Moreover, the "sufficient sureties" clause of any particular state right to bail provision should not be read as limiting or eroding any overall liberty interest created by that provision.

Through one lens, the history of bail in England and America demonstrates a steady advance toward pretrial liberty by restricting the discretion of bail setters to detain pretrial and to curb abuses resulting in the detention of bailable defendants. (*See* NIC, *Fundamentals of Bail*, at 21-36; NIC, *Money as a Criminal Justice Stakeholder*, at 11-30; CLEBP, *Model Bail Laws*, at 26-30, 44-81). From ancient times, bail evolved in England to provide customary categories of "bailable" and "unbailable" defendants. (*See* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 45 (1977-78); *see also* Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L. J. 1139, 1154 (1971-72)) Nevertheless, discretionary abuses by the sheriff bail-setters, including denying the release of bailable defendants or requiring payment as a precondition to release, prompted Parliament to pass the Statute of Westminster in 1275. (*See* 3 Edw., ch. 15 (recounting abuses and providing for release "by sufficient surety"); Duker, *supra*, at 45-49; Elsa De Haas, *Antiquities of Bail*, at 91-97 (AMS Press, NY 1966)) The Statute "eliminated the discretionary power of the sheriffs and local ministers by carefully enumerating those crimes which were not replevisable [unbailable] and those crimes which were replevisable [bailable] by sufficient sureties without further payment." (Duker, *supra*, at 46 (internal footnotes omitted)) More dramatically, the Statute *required* the release of bailable defendants and, according to Blackstone, actually made the detention of bailable defendants a crime. (*See* Meyer, *supra*, at 1156; De Haas, *supra*, at 95-96; F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives*, at 4-5 (Praeger Publishers, 1991)) Historically, the actual release of bailable defendants was made possible through the use of unpaid and unreimbursed personal sureties (a person or persons taking responsibility for the defendant) and recognizances (the use of a third-party promise or pledge to pay an amount due only upon default and not through a condition precedent to release, akin to what we call unsecured bonds today). (*See* Devine, *supra*, at 5).

Thus, the inclusion of the phrase "sufficient surety" to the Statute of Westminster must be read with the overall thrust of the Statute in mind, which was to dramatically reduce discretion at bail by categorizing certain persons as bailable and then requiring their release. One bail researcher has termed the historical rule requiring the release of bailable defendants "The Big Rule," simply because throughout history anything violating that rule by getting in the way of the release

of bailable defendants was deemed an abuse and led to reform. (NIC *Model Bail Laws, supra*, at 44; PJI, *The History of Bail and Pretrial Release*, at 3-4 (PJI 2010) (chronicling abuses and resulting reforms)

Importantly, this included the detention of bailable defendants through the means of finding sureties "insufficient." Even though sufficiency might be seen as some remnant of power or discretion allowed to bail setting sheriffs after 1275, common law commentators who have discussed the phrase have uniformly written that when the accused offered sureties, an examination of the sufficiency of those sureties should not lead to detention. Thus, Chitty wrote: "In criminal cases . . . bail is absolute in the first instance. The magistrate may, however, examine them on oath as to the sufficiency of their estate. And it is said, that if he be deceived, he may require fresh sureties." (J. Chitty, A Practical Treatise on the Criminal Law, at 82, *100, 101 (William Brown, Philadelphia 1819) Nevertheless, after warning of the offense of taking "insufficient bail" (unless the defendant appears in any event), Chitty writes: "On the other hand, justices must take care that in cases they are bound by law to bail the prisoner, they do not, under the pretense of demanding sufficient surety, make so excessive a requisition, as in effect, to amount to a denial of bail, which is a grievance expressly prohibited [by the excessive bail clause and common law crimes including wrongful imprisonment]." (*Id.* at 84, *102-03)[1]

Likewise, Petersdorff writes, "But extreme caution should be observed, that under pretense of demanding sufficient sureties, the magistrate does not require bail to such an amount as is equivalent to an absolute refusal of bail, and in its consequences, leads to a protracted imprisonment." (Charles Petersdorff, A Practical Treatise on the Law of Bail in Civil and Criminal Proceedings, at 512 (London, Jos. Butterworth & Son 1824)) In discussing "sufficient" bail, Hawkins writes mostly of the numbers of personal sureties allotted to any particular offense and that, at least in capital cases, they be "sufficient" to answer the sum to which they are bound. Nevertheless, Hawkins essentially repeats Chitty's and Petersdorff's general warning that, "Justices must take care, that under pretense of demanding sufficient surety, they do not make so excessive a demand, as in effect amounts to a denial of bail; for this is looked on as a great grievance." (William Hawkins, A Treatise on the Pleas of the Crown, Vol II, at 139 (London, 1824))

This system of bail and no bail followed into America, and, as in England, the rule favoring, if not demanding the release of all bailable defendants was given effect through the personal surety system, the use of recognizances, and the notion that

[1] The burden was on the defendant, however, to offer "bail," and he could be detained if he did not make the offer.

anything standing in the way of release of bailable defendants was an abuse. In Colonial America, it has been reported by at least one researcher that virtually all defendants in the state studied were able to find sureties and were thus released (*See* Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania,* 50 Temp. L.Q. 475 at 504-505 (1977))

Indeed, America did even more to eliminate the kind of discretion at bail that might limit release. While England gradually enacted a complicated set of rules, exceptions, and grants of discretion that governed bailability, America leaned toward more simplified and liberal application by granting a nondiscretionary right to bail to all but those charged with the gravest offenses and by settling on bright line demarcations to effectuate release and detention. According to Meyer, early American statutes "indicate that [the] colonies wished to limit the discretionary bailing power of their judges in order to assure criminal defendants a right to bail in noncapital cases." (Meyer, *supra,* at 1162) Risk factors – i.e., the sorts of things like criminal history or character of the accused – used by bail setters in England to determine bailability, were only allowed to affect the amount of the financial condition of release, which, as mentioned previously, was in the form of a recognizance or what we might call today an unsecured bond with personal sureties. (*See* NIC *Money, supra,* at 19) Accordingly, even when amounts were high, they did not restrict liberty.

Thus, for much of America's history the word "bail" was equivalent to the word "release," and the right to bail was assumed to equal a right to release. This is illustrated by several U.S. Supreme Court opinions, including the opinion in *Stack v. Boyle,* (342 U.S. 1, 4 (1951)), which equated the right to bail to the "traditional right to freedom before conviction" and "the right to release before trial."

Since the mid-1800s, however, excessive bail jurisprudence has gradually and unfortunately allowed the detention of bailable defendants through courts holding, essentially, that defendants do not have the right to bail "they can make." (*See* NIC *Money, supra,* at notes 73-82 and accompanying text) While technically limited only to cases in which defendants are detained "unintentionally" (that is, the judge issues a release order and makes no record of purposeful use of a release condition to detain), for practical purposes this jurisprudence has also allowed for "intentional" detention of bailable defendants (which has always been unlawful) when judges simply make no record of intent to detain. This, in turn, has led persons to incorrectly articulate the right to bail as merely a "right to have one's bail set." This excessive bail jurisprudence is unfortunate for many reasons, but perhaps primarily because it has allowed sub rosa detention through unchecked

discretion back into a process in which Americans initially chose to include no discretion to detain except in the limited enumerated exceptions. Practically speaking, with the right record a judge can detain anyone pretrial, eroding the fundamental right to bail to mere illusion.

Current cases addressing due process and equal protection violations through the use of money bail, however, do not rely upon excessive bail analysis and apply to either intentional or unintentional detention. Accordingly, courts should recognize that apart from their own merits, these newer cases are making the American right to bail meaningful once again. By eliminating blatant constitutional violations arising from the use of secured money bonds, these cases are also forcing states to re-examine their existing right to bail provisions and detention eligibility nets for purposeful detention without money. While this may cause tension in states that believe their constitutional language is insufficient in some respect, the solution is not to allow for an "end run" around the current provisions. (*O'Donnell* district court order at 190). "If the constitutional guaranties are wrong, let the people change them – not judges or legislators." *In re Underwood*, 9 Cal. 3d 345, 508 P.2d 721 (Cal. 1973).

State supreme court cases[2] examining "sufficient surety" language in right to bail clauses are somewhat scarce, relatively recent, and fairly narrow, looking primarily at whether a denial of bail, setting a "cash only" bond, or forcing a defendant to pay a percentage bond in cash violates the "sufficient sureties" language of a right to bail provision by denying the defendant a "surety." The opinions in these cases virtually never cite to legislative or constitutional documents shedding light on the meaning of the clauses at enactment; indeed, many articulate looking for such documentation and finding none. Accordingly, the opinions in these cases often refer to the history of bail, dictionary definitions of "surety," and statements of the purpose of bail to guide their decisions. (*See e.g.*, *State v. Brooks,* 604 N.W. 2d 345 (Minn. 2000) (finding a constitutional violation); *State v. Briggs,* 666 N.W.2d 573 (Iowa 2003) (finding no violation). In 2015, the Wyoming Supreme Court

[2] I am purposefully not including state courts of appeals opinions in the following section for a few reasons. First, depending on how they are decided, they run the risk of being obliviated by a state supreme court opinion using the knowledge of bail and no bail in this generation of reform. For example, the discussion in *State v. Gutierrez,* 140 P.3d 1106 (N.M. Ct. App. 2006), seems absolutely antiquated when compared to the state supreme court's opinion in *State v. Brown,* 338 P.3d 1276, 1277 (2014). Also, courts of appeals can be complex in terms of precedential value. One case out of the Colorado Court of Appeals (*Fullerton v. County Court,* No. 02CV834 (Colo. Ct. App. 2005)) is fairly on point, but it is written by a single panel of a court that does not even have precedential value over other panels of the same court. I have also not included one high court case from New York (*McManus v. Horn,* 967 N.E. 2d 671 (N.Y. 2012), because New York does not have a constitutional right to bail, and the statute apparently does not have any phrase equivalent to "sufficient sureties."

analyzed the various relevant cases and wrote, "The *purpose of bail* proves to be the fulcrum upon which the meaning of 'sufficient sureties' is tipped one way, in favor of a broad definition, or tipped the other way, in favor of a narrow definition. In evaluating the cases from other jurisdictions that interpret 'sufficient sureties' differently, the definition ultimately adopted was informed by the stated purpose of bail in those jurisdictions. (*Saunders v. Hornecker,* 344 P.2d 771, 780 (Wyo. 2015))

The courts in these cases typically limit discussion only to the narrow issue concerning the form of bond – e.g., is a "cash only" bond considered a "surety" for purposes of the clause – and largely avoid expressly deciding questions concerning, for example, whether a cash bond deemed a surety but set at an unattainable amount would violate the constitution, likely under excessive bail analysis. (*See e.g.*, *State v. Jackson,* 384 P.2d 208, 216 (Mo. 2012) (writing that "[c]oncerns about the misuse of cash-only bail to keep a defendant in jail are not addressed by [the right to bail clause] but rather by the [excessive bail clause] of the Missouri Constitution", which was not raised)) Though rare, the denial of bail expressly discussed as a form of assurance under a "sufficient surety" clause (and not as a part of revocation) has been found unconstitutional by one at least one court (*see Simms v. Oedekoven*, 839 P.2d 381, 385, 86 (Wyo. 1992) (addressing the state's argument that denial of bail was the only "sufficient" option). State courts far more frequently hold that the denial of bail for bailable defendants is unconstitutional without express reference to sufficiency. (*See, e.g., Locke v. Jenkins*, 253 N.E.2d 45, 46 (Ohio 1969) (the right to bail is "absolute," and so refusal to set bail for a bailable defendant was unconstitutional)).

On the narrow issue of whether a form of bond (cash or cash-percentage) violates a sufficient sureties clause, the cases are split, with some declaring that cash only or cash percentage bonds violate a state's sufficient sureties clause and some declaring that they do not. (*Compare State v. Brooks,* 604 N.W. 2d 345 (Minn. 2000) (finding a violation); *State v. Hance,* 910 A.2d 874 (Vt. 2006) (same); *State v. Neal,* 14 N.E. 3d 1024 (Ohio 2014) (same) *with State v. Briggs,* 666 N.W.2d 573 (Iowa 2003) (finding no violation); *State v. Jackson,* 384 S.W.2d 208 (Mo. 2012) (same); *Saunders v. Hornecker,* 344 P.3d 771 (Wyo. 2015) (same).

Of these cases, the better rationale is found in the first group, as they correctly view the term "surety" broadly, more accurately comprehend the history of bail to be primarily concerned with liberty and the release of bailable defendants, and appear to better understand the practicality that a form of bond that tends to detain bailable defendants is no different from denial of bail altogether. If anything, a

more detailed and accurate understanding of the history of bail in England and America as well as universally true definitions of terms and phrases at bail would only bolster these conclusions that while the primary purpose of a *money condition* might be court appearance, the overall primary purpose of a right to bail clause is release, and thus the "sufficient surety" limitation should not be read to diminish that purpose. Indeed, this purpose – to foster releasee and limit detention – becomes even more acute when states enact additional exceptions to the right to bail through, for example, preventive detention provisions. *See Smith v. Leis*, 835 N.E.2d 5, at 318 (Ohio 2005) (noting "the Attorney General similarly concedes that 'the constitutional amendment, by providing for outright denial of bail [through preventive detention] further strengthens the case against achieving a *de facto* denial of bail without satisfying the rules for a true denial of bail.'").

The latter group of cases, on the other hand, improperly focuses on court appearance as the primary purpose of bail, likely due to misunderstandings between the purpose of bail when "bail" is defined as a process of release versus the purpose of bail when "bail" is defined as money. (*See Hance, supra* at 365-66 and note 5 ("*Briggs* gave short shrift to the role of bail via a surety in preventing excesses in pretrial confinement" and the opinion is "internally confusing")) The *primary* purpose of bail is to provide a mechanism for conditional release, and the primary purpose for money at bail is (and can only be) to provide reasonable assurance of court appearance. (*See Model Bail Laws, supra,* at 39) Court opinions focusing on court appearance as the primary purpose are often improperly blurring bail with one of its conditions, money.

Opinions declaring that limitations on bond forms (such as cash only) violate a sufficient sureties clause necessarily lean toward liberty, as providing options to defendants for payment of a money condition automatically increases the chances of release. Opinions declaring those limitations not to violate the clause naturally lean toward detention because fewer options equals a higher chance of incarceration. Nevertheless, courts writing these latter opinions seem to struggle with the potential effect of their holdings on pretrial liberty, and so one sees a variety of statements in those opinions as evidence of that struggle. (*See, e.g., Briggs, supra* (writing that while using a cash only bond does not violate the constitution, if a court finds that the defendant is "absolutely bar[red] his or her utilization of a surety in some form, a court is constitutionally bound to accommodate the accused's predicament"); *Gendron v. Ingram,* 24 Ill. 2d 623, 626 (Ill. 1966) (explaining that the law mandating the cash percentage bond was actually designed, in part, to foster liberty); *Jackson, supra,* at 215-17 (reiterating

that purposeful detention of a bailable defendant is unlawful, and justifying cash bonds because they help defendants avoid the commercial surety industry)).

In sum, "sufficiency" through history was never allowed to stand in the way of the release of bailable defendants, and, despite a fairly complicated history of cases splitting on the precise issue of "cash only" bonds in our system of bail, to date no American court has held otherwise.

Here is another few sentences that seem to flow from the research.

The liberty interest for purposes of equal protection or due process claims exists despite the unfortunate fact that American excessive bail jurisprudence can be used to justify the detention of bailable defendants so long as it is not done purposefully. But excessive bail is not alleged in these cases, and it should not be used somehow to diminish the liberty interest leading to relief from equal protection or due process violations. Likewise, in this case there is no allegation of a violation of the right to bail by "sufficient sureties," which might trigger some deeper analysis of the phrase. Even if there was, "sufficiency" through history was never allowed to stand in the way of the release of bailable defendants, and to date no American court has held otherwise.