Assessment of The Heritage Foundation's "History of Cash Bail"

Timothy R. Schnacke, September 27, 2017

The Heritage Foundation issued its "History of Cash Bail" on August 25, 2017. It appears to represent yet another attempt by the bail insurance companies to provide a history of bail slanted to argue for the continuation of secured financial conditions of release. It does so primarily by using wrong and misleading information to advance key legal points argued by the bail insurance companies to chip away at the contrary points advanced by persons such as Eric Holder, and organizations such as Civil Rights Corps and Equal Justice Under Law, the Pretrial Justice Institute, the Conference of Chief Justices, and the Department of Justice in various lawsuits around America. Even if it is truly independent, the Heritage document is uncannily similar – it not identical – to the entire position of the commercial bail industry on these issues. However, because a true history of bail paints a dismal picture of both the commercial bail industry and secured financial conditions, or "cash bail," the Heritage Foundation – in a document most assuredly anticipated by the bail insurance companies – appears to re-write history to gloss over the negative aspects of commercial bail and to pave the way for the bail insurance companies' dubious legal arguments.

To quickly assess the overall quality of the history part of the document, one only needs to look at four things: (1) the title; (2) the abstract; (3) the key points; and (4) the conclusion. Each is severely flawed.

The Title: "The History of Cash Bail" is incredibly misleading, and historically inaccurate given what Heritage writes. "Cash bail" or "money bail" is merely a shorthand way that people have begun to describe the use of secured financial conditions during the pretrial release and detention process. Because jurisdictions have latched onto this shorthand term, the for-profit bail industry has recently begun attempting to paint "cash bail" as having some deep historical roots in both England and America. Whether intentionally or not, this need for the bail industry to argue for acceptance of "cash bail" has completely infected the Heritage document.

Unfortunately, "cash bail," or secured financial conditions, really only appeared in America in the 1800s, at the time when America began running out of personal sureties. Until the Twentieth Century, no historian ever mentioned the term "money bail" or "cash bail" when discussing the history

of bail or bail itself, which is best described as a process of conditional release. Technically speaking, even in unsecured form, England used property as a sub-condition likely until the 7th or 8th Centuries, when coin money began circulating (after centuries of disuse), and then it was always only used in the form of a "pledge" or promise by the personal surety (and sometimes a promise by the surety and the defendant) to pay the amount only upon default by the defendant. A proper history of "cash bail" would begin in the 1800s in America because it was only in the 1800s that America began experimenting with defendants self-paying their own financial conditions. Before the 1800s, going back to colonial times, America still used personal sureties who were not allowed to take a fee or be reimbursed, and administering what we call today unsecured bonds, all of which led to virtually all bailable defendants obtaining release. The title is apparently designed to mislead persons into thinking that "cash bail," the thing we are all fighting about, is some sort of deep historical concept (at the end, the document says, "Money bail has deep historical roots in Anglo Saxon law and custom"), but "cash bail" or "money bail," as defined as secured financial conditions that have the ability to detain defendants, have, historically speaking, only been in existence for a relatively short period of time.

Understanding the true history of bail is of primary importance, I believe, because ever since the Pretrial Justice Institute published a recent history of bail in 2011 (the one used before that was written prior to *Salerno* in 1984), which mentioned bail's Roman roots, the bail industry has tried to argue that commercial sureties have been around since that time. When that did not work, they argued that the same basic system as our system today – with sureties and up-font payments as security – has been around for ages. Their goal is apparently to make courts think that our current system is deeply ingrained in our society's history. But that is simply not true. As mentioned above and more fully explained below, using primarily up-front payments to secure release really only started in the 1800s, as we began to lose personal sureties. So not only commercial sureties, but the entire concept of putting something down – "skin in the game" and all that – is really a very new concept in the history of bail, and one that has failed ever since we allowed it to take hold in America. You tell when a history document is written for the bail insurance companies because it typically leaves out the 100 years between 1900 and 2000, when commercial sureties began, were quickly criticized, outlawed in some states, and became the source of decades of reform. This document mentions the origin of commercial sureties and

quickly jumps to how they work. This one hundred years of fights against the commercial bail industry is simply too important to leave out of any history, let alone a history of "cash bail."

The Abstract: The most egregious error in the abstract comes from the line arguing that today's bail reform advocates are "seeking to erase the Bail Clause from the Bill of Rights." This is simply false; instead, bail reform advocates are seeking merely to uphold equal, but until now ignored legal principles, such as due process and equal protection to a bail process that is typically done without legal standards. Moreover, it is not simply a question of using one constitutional provision over another. Indeed, the United States Supreme Court analyzed the federal detention system in 1984 by addressing three separate claims implicating substantive due process, procedural due process, and the Excessive Bail Clause. Judicial interpretation of the 8th Amendment is ripe for renewed inspection (and, indeed, I predict a wave of cases that could overturn a great much of America's 8th Amendment jurisprudence if simply brought forward), but that is not the primary request being made by bail reformers today. Today, bail reformers are focusing on fairness in general as well as compared to others, which means the focus is on due process and equal protection. This argument – that courts should analyze all current bail claims – no matter how they are brought – under the 8th Amendment's Excessive Bail Clause, is perhaps the primary legal claim advanced by attorneys for the bail insurance companies. In short, this is not some neutral policy document.

The Key Points: There are three key points, but the key point based primarily on the history is simply wrong. Key point number one says, "The fundamental purpose of bail is to tie a defendant to a jurisdiction and guarantee his appearance at trial." This is what the bail industry often articulates as the purpose of bail, which is based on an inaccurate belief that bail means money (which is, more accurately, a condition of release or a sub-condition of the condition to return to court.) I spend all of two papers (*Fundamentals of Bail*,[1] and *Money as a Criminal Justice Stakeh*older[2]) outlining the historical and legal basis for bail being correctly defined as

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[1] http://www.clebp.org/images/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf

[2] http://www.clebp.org/images/2014-11-05_final_nic_money_as_a_stakeholder_september_8,_2014_ii.pdf

process of conditional release. Why do we have bail? To release people, just as the purpose of "no bail" is to provide a mechanism to detain people. Why do we have conditions of bail? To provide reasonable assurance of both public safety and appearance. Historians, legal scholars, researchers, courts, and even the authors of the national standards on pretrial release and detention point to a three-fold purpose of bail in virtually every state and the federal system, which is to: (1) maximize release; (2) maximize public safety; and (3) maximize court appearance.

Moreover, even if bail is defined as money, it is never used to "guarantee" anything, as Heritage claims. The Supreme Court has been clear that we may only require reasonable assurance, and not *complete assurance* of either public safety or court appearance. A guarantee of defendant behavior is likely only attained through detention, or "no bail," which is the opposite of bail. The bail industry likes to define bail as money simply because it makes it easier to claim that money – in particular, secured financial conditions – has a long history. The industry likes to focus on court appearance and leave out public safety and release simply because its business model has nothing to do with public safety and greatly interferes with the release of bailable defendants.

Key points two and three are no better. Number two implies that the history does not support an argument that bail practices that result in incarceration based on poverty violate the 14th Amendment, but the history actually shows that whenever bailable defendants were denied release for any reason, bail reform has happened. The third point says that bail reform is a policy issue that should not be resolved in the courts; this is completely wrong, as legal claims – such as claims that bail practices violate Equal Protection and Due Process – must be decided in the courts.

The Conclusion: The conclusion begins by saying, "Money bail has deep historical roots in Anglo-Saxon law and custom. Bail emerged to solve a problem we still grapple with today – balancing the general right of defendants to pre-trial freedom with the need of society to protect against flight and ensure punishment." I have already mentioned how "money bail" (meaning "cash bail" as found in the title) as a term used to describe secured financial conditions does not have a deep history at all.

But the second sentence, describing a balance designed, in part, to "*ensure punishment*," is absolutely wrong and, frankly, so monstrously ridiculous

that it has never been articulated in that way before. Throughout my papers (based on the history, law, research, and national standards) I describe the balance as one between release, court appearance, and public safety. The Heritage statement leaves off public safety (typical of bail industry documents for an industry that does not attempt to work in the world of public safety) and then, amazingly, adds the line about punishment. This is disastrously inaccurate, and this paper could be discarded on that basis alone. Even the bail industry would agree that some defendants will have their charges dropped or be acquitted; bail allows release so that defendants can help with their own defense. There is simply no basis for saying that bail has anything to do with ensuring punishment – indeed, bail designed to punish or to otherwise make it easier to punish (such as, for example, as a "penalty" for the charge or by coercing pleas) is clearly unconstitutional. If anything, one of bail's main purposes, to provide a process of release, is likely necessary to ensure that defendants are *not* unlawfully or unnecessarily punished, the opposite of what Heritage claims. The line shows a complete misunderstanding not only of bail, but of the entire American criminal justice system, and it indicates that maybe – at least for bail – the Heritage Foundation should not even be allowed to discuss constitutional matters.

These four things, alone, point to a severely flawed history document, which can only be attributed to an attempt to fit the history into the bail industry's legal agenda.

In between these four main points, though, are a number of other misleading and slanted statements. I'll use numbered paragraphs to address each briefly.

1. First is the obvious tie to the for-profit bail industry and the insurance companies that argue for "cash bail's" continued existence. In addition to whatever slant you can discern from the title, abstract, key points, and conclusion, it is clear this document was possibly commissioned, or at least molded or guided by bail insurance company rhetoric. If not, then it is a fascinating and almost incalculable coincidence that Heritage has written a document so fully supporting the bail industry's claims. Nevertheless, I know enough about the history of bail and the various sources and citations needed to create one that I can spot a bail industry version versus one based on historical fact. When the industry attempts a history (they have attempted one in the past:

https://www.blogger.com/blogger.g?blogID=6699700212392111557#editor/target=post;postID=8276391451049442377;onPublishedMenu=allposts;onClosedMenu=allposts;postNum=17;src=postname), it uses only certain sources – typically sources that are innocuous, such as my original history paper, or Duker, but leave out any sources that paint the industry or money bail in a bad light, such as my later history documents or a variety of other secondary sources critical of money bail.

In some cases, Heritage uses original or primary sources as citations for a line of historical events. But creating a line of historical events by using only primary sources would be near impossible; instead, it is clear that they used secondary sources to understand the line of events, and then only cited to the primary sources. An example is citing to the Assize of Clarendon. There is likely no way that anyone working on their own would say, "I wonder if the Assize of Clarendon has anything to do with bail?" Instead, various secondary sources, including my own, describe it, but most of those sources are not cited, perhaps not to appear to have over-relied upon only one or two secondary sources, or perhaps to make the document look more "official" by citing only the primaries. Nevertheless, various secondary sources are crucial to creating a list of historical events, but those secondary sources often make the case against commercial bail; accordingly, citing to original sources only is misleading and likely only benefits the industry. Because the Heritage document skips recognizing the various secondary sources that it clearly used to create this history, it avoids directly pointing to sources critical of the commercial bail industry.

Interestingly, and perhaps to give some appearance of independence, this document does not cite to an earlier history written by a professor who has acted on behalf of the bail insurance industry in various court cases. But it also does not cite to any of my more substantive articles on the history of bail, most likely because those documents show a history that is unflattering to the industry. Indeed, in an attempt to stay far away from me as possible, they have even decided to call this the "third wave" of bail reform, thereby avoiding my documents describing the "third generation" as well as most of Professor John Goldkamp's work, in which he coined the term "generations" of reform. Finally, though trying to remain neutral, the authors

apparently cannot help but to use certain bail insurance language, such as calling bail reform advocates of the 1960s "liberals" (instead, bail reformers then were concerned with the detention of bailable defendants, which was contrary to the history of bail as well as both state and federal law, and which represents both a liberal and conservative view) as well as using the phrase "get out of jail free card," which has been, until now, exclusively used by the commercial bail industry.

2. In the very first paragraph, Heritage says, "Money-bail practices were well known to the Framers as they drafted the Constitution and the Bill of Rights," thus, once again, implying that "money bail" in the form of secured financial conditions was well known to the Founding Fathers. It also implies that the Framers understood that bail did not need to be affordable. But historical documents from colonial America point to the use of personal sureties and what we call unsecured bonds, or "recognizances" to effectuate the release of bailable defendants. As I wrote in my *Money* paper about the colonial period,

> Excessiveness rarely played a factor in hindering that release to [personal sureties]. In a review of the administration of bail in colonial Pennsylvania (1682-1787), author Paul Lermack concluded that 'bail . . . continued to be granted routinely . . . to persons charged with a wide variety of offenses . . . [and] [a]though the amount of bail required was very large in cash terms and a default could ruin a guarantor, few defendants had trouble finding sureties.' This is likely because '[t]he form of bail in criminal cases, all of the common law commentators agree, was by recognizance,' that is, with no requirement for anyone to pay money up-front. Sufficiency was often determined by requiring sureties (i.e., persons) to 'perfect' or 'justify' themselves as to their ability to pay the amount set, but they were not required to post an amount prior to release. Instead, the sureties were held to a debt that would become due and payable only upon their inability to produce the accused. Because the sureties were not allowed to profit, or even

> be indemnified against potential loss, bonding fees and collateral also did not stand in the way of release.

This is not to say that there were not aberrations. In a footnote, I cited Devine and quoted Lermack as writing, "Provision was sometimes made for posting bail in cash, but this was not the usual practice. More typically, a bonded person was required to obtain sureties to guarantee payment of the bail on default."

As noted by Devine, Blackstone indicates that it was the English system of personal sureties and promises or pledges – rather than upfront payments – that took hold in early America. Indeed, the release of bailable defendants was so important that delaying or refusing bail (thus leading to detention) of a bailable defendant was considered a crime in colonial America. Divine wrote:

> Blackstone, writing in the last decade of America's colonial period, explains the workings of the bail system known to the founders of the United States. A suspected offender who was arrested was brought before a justice of the peace. After examining the circumstances, unless the suspicion was completely unfounded, the justice could either commit the accused to prison or grant bail. A justice of the peace who refused or delayed bail in the case of a suspect who was legally eligible for it committed an offense. Requiring excessive bail was also prohibited by the common law. However, Blackstone explained, what constituted excessive bail was left to the court upon considering the circumstances. Granting bail consisted of a delivery of the suspect to sureties upon their giving sufficient security for appearance. The individual bailed merely substituted, Blackstone remarked, their friendly custody for jail.

After reading all of the relevant sources, I remain convinced that this historical system, known as a system of "recognizances," is the system in use in both England and the American Colonies. Blackstone defined a "recognizance" as "an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, to

keep the peace, to pay a debt, or the like." Divine summarized Blackstone when discussing how a recognizance applied to bail, writing that,

> Specifically, a recognizance was an obligation to pay a specified sum entered into before an authorized magistrate. It was undertaken, however, subject to a condition of performing a specific act, and performance voided the obligation in force. It differed from a bond only in the technicality that a bond created a new debt while a recognizance merely acknowledged on the record an existing one. When employed in bail the condition for voiding the obligation to pay was producing the accused for trial. This the bail sureties acknowledged on the record before a magistrate a debt in the required amount, the debt was subject to the condition that they make the accused available as specified. If they then produced the accused, the debt was voided. If not, it was declared forfeit by the magistrate and the sureties were obliged to pay their pre-existing debt.

Other common law commentators and bail scholars conclude the same, using the language of recognizances, pre-existing debts, promises, and pledges. For example, Petersdorff, who in 1824 wrote an exhaustive treatise on both civil and criminal bail in England, describes the process of bail, defined both as the surety and as the process of release itself, or the "recognizance," as a process in which sureties became bound to indebtedness (a promise to pay) to a sum based on the value of their property and to be levied against them in the event of default. Specifically, he writes: "the principle and bail usually acknowledge themselves respectively to owe the King a named sum . . . payable on the contingency of the defendant's omitting to appear at the appointed place of trial." This is the system – a system of promising to pay some amount, but not paying it up-front – that was known to the American colonists.

Indeed, Paul Lermack, writing about bail in colonial Pennsylvania, explained that even when a defendant was required to "post security in advance," this meant only finding sureties who would be on the hook by promising to pay some amount of money due only upon

default. Sheriffs and Judges main criteria for selecting or approving sureties was their ability to pay upon default. And, of course, there were big differences between civil bail (which often involved some debt certain, sometimes required payment up front, and differed among plaintiffs, who were more likely to be allowed to serve as their own recognizance or with fictitious sureties, and defendants) and criminal bail. Likewise, there was bail for witnesses in criminal cases (who carried the prosecution), which also used the recognizance system. This system is quite foreign to us now, and included the use of so-called peace bonds, which required a person to find sureties to guarantee future behavior, apparently without being charged with anything (sort of like a civil protective order). However, this system remained in place until the early to mid-1800s, when the lack of personal sureties caused judges concern over the detention of bailable defendants. Some authorities differ on whether the defendant himself was ever required to promise anything, but I have seen reference to cases (and references in other sources, such as Petersdorff, above) in which defendants were required to promise different sums than the sureties. And yes, this whole system did lead to forfeitures, and sometimes to the government finding that the sureties were actually insufficient, but this never happened enough to cause its collapse.

Setting "impossibly high" bail in the era of recognizances (personal sureties and unsecured bonds) could still lead to detention when no surety would agree to supervise a defendant. Moreover, I have seen cases – I have no time to list them here – showing that courts still had discretion to detain upon showings of whether the sureties were sufficient. In one case, the defendant was remanded because he supplied an affidavit in which he said how much money and property he had (along with affidavits from the sureties), and the judge found it to be insufficient given the amount he wanted them to promise. This is likely an abuse, and certainly when the amounts seemed astronomical, that is precisely when England enacted its excessive bail clause. One American commenter, though, mentioned that in at least on colony, officials gradually increased the promised bail amounts over time, likely due to the fact that the money – as with unsecured bonds today – was considered somewhat ritualistic, sometimes with little or no intent to collect in the event of a fault. One is likely to see other aberrational cases throughout England and America, especially given

the Colonies' differing practices on who was to even be allowed to bail. No part of bail is entirely clean.

In fact, if you read my *Money* and *Model Bail Laws* paper, you see how even though England used various "risk" factors to determine bailability, America generally decided on bright line categories of bailability, and only allowed the so-called "risk factors" to be used in determining the amount of the financial condition. It is quite likely that this is what ultimately caused what judges felt to be a need to detain otherwise bailable defendants in America.

The Heritage document uses a Yale Law Journal Note as one of its main citations, but even that Note recognized that forcing people to pay bondsmen or put up collateral "represents a complete reversal of the suretyship concept," which did not allow payment or indemnification under the theory that "anything that encouraged the surety to relax his vigilance was held illegal." There will be more on that Note later on.

3. In the first paragraph, Heritage also says that the "Framer's primary concern in drafting the Eighth Amendment's [Excessive] Bail Clause was to ensure that bail not be set unreasonably high." True bail histories note the entire lack of any real debate on the Excessive Bail Clause, and there was certainly no mention of the word "reasonable." Indeed, because it is so sparse, I include the only statement made concerning the Clause here: "Mr. LIVERMORE.—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges?"

   Following the explanation of other historians, it appears that the inclusion of the Clause was most likely to ensure that the known abuses from England – i.e., the pretrial imprisonment bailable defendants – were kept from the American system in whatever way possible. There is actually a very interesting, though somewhat complicated, history of events concerning the Excessive Bail Clause in America, and you would think that any bail historian seeking to explain the Clause would at least mention it. Instead, however,

Heritage makes a conclusory and erroneous statement that somehow the Framer's meant for bail to be available and yet not affordable.

4. In the third paragraph on page 2, Heritage argues that advocates hoping to make bail affordable should work through legislatures, and not the judiciary. This completely misapprehends those who file suits in the courts, as those people are making legal claims. Of course, the proper place to determine whether the Due Process or Equal Protection Clauses require affordable bail is *precisely* through the courts. Later in the document, Heritage refutes its own argument by making legal claims that would necessarily require the courts to resolve. The bail insurance companies hope to keep bail reform out of the courts and in the legislatures because the legislatures have been favorable to commercial bail for decades. A reason for this is that one cannot contribute to a federal judge's election, for there is none, and one cannot "lobby" the federal courts.

5. Heritage says, also on page 2 under "The Origins of Cash Bail," that "The surety had to put up a pledge equal to the amount of the potential penalty which would be forfeited if the accused failed to appear." The crucial term used by Heritage is "put up," which implies the up-front payment. For this proposition, Heritage cites to a Yale Law Journal Note, which on the page cited, is actually talking about post-Norman Invasion practices rather than the pre-Invasion practices discussed by Heritage (which is a pretty big error for a historical document, but not worth discussing here). The line reads, "sheriffs commonly released prisoners either on their own recognizances, *with or without requiring the posting of some sort of bond*, or on the promise of a third party to assume personal responsibility for the accused's appearance at trial." This one line, more particularly the italicized phrase, is something that I struggled with as well, as it was the only line from any source I encountered in any of my research that could even potentially mean that up-front monies were routinely required. After all of my research, however, I concluded that for this line to be correct, it had to read not as a requirement to post money up front, but rather a process following the same process described in all the other sources of posting the bond or recognizance by using personal sureties making promises or pledges to lose property upon default.

Indeed, the author of the Yale Note cites only to a book by Pollock and Maitland (which I have), and that authority, while not as clear as others on the issue, was primarily useful for describing the tithings and hundreds systems of cooperative elements often necessary to keep recognizances and the personal surety system in place. Giving Heritage the benefit of the doubt, I would say "putting up a pledge," if read to mean "making a promise," is historically accurate. The Yale Note, while necessary for me to read, was really only referencing the history in passing in order to make certain claims later. It is a Note, after all, likely written by a student, and I am sure that – unlike me and my papers – this point was not one that the author felt needed to be completely cleared up. And again, the author of the Note later correctly states that the concept of bail bondsmen forcing defendants to put up collateral is "a complete reversal of the suretyship concept."

6. Also on page 2, Heritage cites to my first history document to say that subsequent centuries in England saw reforms. Unfortunately, they do not cite to either my *Fundamentals* or my *Money* paper, in which I explain the trend from all those reforms, which is that anytime you see the wrong people in or out of jail, history demands correction in the way of reform. Most reforms dealt with the situation when so-called "bailable" defendants – those who were given a right to release – were nonetheless denied freedom. Because my *Fundamentals* and *Money* papers do not paint the bail industry in a very favorable light, they are not cited in the Heritage document.

7. Heritage repeats an error found in Duker by calling the Petition of Right the Petition of Rights, which is a small matter to some, but a lot like calling our Constitution the Constitution of the United State of America. The error in Duker is really minor, in that his history is, in many other ways, an excellent source.

8. On page 2 and 3, Heritage says that in England by the end of the 17th Century, the "right to release was . . . unrelated to the ability of the accused to meet the requirements of bail – that is, if sufficient surety could not be obtained, the accused was most often detained." Actually, England did bail completely differently than we think of it here in America. They used various risk factors, such as criminal history and type of charge to determine bailability to begin with. If one was deemed bailable, he or she was expected to be released. It is

true that in exceptionally rare circumstances when a person could find no surety, it might lead to detention, but that simply didn't happen much given the way England did its system of suretyship. In America, on the other hand, we settled on bright line demarcations of bailability in the first instance, and then allowed judges to use the various "risk" factors only to determine conditions of bail, which ultimately led to detention based on a condition like money. This fact did not matter much in colonial America, as we had abundant personal sureties. But when we began to see diminishing personal sureties, more and more people were detained. Only then did we begin trying to see if the defendant could "self-pay," and only then did we realize that the typical defendant could not.

9. On page 3, Heritage states that in England in the 17th Century, one of the purposes of pretrial release was to ensure that wrongful acts be punished, which really isn't true. That goal was likely an overall goal of the Crown, but pretrial release was first done post-Norman Invasion to avoid using jails while remaining somewhat in control of defendants. And, in any event, America's purposes underlying the process of bail were changed from the English bail system to better reflect American notions of liberty and freedom.

10. Also on page 3, when discussing bail in early America, Heritage says, "by the dawn of the Republic, custom had already developed a strong presumption favoring pretrial release by means of a bail payment." Again, this is wrong as all the historical documents point to a personal surety system based on promises and pledges, and not "bail payments," in order to obtain release. The right to bail, or release, was considered "absolute."

11. These days, nobody, and I mean nobody cites to *Taylor v Taintor* for substance except the commercial bail industry. Well, now Heritage does, too.

12. Also on page 3, Heritage takes pains to mention how a sheriff might get into trouble for not setting bail well enough to keep a defendant from escaping, but it leaves out the discussion, made earlier and observed by Blackstone and others as an equal, if not more important historical theme, that sheriffs would be held liable for keeping an otherwise bailable defendant in jail as well.

13. Also on page 3, Heritage says, "In America, as in England, the fact that a defendant was accused of a bailable offense did not guarantee his automatic release." This is technically true, but as I mentioned before, virtually all bailable defendants obtained release during the colonial period due to our initial use of recognizances and the personal surety system. There are extremely rare cases in which the defendant knew absolutely no one who would make the requisite promises for him, but these cases were rare exceptions until later in America.

14. Also on page 3, Heritage speaks of the factors judges are to consider at bail, implying that those factors might lead to the detention of bailable defendants. As mentioned before, while it is true that America developed such factors, America, unlike England, settled on bright line demarcations of bailable and unbailable defendants and only allowed the factors to determine the amount of the financial condition, and not bailability. This was a major shift from England, which used those factors to determine bailability in the first instance. This whole discussion is slightly confusing, but supremely important and so I mentioned it in my *Money* paper, but elaborated on it in my *Model Bail Laws* paper.[3]

15. Heritage says, also on page 3, that "pre-trial release was not a 'get out of jail free card' – it was conditioned upon the ability of the accused to post a reasonable bail and provide adequate sureties that he would return to face judgement." In addition to using the bail insurance phrase, "get out of jail free" (which, until now, has mostly only been used by the bail industry), this statement is wrong for the reason that in early America nobody was forced to "post" money or cash bail, as we still operated under the personal surety system.

16. At the end of page 3 and beginning on page 4, Heritage mentions that the states' constitutions included "strong presumptions favoring pretrial release through bail." As mentioned before, the states created bright line demarcations between "bailable" and "unbailable" defendants. Most states have said through case law that the right to

[3] http://www.clebp.org/images/04-18-2017_Model_Bail_Laws_CLEPB_.pdf

bail is "absolute," rather than a "strong presumption." Whenever a state creates a class of unbailable defendants through what is known as a "detention eligibility net," a court simply cannot decide to avoid that designation whenever it chooses by setting a release condition designed to keep a defendant in jail. This is the essence of a recent federal ruling in Harris County, Texas, and it only makes sense when one reads a history other than the one presented by Heritage. Heritage says America did nothing novel, but moving from a system by which courts could assess a defendant for certain risk and then declare him bailable, to a system that made that declaration upfront was incredibly novel, and it helps explain how America came to tolerate release conditions designed to detain or resulting in pretrial detention.

17. On page 4, Heritage skips from colonial America to the rise of commercial bail bondsmen without adequately explaining why that was necessary or assessing the commercial system historically. The slow move from a promise to produce someone to merely a promise to pay, as they note, was actually a long process dealing with the slow erosion of rules against profit and indemnification in the bail system to address the reduction of personal sureties. Also in the 1800s, courts experimented with requiring defendants to self-pay financial conditions, but that obviously didn't work and likely seemed wholly impracticable at the time. Because Heritage does not understand the personal surety system, Heritage fails to explain the most dramatic shift in America from what we call today "unsecured bonds," to what we call today "secured bonds."

18. Heritage cites to *Stack v. Boyle* to argue that release is always conditional (it is, as every release in which a case remains has the condition to return to court), but leaves out an explanation of why all the "bail equals release" language in that opinion is crucial to understanding bail historically.

19. When discussing bail in the Supreme Court, Heritage leaves out the many cases I have written about showing how the Court defined bail primarily as a process or procedure of conditional release and not money. Its primary emphasis on *Carlson v, Landon* – a case most people do not talk about – is likely justified by the fact that *Carlson* can be used to erode the Supreme Court's other statements about bail; that is, it can be used to support the for-profit bail industry's

arguments. Because *Carlson's* statements about criminal bail were dicta in a civil case, however, most people only rely on the opinion in *Salerno* to provide the context from *Carlson.* By now we all know that not every class of defendant is entitled to bail. It is how we do "bail" and "no bail" that causes constitutional issues to arise.

20. Heritage cites to an article by Caleb Foote titled, *The Coming Constitutional Crisis in Bail*, to make a minor historical point, but leaves out Foote's main thesis from that paper, which was that because bail failed to account for indigent defendants, the Excessive Bail Clause should be read to include a right to bail "secure against both legislative and judicial abridgement." Moreover, Foote wrote that "existing interpretations [of the 8th Amendment] which exclude the poor from pretrial release are seriously out of step with current constitutional concern for the poor." His position was that such blatant discrimination against the poor in America could not stand and thus concluded: "From the analysis of equal protection I conclude that extension of the *Griffin* rule to bail is particularly appropriate, and that pretrial detention of an accused who would go free but for differences in financial circumstances is a violation of the equal protection clause." Saying in the footnote that Foote was "highly critical of money bail" is a fairly big understatement. In fact, most academics have been highly critical of money bail since the 1920s, but the Heritage document does not include any of them in the text.

21. Heritage cites to Packer to say that judges have to decide on "bail or jail" or other conditions of release. Packer apparently used that phrase in 1964, and likely reflected the belief, at the time, that bail meant release. It is only recently in American history that we have become accustomed to bailable defendants being detained pretrial. By the way, Packer also wrote, "It is important, especially in a society that likes to describe itself as 'free' and 'open,' that a government should be empowered to coerce people for what they do and not for what they are." Most people affected by our discriminatory bail practices today are punished for what they are: poor and people of color.

22. Heritage's discussion of the changes in American criminal justice – including better policing – could just as easily provide the basis for an argument for the elimination of financial conditions of release for flight altogether.

23. In footnote 57, Heritage says the Supreme Court has sent mixed signals concerning the presumption of innocence. This means that Heritage does not understand the presumption of innocence, has not read my paper on the presumption of innocence, does not understand the ABA Standards when discussing the presumption of innocence, does not fully understand the Supreme Court's opinion in *Bell v. Wolfish,* and has been listening to the bail industry, which used to proclaim loudly that the presumption simply did not apply to bail. Indeed, Heritage claims that judges "cannot be blind to the fact that several government officials, and often a grand jury, have already drawn conclusions about the likelihood of the defendant's guilt." This statement, however, only further shows their ignorance of the presumption, which should be seen as a concept transcending the trial and operating to advance defendants through the justice system while criminal justice actors perform various justice-related activities "with no surmises based on the present situation of the accused." *Taylor v. Kentucky* 436 U.S. 478, 485 (1978). It is precisely because other actors in the criminal process have made findings that could bias a defendant that we must employ the presumption at all times.

24. In its section on the "first wave" of reform, Heritage conveniently leaves off the four decades of research into and criticism of the commercial surety system. It dismisses the Kennedy quote concerning money as "simplistic," and yet that quote, to me, best summed up the entire first conference on bail reform in the 1960s. Based on the citations in this section of the Heritage document (mostly including sources from the second generation of bail reform and with no cite to the Attorney General report or any full explanation of the legislative history of the 1966 Act), I would say that Heritage has no idea what the first generation of bail was all about. Quite differently from the way Heritage portrays it in this document, the question of what to do about dangerousness was raised but quickly dropped from consideration of any reforms at the time. Moreover, recounting that "the sole purpose of bail laws must be to assure the presence of the defendant," without even some small reference to the fact that in 1966 public safety was not considered to be a constitutionally valid purpose for limiting pretrial freedom, is incredibly misleading. Again, a purpose limited to court appearance is the bail industry's purpose, not the legal or historical one articulated today.

25. When discussing the "second wave" of reform, Heritage mentions the "liberal release agenda of the 1960s," but the reforms in that earlier generation were designed primarily to bring America back toward its original constitutional foundations of bail as release. The fact that Heritage calls a trend in a historical document "liberal" is telling, but, in any event, following the constitution and statutes as written is about as conservative as I can imagine.

26. Heritage's discussion of the "second wave," as they call it, also suffers from serious omissions. The Bail Reform Act (BRA) of 1984 was attempting to fix not only the perceived inadequacies of the 1966 Act, but also to eliminate money's tendency to get in the way of both release and proper or lawful detention. No, the BRA did not eliminate money altogether (back then, there was nowhere near the amount of research showing the devastating effects of money or its mere ineffectiveness to act as a motivating force), but the BRA made it clear that money would not be allowed to detain. Heritage opts to cite to a misleading Committee report statement essentially implying that judges could still set unattainable money conditions under the BRA, but leaves off the rest of that statement that makes it clear that when a defendant does not have the money, it triggers the detention provisions of the BRA. This is a seriously misleading omission, likely made because the concept of treating unattainable bond amounts like detention orders is the essence of a recent federal district court ruling against the bail industry in Harris County, Texas. Moreover, subsequent court decisions have also made it clear that unattainable financial conditions should never happen under the BRA, and if they do, they trigger the statutory detention provisions. Today, the federal system remains primarily an in-or-out system, with minimal or no use of financial conditions. To get the best idea of how America began to implement processes for the increased intentional detention of defendants starting in the 1960s, see my *Model Bail Laws* paper, which includes legislative histories of both the D.C. Act of 1970 and the BRA of 1984.

27. On page 7, Heritage says that people argued unsuccessfully back in the 1960s and the 1980s to eliminate money bail, apparently to imply that the same arguments should be ignored today. In my opinion, after studying the historical documents at length, I think the fact that we

retained money in the bail system was only because we did not feel we had the answers as to how to do "bail" and "no bail" in a moneyless system. America used to have financial conditions of probation, but we slowly eliminated them when we learned that money was ineffective and unfair. Today, we are learning the same thing about money used in the bail process. Moreover, as I explain in my *Model Bail Laws* paper, today we now know precisely how to do release and detention in a moneyless system.

28. Heritage uses all of this misleading historical information to bolster its legal arguments, which, not surprisingly, mirror those advanced by the bail insurance companies. To the extent that this flawed history is used to do that, then their legal arguments are similarly flawed. To the extent that Heritage presents a "history" to argue that these issues are primarily policy arguments, and not legal ones, then they have certainly not read or understood any true histories of bail, which show, instead, that the law and the history are intertwined. Indeed, the arguments they make on pages 7 and 8 – including several legal arguments complete with cites to various court opinions – illustrates my point that these are the kinds of things that must be decided in our courts.

29. Heritage perhaps unwittingly ends the document by raising what I believe to be the most important issue facing America today, which is answering the fundamental questions: (1) whom do we release; (2) whom do we detain; and (3) how do we do it in a moneyless system. Nevertheless, the thrust of this history document is an argument to retain the status quo. Unfortunately, that status quo – a money bail system that simultaneously interferes with both release and detention – currently allows states to declare a group of persons eligible for detention, but then tolerates those states using money to do an "end run" around that declaration by using money whenever a judge sees fit. This is tolerated despite the clear unfairness and ineffectiveness of money as a condition of release. This is clearly unconstitutional, and thus the status quo must be changed. By far, the biggest lesson I learned from studying the history of bail was that, given the right markers, bail reform becomes inevitable. All of those markers are present today in America, but none of them are even mentioned by Heritage. Studying the history of bail eleven years ago, I predicted a massive bail reform movement. Heritage seems surprised.

This Heritage document should never be seen as a proper history of bail. The slant is too obvious, the ideology too apparent, and the influence of the for-profit bail insurance industry too blatant. But it is also riddled with errors. From merely looking at the title, the abstract, the key points, and the conclusion, we can see that it has been molded by the for-profit bail industry and written by persons desiring not to delve deeply into the documents required to craft a worthwhile historical piece, but rather to advance an argument for a particular ideology or industry. The bail insurance companies will not doubt cite to it, especially in their zeal to keep the courts from deciding legal issue and to retain "cash bail." Nevertheless, even the most neutral and detached person in this generation of reform should object to the Heritage document as a transparent revision of history that either intentionally or unwittingly helps a single industry make money at the expense of our American freedoms.