a status or condition and not an act" and statute prohibiting such status violates the fourteenth amendment).

221. *See id.* at 662 ("[T]he statute made it a misdemeanor for a person either to use narcotics, or to be addicted to the use of narcotics." (internal quotation marks omitted)).

sleeping on the street who is charged under a vagrancy ordinance will spend time in jail merely because he is homeless.[222] A poor individual who is unable to afford pre-trail release will spend time in jail, not because he is dangerous or a flight risk, but because he is poor. The majority in *Robinson* voiced this exact concern; and stated that even one day in prison would be cruel and unusual punishment if that punishment stemmed from the criminalization of a status or condition.[223]

The Court in *Powell* distinguished a mere condition from an involuntary condition, and in doing so, held that Powell had not established that his condition as a chronic alcoholic left him unable to control his actions.[224] The Court further distinguished Powell from Robinson by articulating the importance of mens rea, or "a guilty mind" for criminal liability.[225] After *Powell v. Texas*, many believed the Court greatly narrowed the constitutional thrust of *Robinson*.[226] Although in *Powell* the Court refused to extend *Robinson* to a chronic alcoholic charged with public intoxication,[227] this narrowing does not affect the decision's applicability to status crimes and the criminal bond system. Even the narrowest interpretation of *Robinson*, prohibits a state from punishing a

222. *See* Smith, *supra* note 42, at 293 ("[H]omeless persons must commit a punishable crime in order to satisfy the undeniable need for sleep.").

223. *See Robinson*, 370 U.S. at 667 ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

224. *See* Powell v. Texas, 392 U.S. 514, 553 (1968) ("[N]othing in the record indicates that he could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street.").

225. *See id.* at 533 ("[H]is behavior lacked the critical element of *mens rea*. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*.").

226. *See* Luna, *supra* note 24, at 71 (describing how the court appeared to limit the Robinson decision in Powell).

227. *See Powell*, 392 U.S. at 535 ("We are unable to concluded . . . that chronic alcoholics . . . suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication.").

mere status.[228] That is, punishing an individual for who they are,[229] or in the context of secured cash bonds, punishing an individual for what they do not have.

This Note does not argue that an individual who is poor and commits a criminal act cannot be punished under the law for that crime; rather, this Note purports that the use of a secured cash bond to detain poor individuals *before a conviction for a crime* is unconstitutional under *Robinson* and the Eighth Amendment.

Criminal defendants and inmates have used *Robinson* in federal claims in an attempt to invalidate anti-recidivism statutes, long prison terms, parole procedures, and prison discipline procedures.[230] The difference between criminal bond and challenges to prison terms and procedure, is that bond is pre-trial and the presumption of innocence is still intact. Further, the determinate factor for pre-trial release is based upon a status.[231]

For many crimes, a secured cash bond punishes a poor defendant, merely because of his economic status.[232] In countless instances, high bond amounts are placed on defendants charged with non-violent misdemeanors.[233] The largest determining factor

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228. *See* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 29 HARV. L. REV. 635, 650 (1966) ("A reading of *Robinson* based on the pure status theory sharply limits the decision's significance; yet this is the interpretation of the case that most courts have apparently adopted.").

229. *See* Robinson v. California, 370 U.S. 660 (1962) ("We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never . . . been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment."); *see also* Smith, *supra* note 42, at 293 (stating that statutes which punish homelessness are unconstitutional under the Eighth Amendment).

230. *See* Luna, *supra* note 24, at 67 (describing the importance of the *Robinson* interpretation for constitutional challenges to various statutes).

231. *See The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH, 194 (Dec. 2010) https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (describing the system of monetizing pretrial freedom and the laws that lead to incarceration of poor individuals but not wealthy individuals) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

232. *See id.* (same).

233. *See* Richard A. Oppel Jr., *Defendants Can't Be Jailed Solely Because of Inability to Post Bail, Judge Says*, N.Y. TIMES (Jul. 17, 2017), https://www.nytimes.com/2017/07/17/us/chicago-bail-reform.html ("Not only does this cost society more in the long run, but it also means that taxpayers foot the bill for nonviolent defendants . . . even though they pose little threat.") (on file

of whether a defendant will be released before trial is not based on what crime he is accused of, the defendant's dangerousness, or risk of flight, it is based on money.[234]

Anthony Cooper, a fifty-six-year-old on social security, was charged with public intoxication, after being picked up at a bus station.[235] Cooper's bond was set at $300 through a fixed bond schedule.[236] Because Mr. Cooper could not afford the $300, he remained in jail for six days.[237] Ms. O'Donnell, a single mother in Texas was arrested for driving without a valid driver's license.[238] Her bail was set at $2,500.[239] Because Ms. O'Donnell was poor and unable to pay her bond amount, she spent three days in jail.[240]

In 2007, OJ Simpson was charged with twelve criminal counts including robbery, kidnapping, burglary, and assault with a deadly weapon.[241] Two days after Simpson's bond hearing, he was released on a $125,000 bond.[242] After Simpson's release on pre-trial bond, Simpson was rearrested for violating a no-contact condition of his bond. Simpson's bond was reset at $250,000.[243] Because of

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with the Washington & Lee Journal of Civil Rights & Social Justice).

234. *See* Lisa Foster, Remarks at ABA's 11th Annual Summit on Public Defense (Feb. 6, 2016) (transcript available at http://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit) ("Bail exacerbates and perpetuates poverty because of course only people who cannot afford the bail assessed or to post a bond—people who are already poor—are held in custody pretrial.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

235. Leon Neyfakh, *Is Bail Unconstitutional*? SLATE.COM (June 30, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/06/is_bail_unconstitutional_our_broken_system_keeps_the_poor_in_jail_and_lets.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

236. *Id.*

237. *Id.*

238. The Editorial Board, *Locked Up for Being Poor*, N.Y. TIMES (May. 5, 2017), https://www.nytimes.com/2017/05/05/opinion/locked-up-for-being-poor.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

239. *Id.*

240. *Id.*

241. *O.J. Simpson Released After Judge Scolds Him, Doubles Bail*, CNN (last updated Jan. 7, 2008, 3:40 AM), http://www.cnn.com/2008/CRIME/01/16/simpson.bail/index.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

242. *Id.*

243. *Id.*

Simpson's economic status, he was able to post the second bond and was once again released from custody.[244] Mr. Cooper and Ms. O'Donnell spent more days in pre-trial custody for non-violent misdemeanors than OJ Simpson, who was charged and subsequently convicted of twelve violent felonies.[245]

Mr. Cooper and Ms. O'Donnell's stories happen daily and demonstrate the use of secured cash bonds to punish the status of poverty.[246] Mr. Cooper and Ms. O'Donnell did not pose a safety risk to the public, nor did they pose a risk of flight.[247] Further, both individuals maintained a presumption of innocence. The requirement that Mr. Cooper and Ms. O'Donnell, and defendants like them, pay a secured cash bond in order to afford pre-trail release, is unconstitutional under *Robinson*.[248] A secured cash bond punished Mr. Cooper and Ms. O'Donnell for who they are, not for what they did. Mr. Cooper and Ms. O'Donnell spent days in jail simply because they were poor.[249]

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244. *See id.* ("Former football star, O.J. Simpson walked out of jail late Wednesday after posting a $250,000 bail.").

245. *See id.* (listing the crimes O.J. Simpson was charged with and how long he spent in pre-trial custody).

246. *See The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH, 47 (Dec. 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (analyzing the statistics surrounding the cash bail system) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also id.* (describing the laws that lead to incarceration of poor individuals but not wealthy individuals).

247. *See* Editorial Board, *Locked Up for Being Poor*, N.Y. TIMES (May. 5, 2017), https://www.nytimes.com/2017/05/05/opinion/locked-up-for-being-poor.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* Leon Neyfakh, *Is Bail Unconstitutional*?, SLATE.COM (Jun.30, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/06/is_bail_unconstitutional_our_broken_system_keeps_the_poor_in_jail_and_lets.html (discussing the stories of criminal defendants who remained in pre-trial custody because they were unable to pay small monetary bonds for petit offenses) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

248. *See* Robinson v. California, 370 U.S. 660 (1962) ("But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

249. *See* Leon Neyfakh, *Is Bail Unconstitutional*?, SLATE.COM (Jun. 30, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/06/is_bail_unconstitutional_our_broken_system_keeps_the_poor_in_jail_and_lets.html ("Our broken system keeps the poor in jail and lets the rich walk free.") (on file with the

Bail is intended to "afford [the] release of a defendant while reasonably assuring court appearance and public safety."[250] The criminal bond system is not supposed to be punitive; however, if a defendant cannot pay, they are sentenced to jail.[251] This jail sentence is based on poverty.[252] Every year, over half a million individuals remain in pre-trial custody because they have insufficient financial means.[253] Depending on the jurisdiction, trial calendars can be so clogged that a defendant is forced to wait months, or even years, for their day in court.[254] "[T]o punish the unfortunate for [their] circumstances debases society,"[255] and the evolving standards of decency which underpin the Eighth Amendment and *Robinson*, reject this practice.

VI. Policy Concerns & Reform Efforts

In addition to the constitutional concerns under *Robinson* and the Eighth Amendment, the current criminal cash bond system creates several due process issues and policy concerns.[256] Among

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Washington & Lee Journal of Civil Rights & Social Justice).

250. *See* BAIL BOND, U. OF PRETRIAL, https://university.pretrial.org/glossary/bailbond (last visited Oct. 15, 2017) (providing a comprehensive definition for the term "bail bond") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

251. *See* Maya Dukmasova, *Cook County's Tradition of Using Bail as Punishment May Be Hard to Change*, CHICAGO READER (Sept. 9, 2017), https://www.chicagoreader.com/Bleader/archives/2017/09/19/cook-countys-tradition-of-using-bail-as-punishment-may-be-hard-to-change (describing cash bond as punishment) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

252. *See id.* (same).

253. Dobbie et al., *supra* note 71, at 9.

254. *See* Jamie Fellner, et al., *"Not in it for Justice"*, HUM. RTS. WATCH (Apr. 11, 2017), https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly (examining trial calendars in multiple counties to show how long defendants often wait for their day in court) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

255. *See* Parker v. Mun. Judge, 83 Nev. 214, 216 (1967) (emphasizing how crime and the need for welfare or employment must not be confused).

256. *See The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH, 584 (Dec. 2010) https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (detailing the due process issues associated with the cash bond system) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

these are the effects of bond on the presumption of innocence, undue pressures on defendants to plea, the increased likelihood of wrongful convictions, and racial discrimination due to economic disparities. Further, the effect of secured cash bonds on indigent defendants extends beyond the courtroom.[257]

Secured cash bonds hold poor defendants in custody and causes them to lose things on the outside, making recidivism more likely.[258] These individuals can lose employment, housing, custody of children, education opportunities, and support systems.[259] In a New York University Law Review Article, Arthur Goldberg, a former Associate Justice of the Supreme Court, outlined many of these concerns.[260]

> After arrest, the accused who is poor must often await the disposition of his case in jail because of his inability to raise bail, while the accused who can afford bail is free to return to his family and job . . . . This is an example of justice denied, of a man imprisoned for no reason other than his poverty. Think of the needless waste . . . every time a responsible person presumed by a law to be innocent is kept in jail awaiting trial solely because he is unable to raise money bail.[261]

Additionally, many reformers, civil rights organizations, and legislative bodies have recognized these issues and are working toward "chipping away at money bail, arguing it discriminates against the poor, ruins innocent people's lives, fuels mass incarceration and contributes to wrongful convictions."[262]

The push towards the elimination of the cash bail system and bail reform in the United States is increasingly growing. "California reforms its bail system so that rich and poor alike are

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257. *See id*. (same).

258. *See id.* (same).

259. *See id.* (same).

260. *See The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH, 194 (Dec. 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (outlining the due process concerns that surround the criminal cash bail system) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

261. *Id.*

262. *See* Jon Schuppe, *Post Bail*, NBC NEWS (Aug. 22, 2017), https://www.nbcnews.com/specials/bail-reform (arguing against the use of bail in exchange for freedom) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

treated fairly;"[263] this statement was made as California became the first state to eliminate the criminal cash bond system through the California Money Bail Reform Act.[264] The bill passed August 2018, by a vote of 41–27.[265] Although the fight against money bail has taken place for years, the California Court of Appeal's decision, *In re Humphrey*,[266] appears to have been a large force behind the new legislation.[267] In January 2018, the California Court of Appeal held that because the trial court set Kenneth Humphrey's bond amount at $350,000 without looking into Humphrey's ability to pay or considering non-financial conditions of bail, Humphrey was entitled to a new bail hearing.[268] The California Court of Appeal further instructed that "[i]f the [trial] court determines that [Humphreys] cannot afford the amount of money bail it finds necessary to ensure [his] future court appearances, it may set bail at that amount only upon a determination by clear and convincing evidence that no less restrictive alternative will satisfy that purpose."[269] The court also stated that "legislation is desperately needed" and that both the judiciary and legislature need to "change the way [they] think about bail."[270]

Following *In re Humphreys*, the California Legislature re-evaluated the California bail system. The California Money Bail

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263. Thomas Fuller, *California Is the First to Scrap Cash Bail*, NY TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/us/california-cash-bail.html (quoting Governor Jerry Brown) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

264. *See id.* ("'Today, California reforms is bail systems so that rich and poor alike are treated fairly,' said Gov. Jerry Brown, who signed the California Money Bail Reform Act into law on Tuesday.").

265. *Id.*

266. *In re* Humphrey, 19 Cal. App. 5th 1006 (Cal. Ct. App. 2018) (ruling that a trial court's decision to set bond at $350,000, without looking into the criminal defendant's ability to pay or considering non-financial conditions of bail, entitled the criminal defendant to a new bail hearing).

267. *See* Fuller, *supra* note 263 (describing the court's ruling in Humphrey prior to the California Money Bail Reform Act).

268. *See In re Humphrey*, 19 Cal. App. 5th at 1048 ("[t]he trial court erred in setting bail at $350,000 without inquiring into and making findings regarding petitioner's ability to pay and alternatives to money bail, and if petitioner's financial resources would be insufficient and the order would result in his pretrial detention, making the finding necessary for a valid order of detention.").

269. *Id.*

270. *Id.* at 1049.

Reform Act will be placed into effect October 1, 2019.[271] Under the Act, individuals who are arrested and detained will be subjected to a pre-trial risk assessment.[272] The assessment will not be required for individuals charged with misdemeanors, and these individuals should be detained and then released except in special circumstances.[273] Individuals subjected to the pre-trial risk assessment will be given an assessment of low risk, medium risk, or high risk.[274] Under the Act, individuals who are assessed as low or medium risk should be released on his or her own recognizance or released with the least restrictive non-financial conditions to ensure public safety or the defendant's appearance in court.[275]

Although the California Money Bail Reform Act will likely solve several issues in the cash bond system, many advocates of bail reform are concerned that the Act may lead to increased incarceration and preventative detention.[276] For individuals who are classified as high-risk or meet "specific conditions," it is within the court's discretion to detain the individuals, if after an arraignment, the court finds that there are no pre-trial conditions of supervision that would reasonably ensure public safety or the appearance of the individual in court.[277] Additionally, the Act creates a presumption that no condition of release would reasonably ensure public safety for individuals charged with a

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271. California Money Bail Reform Act, 2018 Cal. Legis. Serv. Ch. 244 (S.B. 10) (effective date October 1, 2019).

272. *See id.* (describing defendants that will be subjected to a risk assessment by Pretrial Services).

273. *See id.* (same).

274. *See id.* (describing the classifications made from the risk assessment).

275. *See id.* (stating that low-risk and medium-risk defendants will be released from pre-trial custody without monetary conditions except in special circumstances).

276. *See* Jasmine Tyler, et al., *Human Rights Watch Opposes California Senate Bill 10, The California Bail Reform Act*, HUM. RTS. WATCH, https://www.hrw.org/news/2018/08/14/human-rights-watch-opposes-california-senate-bill-10-california-bail-reform-act (last visited Oct. 31, 2018) (writing about the potential concerns with the new bill) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

277. *See* California Money Bail Reform Act, 2018 Cal. Legis. Serv. Ch. 244 (S.B. 10) (effective date October 1, 2019) ("The bill would allow the court to detain the person pending arraignment if there is a substantial likelihood that no condition or combination of conditions of pretrial supervision will reasonably assure public safety or the appearance of the person in court.").

violent felony, or individuals convicted of a violent felony in the last five years.[278] This presumption is rebuttable.[279] The Act also gives the prosecution power, "under specified circumstances," to file motions to seek the detention of individuals, who otherwise would be released, through a preventative detention hearing.[280]

Although California is currently the only state to eliminate the cash bond system, several other states and courts have implemented bond reform and new tools to determine bail. Several courts have implemented a

> Federal Risk Assessment Tool [that] relies on nine key factors to predict pretrial risk, including (1) "charges pending against the defendant at the time of arrest," (2) "number of prior misdemeanor arrests," (3) "number of prior felony arrests," (4) "number of prior failures to appear," (5) employment status of defendant at the time of arrest, (6) defendant's residency status, (7) defendant's substance abuse problems, (8) "nature of the primary charge," and (9) if the primary charge is a misdemeanor or a felony.[281]

Point values are given for each of the risk factors and added to create a comprehensive risk score in order to determine sufficient bond conditions.[282]

The Federal Risk Assessment Tool is just a glance into the national trend moving away from the current cash-driven bail systems. New Jersey, Arizona, Kentucky, and several counties in other states have adopted the Arnold Public Safety Assessment in their courtrooms.[283] The Arnold Public Safety Assessment is a

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278. *See id.* (describing defendants who Pretrial Services shall not release).

279. *See id.* ("There shall be a rebuttable presumption that no condition or combination of conditions of pretrial supervision will reasonably assure public safety if the court finds. . . .").

280. *See id.* (describing the ability of the prosecutor to file a motion seeking the detention of a defendant in specific circumstances).

281. Marie VanNostrand, *Pretrial Risk Assessment in the Federal Court*, FEDERAL PROBATION, http://www.uscourts.gov/sites/default/files/73_2_1_0.pdf (last visited on Dec. 1, 2018) (listing the nine factors risk factors used in federal pretrial risk assessment for pretrial release) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

282. *See id.* (describing the classification and weighting system under the federal risk assessment tool).

283. *See More Than 20 Cities and States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial,* LAURA & JOHN ARNOLD FOUND. (June 26, 2015), http://www.arnoldfoundation.org/more-than-20-cities-

> [P]retrial risk assessment tool [that] uses evidence based, neutral information to predict the likelihood that an individual will commit a new crime if released before trial, and to predict the likelihood that he will fail to return for a future court hearing. In addition, it flags those defendants who present an elevated risk of committing a violent crime.[284]

The Arnold Safety Assessment uses nine risk factors and analyzes them based on three categories: Failure to Appear, New Criminal Activity, and New Violent Criminal Activity.[285] The nine risk factors are age at arrest, current violent offense, pending charge at the time of the offense, prior misdemeanor and felony convictions, prior violent conviction, prior failure to appear in the past two years, prior failure to appear older than two years, and prior sentence to incarceration.[286] Each factor is assigned points "according to the strength of the relationship between the factor and the specific pretrial outcome."[287] The Assessment does not replace judicial discretion, but aids judges in determining risk and sufficient conditions of bond.[288]

In New Jersey, the legislature implemented the New Jersey Criminal Justice Reform Act in 2017.[289] The Act established the use of the Arnold Public Safety Assessment for determining the

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and-states-adopt-risk-assessment-tool-to-help-judges-decide-which-defendants-to-detain-prior-to-trial/ (listing the jurisdictions that have implemented the Arnold Public Safety Assessment) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

284. *Public Safety Assessment: Risk Factors and Formula*, LAURA & JOHN ARNOLD FOUND., http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf (last visited on Nov. 3, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

285. *See id.* ("Researchers analyzed the data and identified the nine factors that best predict whether a defendant will commit new criminal activity (NCA), commit new violent criminal activity (NVCA), or fail to appear (FTA), in court if released before trial.").

286. *See id.* (listing the risk factors used in the Safety Assessment).

287. *Id.*

288. *See id.* ("The PSA is a decision-making tool for judges. It is not intended to, nor does it functionally, replace judicial discretion.").

289. *See* Schuppe, *supra* note 262 (describing the current bail system in New Jersey).

pre-trial release of a defendant.[290] Although still at the early stages of implementation, in the last year, this algorithm for release conditions has cut down approximately one third of defendants who are detained pre-trial in New Jersey.[291] "Court officials say the early numbers show the new procedure is already working: [P]eople who aren't dangerous are not being jailed solely because they can't afford bail, and dangerous people aren't being released even though they can afford to pay."[292] The New Jersey Criminal Justice Reform Act was recently upheld by the Third Circuit Court of Appeals[293] and has been seen by many as a step toward the complete elimination of cash bond in the state.[294]

In July 2017, U.S. Senators Kamala D. Harris and Rand Paul introduced the *Pretrial Integrity and Safety Act of 2017*.[295] In an effort to replace the state practice of money bail, this bipartisan bail reform bill aims to monetarily incentivize states to replace money bail systems with "individualized, pretrial assessments with risk-based decision making."[296] The bill also aims to encourage the presumption of release pre-trial and the implementation of non-financial conditions before imposing financial conditions.[297]

The new bail assessment tools and bipartisan bill are positive changes that begin to address the concerns of *Robinson* as applied to bail. In order for the bail system to be constitutional under the Eighth Amendment and *Robinson*, secured cash bonds cannot be

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290. *See id.* (same).

291. *Id.*

292. *Id.*

293. *See* Holland v. Rosen, 895 F. 3d 272, 302 (3rd. Cir. 2018) (ruling that the New Jersey Criminal Justice Reform Act did not violate the constitution, affirming the injunction).

294. *See Appeals Court Rules in Favor Of New Jersey's Bail Overhaul*, NAT'L PUB. RADIO (NPR) (July 10, 2018) https://www.npr.org/2018/07/10/627588135/appeals-court-rules-in-favor-of-new-jerseys-bail-overhaul ("New Jersey will able to keep using a new system that eliminates cash bail.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

295. The Pretrial Integrity and Safety Act of 2017, S. 1593, 115th Cong., https://www.congress.gov/115/bills/s1593/BILLS-115s1593is.pdf (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

296. *Id.*

297. *See id.* (granting the replacement of money bail as a condition of pretrial release and providing for the presumption of release in most cases).

used to criminalize the status of poverty. The use of a secured cash bond, when non-financial bond conditions would be effective, punishes the poor for simply being poor.

V. Conclusion

For the poor, cash bail means jail.[298] In 1962, the Supreme Court held that criminalizing a status, is unconstitutional under the Cruel and Unusual Clause of the Eighth Amendment.[299] Applying *Robinson*, the use of a secured cash bond to hold poor defendants in custody, is unconstitutional. Individuals are spending days, weeks, or months in jail because of who they are, and the Court in *Robinson* explicitly rejected this practice.[300]

Although *Powell* narrowed the scope of Robinson, the core principle remained untouched: A state cannot punish an individual merely for that individual's status.[301] The applicability of this principle is best seen through subsequent cases that successfully used *Robinson* to invalidate vagrancy ordinances. Many courts struck down vagrancy ordinances and statutes because they punish a mere status, the status of homelessness. Under these laws, a homeless individual spends time in jail simply because he is homeless. This violates the Eight Amendment.

The thrust of *Robinson* extends to criminal bond statutes as well. A poor defendant charged with a crime, who does not pose a risk of flight or threat to public safety, will spend time in jail before trial, simply because he is poor.[302] The statistics that support this

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298. *See The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH, 194 (Dec. 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (explaining that many criminal defendants sit in jail because they are poor) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

299. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (holding a California statute unconstitutional under the Eighth Amendment because the statute criminalized the status of "be addicted to the use of narcotics").

300. *See id.* at 667 ("Even one day in prison would be a cruel and unusual punishment the 'crime' of having a common cold.")

301. *See id.* (holding a California statute unconstitutional under the Eighth Amendment because the statute criminalized the status of "be addicted to the use of narcotics").

302. *See* Foster, *supra* note 19 (stating that poor individuals sit in jail because they are poor, not because they are more dangerous or more likely not to appear

assertion are alarming.[303] Every day, poor individuals spend time in jail because they cannot pay a secured cash bond as low as $100.[304] To these individuals, that $100 serves as a complete barrier to freedom, for no other reason than the defendant's financial status.[305] This $100 is not a punishment for what this defendant did, which at this stage has yet to be proven, but rather, for who they are.

The arguments for the elimination of the cash bond system have almost completely centered around the Fourteenth Amendment. However, if the Eighth Amendment and *Robinson* are applied, the current cash bond system is unconstitutional.[306] The use of a secured cash bond as a means to punish the poor, like punishing an individual for the disease of leprosy, is "barbarous"[307] in light of the standards of decency which drive the Eighth Amendment. Punishing poverty through the use of secured cash bonds, for non-violent misdemeanors or where non-financial conditions of release are sufficient, violates *Robinson* and the Eighth Amendment.[308]

Recently, there has been a strong push toward the elimination of the criminal cash bond system and reform efforts. Many legislatures have implemented assessment tools in order to make sure bond is not imposed arbitrarily. In order to comport with *Robinson* and the Eighth Amendment, secured cash bonds cannot be used to hold individuals in jail merely because they are poor.

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in court).

303. *See* Steve Schmadeke, *Cash Bail Under Fire as Discriminatory While Poor Inmates Languish in Jail*, CHI. TRIB. (Nov. 15, 2016) http://www.chicagotribune.com/news/local/breaking/ct-cook-county-cash-bail-met-20161114-story.html (analyzing the statistics surrounding the criminal cash bond system) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

304. *See id.* (same).

305. *See id.* (same).

306. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (holding a California statute unconstitutional under the Eighth Amendment because the statute criminalized a status).

307. *See id.* at 676 (Douglas, J., concurring) (stating that punishing a status is synonymous to criminalizing a sickness; and doing so would be "barbarous" under the Eighth Amendment).

308. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (holding a California statute unconstitutional under the Eighth Amendment because the statute criminalized a status).

Secured cash bonds should not be imposed arbitrarily or through a fixed bail schedule. Because fixed bail schedules do not take into account a defendant's ability to pay, they should be completely eliminated. For jurisdictions that give judges discretion in setting bond, better tools must be in place to assess a defendant's ability to pay and the effectiveness of non-financial conditions in lieu of financial conditions. Facially, the California Money Bail Reform Act appears to address these issues.

The use of a secured cash bond should not be standard practice, but instead a carefully limited exception. Financial conditions for release should only be considered where non-financial conditions are insufficient to mitigate risks of flight or safety. There are many options for non-financial conditions of release, such as reporting requirements, house arrest, no contact orders, substance abuse programs, drug testing, court date reminders, or travel restrictions.[309] When financial conditions of release are found to be necessary, the court should consider a defendant's ability to pay. When examining a defendant's ability to pay, the court should assess several factors. These factors could include information such as employment, household income, number of children, public assistance or government benefits, monthly expenses, and liquid assets. Whether a defendant has a public defender or court appointed attorney should also be a factor considered by the court.

Bail should never be imposed for the purpose of ensuring a defendant remains in jail until trial.[310] The criminal bond system is intended to "afford [the] release of a defendant while reasonably assuring court appearance and public safety."[311] In many situations, these three goals can be met without the use of a secured cash bond. Bond practices that hold individuals in custody because they are unable to pay amounts such as $100 or $500,

309. *See The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, HUM. RTS. WATCH, 194 (Dec. 2010), https://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf (suggesting non-financial conditions of release for bond) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

310. *See* 234 PA. CODE § 524 (2018) ("No condition of release, whether nonmonetary of monetary, should ever be imposed for the sole purpose of ensuring that a defendant remains incarcerated until trial.").

311. BAIL BOND, *supra* note 48.

undoubtedly punish the poor. The use of secured cash bonds solely to hold individuals in custody for non-violent misdemeanors or where non-financial conditions are sufficient, should be rejected. The current criminal cash bond system punishes poor defendants for who they are, not for what they have done. *Robinson* and the Eighth Amendment explicitly reject this practice.[312]

312. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that a statute may not punish an individual based upon their condition or status).