

ARTICLE  
BAIL AT THE FOUNDING

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## BAIL AT THE FOUNDING

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*How did criminal bail work in the Founding era? This question has become pressing as bail, and bail reform, have attracted increasing attention, in part because history is thought to bear on the meaning of bail-related constitutional provisions. To date, however, there has been no thorough account of bail at the Founding. This Article begins to correct the deficit in our collective memory by describing bail law and practice in the Founding era, from approximately 1790 to 1810. In order to give a full account, we surveyed a wide range of materials, including Founding-era statutes, case law, legal treatises, and manuals for magistrates; and original court, jail, administrative, and justice-of-the-peace records held in archives and private collections.*

*The historical inquiry illuminates three key facts. First, the black-letter law of bail in the Founding era was highly protective of pretrial liberty. A uniquely American framework for bail guaranteed release, in theory, for nearly all accused persons. Second, things were different on the ground. The primary records reveal that, for those who lived on the margins of society, bail practice bore little resemblance to the law on the books, and pretrial detention was routine. The third key point cuts across the law and reality of criminal bail: both in theory and in practice, the bail system was a system of unsecured pledges, not cash deposits. It operated through reputational capital, not financial capital. This fact refutes the claim, frequently advanced by opponents of contemporary bail reform, that cash bail is a timeless American tradition. The contrast between the written ideals and the actual practice of bail in the Founding era, meanwhile, highlights the difficulty of looking to the past for a determinate guide to legal meaning.*

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Figure 1: Walnut Street Jail, Philadelphia, circa 1789<sup>1</sup>

## INTRODUCTION

How did criminal bail work in the Founding era? This question has become pressing as bail, and bail reform, have attracted increasing legislative, political, judicial, and academic attention. After a generation of policy stagnation and academic silence, bail is back on the agenda. The tragic deaths of Kalief Browder<sup>2</sup> and Sandra Bland<sup>3</sup> jolted the nation into awareness of the fact that millions of people are incarcerated annually for inability to post cash bail.<sup>4</sup> In the wake of that realization, bipartisan energy galvanized reform through legislation, court rules, civil rights litigation, and local advocacy in jurisdictions across the nation.<sup>5</sup> The reforms, in turn, provoked a backlash.<sup>6</sup> Now the bail reform

<sup>1</sup> James Peller Malcolm, *The Jail, Philada.* (illustration), reprinted in *The Jail, Philada.*, LIBR. OF CONG., <https://www.loc.gov/pictures/item/2004672473/> [<https://perma.cc/KCB2-Y5WZ>].

<sup>2</sup> See Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/PUD8-Q2U9>].

<sup>3</sup> See SAY HER NAME: THE LIFE AND DEATH OF SANDRA BLAND (HBO 2018).

<sup>4</sup> See Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 ACADEMY FOR JUSTICE, REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21, 21–23 (Erik Luna ed., 2017) (compiling statistics on pretrial detention due to inability to pay).

<sup>5</sup> See, e.g., Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [<https://perma.cc/TF2S-34WD>]; *The State of Bail Reform*, MARSHALL PROJECT (Oct. 30, 2020), <https://www.themarshallproject.org/2020/10/30/the-state-of-bail-reform> [<https://perma.cc/MHY7-4KS5>]. See generally PRETRIAL JUST. INST., WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING (2019), [https://www.prisonpolicy.org/scans/pji/where\\_pretrial\\_improvements\\_are\\_happening\\_jan2019.pdf](https://www.prisonpolicy.org/scans/pji/where_pretrial_improvements_are_happening_jan2019.pdf) [<https://perma.cc/5SME-4PLD>].

<sup>6</sup> See, e.g., Jesse McKinley, *The Bail Reform Backlash that Has Democrats at War*, N.Y. TIMES (Feb. 16, 2020), <https://www.nytimes.com/2020/02/14/nyregion/new-york-bail-reform.html> [<https://perma.cc/GK5J-Z7WB>]; Fola Akinnibi & Sarah Holder, *How Bail Reform, Crime Surge Mix in an Angry Debate*, BLOOMBERG (Aug. 29, 2023, 2:45 PM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/how-bail-reform-crime-surge-mix-in-an-angry-debate-quicktake> [<https://perma.cc/HF59-KWYJ>].

movement is at a crossroads. It remains to be seen whether this generation of reform will remake the nation's pretrial system or whether, like prior waves of bail reform, it will recede without dislodging the core apparatus of cash bail.<sup>7</sup>

The future of American bail may depend partly on its past. In the courts, civil rights bail litigation hinges on questions of federal and state constitutional interpretation.<sup>8</sup> When is bail "excessive" within the meaning of federal and state excessive-bail clauses?<sup>9</sup> Many state constitutions codify a right to pretrial release on "sufficient sureties" — but what are those?<sup>10</sup> Are any aspects of bail practice so "deeply rooted in this Nation's history and traditions" that they implicate fundamental rights deserving of heightened due process protection?<sup>11</sup> These questions of constitutional interpretation are currently percolating through the courts.<sup>12</sup> Their resolution will require some understanding of bail law and practice through time, and particularly at the time when the

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<sup>7</sup> For an overview of prior "generations" of U.S. bail reform, see TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., *FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM* (2014), and Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 502–07 (2018).

<sup>8</sup> Given the Supreme Court's pronouncement that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," *United States v. Salerno*, 481 U.S. 739, 755 (1987), the broadest question is what limits the Federal Constitution sets on pretrial detention.

<sup>9</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required . . ."); see *infra* pp. 1842–44 (describing and citing state constitutional bail clauses). Unless otherwise noted, references to the Excessive Bail Clause are to the Eighth Amendment of the Federal Constitution.

<sup>10</sup> See *infra* p. 1893.

<sup>11</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

<sup>12</sup> See, e.g., *Schultz v. Alabama*, 42 F.4th 1298, 1331–33 (11th Cir. 2022) (rejecting equal protection, procedural due process, and substantive due process challenges to Cullman County's cash-bail system); *ODonnell v. Harris Cnty.*, 892 F.3d 147, 153, 161, 163 (5th Cir. 2018) (affirming the district court's historically informed factual findings as well as its conclusions that Houston's misdemeanor cash-bail system violated equal protection and procedural due process but ultimately vacating preliminary injunction on grounds of overbreadth), *overruled in part by Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022) (en banc) (in challenge to Dallas' cash-bail system, overruling *ODonnell's* holding that district judges can be sued as county officials, remanding for briefing on remaining jurisdictional questions, and reserving judgment on the merits); *Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 460 P.3d 976, 987, 988 (Nev. 2020) (prohibiting cash bail absent proof of necessity in an adversarial hearing, on the basis of Nevada constitutional bail provisions and federal due process); *In re Humphrey*, 482 P.3d 1008, 1018, 1021–22 (Cal. 2021) (prohibiting detention on unaffordable cash bail absent proof of necessity in adversarial hearing, on the basis of California constitutional bail provisions and federal due process and equal protection). These interpretive debates go back to the first Federal Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 213, and its aftermath. See, e.g., DANIEL J. FREED & PATRICIA M. WALD, *BAIL IN THE UNITED STATES: 1964* (1964); Caleb Foote, *The Coming Constitutional Crisis in Bail* (pt. 1), 113 U. PA. L. REV. 959, 971–79 (1965); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 552–55 (1983).

relevant provisions were enacted.<sup>13</sup> Even setting legal questions aside, history is important to the policy debate; it helps to explain the system we have and expand our sense of what is possible.

To date, however, there has been no thorough account of bail at the Founding.<sup>14</sup> Part of the explanation is the paucity of relevant records from the era. Then, as now, bail determinations were made by magistrates in less formal settings than the criminal trial that followed. They were not well documented in official records. Another part of the explanation is that, until recently, bail process attracted little scholarly interest.<sup>15</sup>

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<sup>13</sup> This is obviously true from an originalist perspective. Even if one is not an originalist, substantive due process standards require inquiry into the nation's "history and traditions," and the Founding era was the birthplace of those. *See, e.g.,* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2249–54 (2022) (canvassing the history of abortion regulation "from the earliest days of the common law until 1973," *id.* at 2254, for purposes of substantive due process analysis). With respect to the Federal Excessive Bail Clause as applied against the states, there might be a question about whether the moment of enactment (1792) or the moment of incorporation (1868) is more relevant to the originalist analysis — assuming that the Clause is incorporated at all! *See* *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) ("[T]he Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment."); *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.12 (2010) (alluding to the Clause as incorporated and citing *Schilb*). But the Supreme Court has "made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government," and that the scope "is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2137 (2022). The Founding era is also relevant for interpreting *state* excessive-bail clauses, moreover, as well as the Federal Excessive Bail Clause as applied against the federal government.

<sup>14</sup> The works of scholarship most on point are Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania*, 50 *TEMP. L.Q.* 475 (1977), and JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE* 485–553 (1944). A handful of scholars have traced the origin of Pennsylvania's state-constitutional bail clauses, which became the model for most American states, but without extensive analysis of how those provisions operated on the ground. *E.g.,* Neil Howard Cogan, *The Pennsylvania Bail Provisions: The Legality of Preventive Detention*, 44 *TEMP. L.Q.* 51 (1970); Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 *ARIZ. L. REV.* 909, 920 (2013). There are also detailed works on criminal procedure in the Founding era, but they address bail only in passing. *See, e.g.,* AARON PALMER, *A RULE OF LAW: ELITE POLITICAL AUTHORITY AND THE COMING OF THE REVOLUTION IN THE SOUTH CAROLINA LOWCOUNTRY, 1763–1776* (2014); RONALD PESTRITTO, *FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA* (1999); DOUGLAS GREENBERG, *CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK 1691–1776* (1976); GEORGE LEE HASKINS, *LAW AND AUTHORITY IN COLONIAL MASSACHUSETTS* (1960); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880* (1989); MICHAEL STEPHEN HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1878* (1980).

<sup>15</sup> Even beyond bail, there is relatively little legal scholarship on Founding-era criminal procedure, although the last few years have seen a notable uptick. *See, e.g.,* Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 *STAN. L. REV.* 603 (2022); Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 *GEO. WASH. L. REV.* 392 (2020); David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 *HARV. L. REV.* 542 (2019).

This Article aspires to correct the deficit in our collective memory. Its goal is to describe bail law and practice in the Founding era, from approximately 1790 to 1810, and along the way to tackle a set of related questions: Was pretrial detention a “carefully limited exception” in the Early Republic?<sup>16</sup> If so, what were the legal limits? What were constitutional excessive-bail and right-to-bail clauses understood to mean? What role did money play in the Founding-era bail system? And finally, which elements of the current pretrial system are “deeply rooted in this Nation’s history and tradition”<sup>17</sup> in the sense of having been established or enshrined in the Founding era?

To answer these questions we have read and distilled Founding-era statutes, case law, legal treatises, and manuals for justices of the peace, as well as secondary literature on Founding-era criminal procedure. With the help of a research team, we also located, digitized, transcribed, and analyzed original Founding-era court and justice-of-the-peace records from archives and private collections. We created full transcriptions of the Record Book of Ebenezer Ferguson, a Philadelphia justice of the peace, and of the Prisoners for Trial Docket from 1790 to 1800 — the original record of every pretrial detainee held in the famous Walnut Street Prison in Philadelphia during those years. We have also digitized a range of original records for the first time, including early records from the Philadelphia Mayor’s Court and Court of Quarter Sessions, the Philadelphia Vagrancy Docket, and the early records of the Pennsylvania Prison Society. To illustrate our findings and to promote future research, we make these resources available online.<sup>18</sup>

The project centers on Philadelphia for several reasons. First, Philadelphia was the birthplace of what would become the distinctively American law of bail and pretrial detention. Pennsylvania’s founder, William Penn, had been scarred by repeated jailing in England for his Quakerism, and consequently included a broad right to pretrial bail in Pennsylvania’s 1682 Frame of Government.<sup>19</sup> That right-to-bail clause would become the “consensus text” for bail clauses in new state constitutions as the nation grew, as well as the model for the Federal Judiciary Act of 1789.<sup>20</sup> Second, Philadelphia is an optimal site to assess daily bail practice in the Founding era. It served as the nation’s capital from 1790 to 1800 and was also a busy port and commercial center, the destination of waves of immigrants from across the Atlantic and of freed

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<sup>16</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>17</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

<sup>18</sup> See BAIL AT THE FOUNDING, [www.bailatthefounding.net](http://www.bailatthefounding.net) [https://perma.cc/4VBW-A6FP].

<sup>19</sup> See *infra* section I.D.2, pp. 1837–42.

<sup>20</sup> See *infra* section I.D.3, pp. 1842–45.

and runaway slaves from the South.<sup>21</sup> As “the premier city” of the new republic,<sup>22</sup> it had relatively well-developed court and recordkeeping systems, and many of those records have endured.<sup>23</sup> Our research suggests that bail practice in Philadelphia was fairly representative of practice in other states, including Massachusetts, New York, Georgia, and South Carolina.<sup>24</sup>

The historical inquiry illuminates three key facts. First, the black-letter law of bail in the Founding era was highly protective of pretrial liberty. In theory, Penn’s uniquely American framework for bail guaranteed release for nearly all accused persons.<sup>25</sup> Second, things were different on the ground. The primary sources reveal that, for those who lived on the margins of society, bail practice bore little resemblance to the law on the books, and pretrial detention was routine.<sup>26</sup> The third key point cuts across the law and reality of criminal bail: both in theory and in practice, the bail system was a system of *unsecured* pledges, not cash deposits.<sup>27</sup> It operated on the basis of reputational capital, not financial capital. This Article lays out these findings and explores their contemporary implications in three Parts.

Part I chronicles the evolution of the distinctively American law of bail, which aspired to limit pretrial detention to a subset of capital cases. It briefly surveys the early origins of bail in English common law, then describes two competing legal models of bail that emerged in America. The first, which we call “the common law model,” hewed closely to English precedent.<sup>28</sup> The second, “the dissenter model,” grew out of the efforts of Nathaniel Ward (in Massachusetts) and William Penn to constrain the state’s power to incarcerate its subjects upon mere judicial whim and ultimately became the dominant legal framework for bail in the United States.<sup>29</sup>

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<sup>21</sup> Billy G. Smith, *Philadelphia: The Athens of America*, in *LIFE IN EARLY PHILADELPHIA* 5, 15 (Billy G. Smith ed., 1995). Philadelphia had been the largest city in the colonies at Independence. GARY B. NASH, *FIRST CITY: PHILADELPHIA AND THE FORGING OF HISTORICAL MEMORY* 78 (2013). By 1790 New York had overtaken it in population, see DEP’T OF COM. & LAB., *HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790: PENNSYLVANIA* 10 (1908), available at <https://hdl.handle.net/2027/uc2.ark:/13960/t09wors6v> [<https://perma.cc/4DE6-DH6F>]; DEP’T OF COM. & LAB., *HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790: NEW YORK* 9 (1908), available at <https://hdl.handle.net/2027/c001.ark:/13960/t2p564q8g> [<https://perma.cc/42T5-8ZFB>], but Philadelphia remained the second-most populous city in the nation until after 1820, *CENSUS FOR 1820* (Washington, Gales & Seaton 1821).

<sup>22</sup> Smith, *supra* note 21, at 3.

<sup>23</sup> See *supra* note 18 and accompanying text.

<sup>24</sup> See *infra* pp. 1868–69.

<sup>25</sup> See *infra* section I.D.2, pp. 1837–42.

<sup>26</sup> See *infra* section II.B.2, pp. 1854–67.

<sup>27</sup> Others have made this point before, but not specifically about the Founding era and without robust data from primary sources. *E.g.*, SCHNACKE, *supra* note 7, at iv; FREED & WALD, *supra* note 12, at 3.

<sup>28</sup> See *infra* section I.C, pp. 1832–35.

<sup>29</sup> See *infra* section I.D, pp. 1835–45.

In both models, “bail” referred to a mechanism of release from state custody. That mechanism did not involve any upfront cash deposit or other transfer of collateral. Rather, the accused person promised to appear for trial and pledged that, if he did not appear, he would forfeit a specified sum.<sup>30</sup> Each defendant also had to produce one or two “sureties.”<sup>31</sup> A surety was an individual — typically a family member, friend, or employer — who also pledged to forfeit a specified sum if the defendant failed to appear. The pledges by the defendant and his sureties, called “recognizances” or “recognizance bonds,” were the “security” offered for the defendant’s appearance.<sup>32</sup> They were promises only; they were not themselves secured by any transfer of collateral or legal right (like a lien). In today’s parlance, the pledges were “unsecured bonds,” such that the entire bail system — as contemplated by the law on the books — was a system of unsecured release.<sup>33</sup>

The difference between the common law and dissenter models lay in who had access to bail. The common law model *prohibited* release on bail for people charged with certain serious offenses, *guaranteed* release on bail for people charged with a tiny sliver of very petty offenses, and left it to the magistrate’s discretion whether to bail or detain defendants the rest of the time.<sup>34</sup> The dissenter model, by contrast, mandated access to bail for nearly everyone, leaving magistrates the discretion to detain only in capital cases (which were limited to first-degree murder cases in Pennsylvania at the time Penn crafted the dissenter framework).<sup>35</sup> When bail was mandatory, as it almost always was on the dissenter model, the law on the books required that the pledge amount be one that the defendant and his sureties could pay if need be. On the dissenter model, in sum, pretrial liberty was precious, nearly all accused people had a right to release on bail, and bail was carefully calibrated to a defendant’s financial circumstances.

Part II turns from the legal framework on the books to the legal practices on the ground. Section II.A notes that criminal bail bonds were only a tiny sliver of a much larger landscape of bonded suretyship in the Early Republic and should be understood in this context. Section II.B documents daily bail practice in Founding-era Philadelphia. Drawing on the primary sources, we reconstruct the process by which people were haled before city magistrates and either bailed or jailed pending trial.

Bail practice on the ground diverged sharply from the law on the books.<sup>36</sup> Almost every facet of our current bail system that has

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<sup>30</sup> See *infra* pp. 1829–30.

<sup>31</sup> See *infra* p. 1830.

<sup>32</sup> See *id.*

<sup>33</sup> See SCHNACKE, *supra* note 7, at 84.

<sup>34</sup> See *infra* section I.C.1, pp. 1832–33.

<sup>35</sup> See *infra* section I.D.3, pp. 1842–45.

<sup>36</sup> See *infra* section II.B.3, pp. 1867–69.



drawn public ire finds its echo in Founding-era practice in Philadelphia. Pretrial process was a two-tiered system of justice; the indigent were frequently jailed for failure to produce sureties, or on a summary conviction for vagrancy. Constables and magistrates abused their power and operated a fines-and-fees system that functioned to incarcerate the poor. Conditions of detention were abysmal. There were also persistent criticisms of these facts and impassioned efforts at reform, including the equivalent of a modern-day community bail fund.

But for those not on the margins, which we estimate included upwards of eighty percent of the population in jurisdictions like Philadelphia, the dissenters' clause worked largely as intended, protecting an absolute right to release on an affordable bond pledge for all but the most serious charges. Indeed, when the law faltered in practice for first-class defendants, it was usually to their benefit, as forfeited bonds were rarely collected. We illustrate these dynamics in section II.C with the extraordinary — but nevertheless representative — prosecution of Aaron Burr at the close of the Founding era. The central drama of the early stages of Burr's prosecution was over bail, and none other than Chief Justice John Marshall, riding circuit, presided. Chief Justice Marshall consistently hewed closely to the text of the dissenters' bail clause, and Burr was set at liberty on an affordable bail despite his low chance of reappearance.

The Article's third theme emerges across our survey of both the theory and practice of bail. In all of the material we canvas, there is no indication that any accused person or surety was ever required to produce cash or other collateral as a condition for the accused person's release.<sup>37</sup> This is not to say that money played no role in the system. Defendants, sureties, alleged victims, and witnesses all had to sign recognizance bonds with a specified money amount on their face. People without financial means could be jailed if they lacked access to sureties, and lacking sureties and lacking money often went hand in hand. The magistrates, constables, and sheriff depended for their income on fees paid by all parties to a proceeding, as well as on fines assessed as punishment, and failure to pay any of these was grounds for incarceration. By contrast, the failure to pay bail was not grounds for incarceration. Indeed, the expression "pay bail" never appears in the records because bail was not a financial transaction. The system operated on a currency of reputation rather than cash.

To complete the Article's descriptive work, section II.D recounts how Founding-era appellate courts mediated between the theory and practice of bail — that is, how they understood and enforced legal limits on pretrial detention. The available case law is sparse, but it allows for a few conclusions. Appellate judges, including Chief Justice Marshall, took it for granted that "excessive bail" prohibitions required bail demands to

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<sup>37</sup> See *infra* section III.A, pp. 1889–91.

be tailored to a person's means.<sup>38</sup> Relatedly, it was perceived as an outrage when respectable citizens were detained pretrial because of a bail demand their sureties could not meet. For such persons, there were legal mechanisms for redress, including habeas review and subsequent civil suits. As a whole, the Founding-era jurisprudence of bail supports the picture of a two-tier, reputation-based system that emerges from the survey of the law on the books and on the ground.

Part III considers the contemporary implications of the Founding-era picture. The most straightforward is that there is no ancient tradition of cash bail. To the extent that some courts and advocates have recently asserted or suggested that cash bail is a time-honored American tradition dating to the Founding era, they are simply wrong. The historical data also take certain propositions favored by bail reformers off the table. These include the notion that the right to bail codified in state constitutions functioned as an absolute right to release, as well as the proposition that the law did not recognize public safety as a legitimate consideration in bail and detention decisions until the 1970s. These too are foreclosed by the record.

Beyond these points, the contemporary implications of the historical picture are uncertain. On the one hand, Penn's dissenter framework for bail, and its adoption across the Early Republic, demonstrates a distinctively American tradition of strict protection for pretrial liberty — a tradition that Chief Justice Marshall helped to enshrine in his handling of Burr's pretrial custody disputes, and that operated well in practice for those with a minimal amount of social capital. On the other hand, those protections were illusory for all who lived outside local networks of respectability. One might well conclude that the clearest American tradition that the Founding-era law and practice of bail discloses is a tradition of unrealized legal ideals. Just as the present moment does, the Founding era juxtaposed lofty legal commitments to liberty with social policy heavily dependent on custody and incarceration. Just as in the present, that contrast was a source of indignation and conflict. The Article does not marshal this complex historical data to argue for specific answers to the thorniest open questions of constitutional law. We hope, instead, to provide the historical clarity necessary to tackle those questions with integrity.

#### I. BAIL ON THE BOOKS: PRETRIAL DETENTION AS A CAREFULLY LIMITED EXCEPTION

In its broadest sweep, the story of bail law — from its English origins to the constitutional provision enacted by nearly all the American states — is a story of continual efforts to restrict the power of the state to lock a person up before trial. This Part chronicles that history.

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<sup>38</sup> See *infra* p. 1878.

Section A briefly surveys the English constitutional enactments that progressively enshrined protections against arbitrary detention. Sections B and C trace the statutory and state constitutional law of bail that developed on this foundation in the Early Republic. This is something of a challenge. As early American treatise author Joel Prentiss Bishop wrote about the proliferation of bail statutes on the books, “[t]he amount of matter which presents itself for consideration under this title is appalling.”<sup>39</sup> Still, it is possible to identify the basic features common to the formal law of bail across the states. We draw heavily from popular treatises of the era, which guided lawyers on which statutes were operative in particular cases and which ancient writs remained in use.<sup>40</sup>

The Founding-era law of bail shows a rapid evolution. The colonies-turned-states followed two major models for bail and pretrial detention. Roughly half initially adhered to inherited English practices, what we call the common law model of bail. The other half pursued a reform model developed by Puritan and Quaker settlers, what we call the dissenter model of bail. The dissenter model was significantly more protective of the liberty of accused persons; it guaranteed release for all noncapital defendants who could procure solvent sureties to vouch for them. While the states evenly split between these models in the 1780s, the dissenter model swiftly became the “‘consensus’ text” not only of the states but of the federal bail system as well.<sup>41</sup> This distinctly American framework aspired to make pretrial detention a carefully limited exception to the norm of pretrial liberty.

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<sup>39</sup> 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 487 (Cambridge, Mass., Univ. Press: Welch, Bigelow, & Co. 1866). Bishop observed that state bail statutes were “almost infinite in number and variety,” *id.* at 499, and that if he were to compile the regulations, they “would lie upon the pages an unread and unconsulted mass,” *id.* at 487. Although Bishop’s treatise did not appear until the mid-nineteenth century, its description was already true in the Founding era. *See, e.g., infra* note 162 and accompanying text.

<sup>40</sup> *See, e.g.,* THOMAS G. WATERMAN, THE JUSTICE’S MANUAL: OR, A SUMMARY OF THE POWERS AND DUTIES OF JUSTICES OF THE PEACE IN THE STATE OF NEW YORK (Binghamton, Morgan & Canoll 1825); J.A.G. DAVIS, A TREATISE ON CRIMINAL LAW: WITH AN EXPOSITION OF THE OFFICE AND AUTHORITY OF JUSTICES OF THE PEACE IN VIRGINIA (Philadelphia, C. Sherman & Co. 1838); GEORGE VAN SANTVOORD, THE INDIANA JUSTICE (Lafayette, Ind., Corydon Donnavan 1845); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: COMPRISING A DIGEST OF THE PENAL STATUTES OF THE GENERAL GOVERNMENT AND OF MASSACHUSETTS, NEW YORK, PENNSYLVANIA, AND VIRGINIA (Philadelphia, James Kay, Jr. & Bro. 1846). Treatise authors often copied one another’s work. By far the most popular treatise from which to crib was Joseph Chitty’s description of English practice, which appeared in 1816 with an American printing in 1819. J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW (Philadelphia, Edward Earle 1819). Chitty’s work in turn simplified and updated William Hawkins’s *Pleas of the Crown* and Michael Dalton’s *The Country Justice*. *See* J. H. Baker, *Hawkins, William (1681/2–1750)*, in OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004); WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN (London, G.G. & J. Robinson, Thomas Leach ed., 7th ed. 1795); MICHAEL DALTON, THE COUNTRY JUSTICE (London, E. & R. Nutt & R. Gosling 1727) (1618).

<sup>41</sup> Hegreess, *supra* note 14, at 909.

### A. Origins of Pretrial Protections

The medieval and early modern history of English bail has been well canvassed by others.<sup>42</sup> For our purposes, the important point is that by the 1780s in America, those with even a rudimentary education in law and political theory would have understood pretrial reform to be at the heart of the English constitutional tradition.

Bail and suretyship grew out of the pre-Norman system of amercements, that is, fines to settle blood feuds.<sup>43</sup> The bail matched the fine exactly, and a surety pledged to pay the fine if the defendant absconded.<sup>44</sup> After the Norman introduction of blood punishments, bail remained a guarantee that defendants would submit to trial and retribution, but the bail pledge became an arbitrary amount of property determined by judicial discretion.<sup>45</sup>

In 1215, Magna Carta declared that “[n]o free man shall be arrested or imprisoned . . . except by the lawful judgment of his peers or by the law of the land.”<sup>46</sup> As many scholars have emphasized, Magna Carta’s decrees were more aspirational than descriptive at the time.<sup>47</sup> But even at the level of aspiration, it remained unclear whether the “no free man” canon set limits on *pretrial* detentions. In *Darnell’s Case*,<sup>48</sup> the Court of King’s Bench refused to bail five knights who had been committed without charge, despite the forceful argument of the scholar John Selden that

<sup>42</sup> See JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 578–87 (2d ed. 2009); ELSA DE HAAS, *ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275* (AMS Press 1966) (1940); Carbone, *supra* note 12, at 519–29; William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34–66 (1977); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966–67 (1961); Charles S. Desmond, *Bail — Ancient and Modern*, 1 BUFF. L. REV. 245, 245–47 (1952).

<sup>43</sup> Duker, *supra* note 42, at 35–36, 41–42.

<sup>44</sup> See Carbone, *supra* note 12, at 519–21; 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 584 (Cambridge, Cambridge Univ. Press 2d ed. 1898).

<sup>45</sup> See Carbone, *supra* note 12, at 521–23.

<sup>46</sup> MAGNA CARTA, ch. 39 (1215). The clause appeared in the thirty-ninth canon of the charter as signed in 1215 by King John. By the seventeenth century, most commentators would have been more familiar with Edward I’s Confirmation of the Charters, which listed the clause in the twenty-ninth canon: “No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. To none will we sell or deny or delay right or justice.” MAGNA CARTA, ch. 29 (1297). See also EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND* 45–57 (London, M. Flesher & R. Young 1642) (Coke’s influential commentary on Magna Carta, canon 29).

<sup>47</sup> See, e.g., THE RIGHTS AND ASPIRATIONS OF THE MAGNA CARTA (Elizabeth Gibson-Morgan & Alexis Chommeloux eds., 2016); Thomas J. McSweeney, *Magna Carta, Civil Law, and Canon Law, in MAGNA CARTA AND THE RULE OF LAW* 281, 285–87 (Daniel Barstow Magraw et al. eds., 2014); Benjamin L. Mabry, *Liberty, Community, and the Free Man in Magna Carta* 3–4 (May 2015) (Ph.D. dissertation, Louisiana State University).

<sup>48</sup> 3 How. St. Tr. 1 (K.B. 1627).

Magna Carta made the detentions unlawful.<sup>49</sup> The following year Sir Edward Coke led Parliament to codify Selden's interpretation of Magna Carta in the Petition of Right<sup>50</sup> (1628). Henceforth, free men were not to be detained without a timely, public charge.<sup>51</sup>

As Parliament gained power in subsequent years, its signal acts of constitution-making aimed to further constrain executive and judicial discretion over pretrial detention.<sup>52</sup> In the Habeas Corpus Act of 1679,<sup>53</sup> Parliament "established procedures to prevent long delays before a bail bond hearing was held," responding to a case in which the defendant was not offered bail for over two months after arrest.<sup>54</sup> Undeterred, Stuart-era sheriffs and justices shifted tactics to require impossibly high bails that no surety could responsibly pledge, effectively precluding defendants' release. Parliament responded again in 1689 with the English Bill of Rights<sup>55</sup> and its prohibition on "excessive bail," a protection incorporated into the Eighth Amendment to the U.S. Constitution over a century later.<sup>56</sup>

In sum, by the time of the United States's Founding, pretrial release on bail was a fundamental part of English constitutionalism, with procedural protections developed in Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights. Together, these statutes required bail determinations to be made in open court sessions, with an evidentiary record, and in a timely manner — at least for those who could claim "the rights of Englishmen."<sup>57</sup> Coke's *A Little Treatise of Baile and Maineprize* established the central meaning of bail itself: "This Word Baile is (as I take it) derived of the French word Bailer, which signifieth to deliver, because he that is Bailed, is as it were delivered into the hands and custody of those that are his Pledges and

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<sup>49</sup> See DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* 13–18 (1966).

<sup>50</sup> 3 Car. 1 c. 1 (Eng.).

<sup>51</sup> See generally J.A. Guy, *The Origins of the Petition of Right Reconsidered*, 25 HIST. J. 289 (1982).

<sup>52</sup> On the constitutional status of Parliamentary acts, see William D. McNulty, *The Power of "Compulsory Purchase" Under the Law of England*, 21 YALE L.J. 639, 641 (1912) ("The English Constitution is sought, not in any single written documents, as in the United States, but from acts of Parliament, [and] quasiacts of Parliament, such as the Magna Charta, [and] the Petition of Rights (1627) . . .").

<sup>53</sup> 31 Car. 2 c. 2 (Eng.).

<sup>54</sup> TIMOTHY R. SCHNACKE ET AL., *PRETRIAL JUST. INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE* 3–4 (2010).

<sup>55</sup> 1 W. & M. 2 c. 2 (Eng.).

<sup>56</sup> See Foote, *supra* note 12, at 967–68.

<sup>57</sup> See SCHNACKE ET AL., *supra* note 54, at 3. On the contested definition of English rights and liberties and their force in common law jurisdictions outside of the United Kingdom, see DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 15–43 (2005).

Sureties.”<sup>58</sup> William Blackstone later adapted Lord Coke’s formulation, defining bail as “a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol.”<sup>59</sup> Bail denoted the process of release: from the custody of the state to the “friendly” custody of sureties — family, friends, employers, or neighbors who would guarantee the defendant’s presence at court.

### B. *Bail Procedure in America*

The American colonists carried with them the basics of criminal bail procedure, and these basics remained relatively familiar across the early states. A criminal prosecution began either with arrest by a local constable or by civilian complaint.<sup>60</sup> In either case, the instigating party — civilian or constable — brought the accused person directly before a justice of the peace or other judicial officer and leveled their accusations under oath.<sup>61</sup> Some justices worked in courthouses, but it was more common to find them at their homes, places of business, or even local taverns (occasionally those all described the same location).<sup>62</sup> As Justice James Wilson explained: “This magistrate is obliged immediately to examine into the circumstances of the crime alleged; and according to the result of this examination, the person accused should be either discharged, or bailed, or committed to prison.”<sup>63</sup> Contrary to present practice, an accused person typically appeared before a judicial officer before going to jail; and a separate order was required from the magistrate — a *mittimus* — to commit someone to jail.<sup>64</sup>

At these initial quasi hearings, justices heard the accusation, pre-viewed the evidence, determined if the evidence was sufficient to support the charge, and, if so, determined whether the accused would be admitted to bail (that is, released) or committed to prison.<sup>65</sup> Some

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<sup>58</sup> E.C. KNIGHT [SIR EDWARD COKE], *A LITTLE TREATISE OF BAILE AND MAINEPRIZE* 1 (London, William Cooke 1635).

<sup>59</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*294.

<sup>60</sup> 2 JAMES WILSON, *THE WORKS OF JAMES WILSON* 446–47 (James DeWitt Andrews, ed., Chicago, Callaghan & Co. 1896).

<sup>61</sup> *Id.* at 447; see also Metzger & Hoefel, *supra* note 15, at 445–46 (explaining that in the Early Republic the law required an arrestee to be brought immediately before a judicial officer); Laurent Sacharoff, *Pre-trial Commitment and the Fourth Amendment*, 99 NOTRE DAME L. REV. (forthcoming 2024) (manuscript at 15–16) (on file with the Harvard Law School Library) (explaining that *mittimus* writs of pretrial commitment required live testimony under oath to make out probable cause).

<sup>62</sup> See STEINBERG, *supra* note 14, at 6–7, 17–20.

<sup>63</sup> WILSON, *supra* note 60, at 447.

<sup>64</sup> DALTON, *supra* note 40, at 580–87; see also sources cited *supra* note 61. There was some leeway for those arrested in the middle of the night or when an immediate audience with a judicial officer was otherwise impossible; constables could hold arrestees “in the stocks, or in an house, till the next day, or such time as it may be reasonable to bring him.” JOHN FAUCHEREAUD GRIMKÉ, *THE SOUTH-CAROLINA JUSTICE OF PEACE* 22 (New York, T. & J. Swords 3d ed. 1810).

<sup>65</sup> VAN SANTVOORD, *supra* note 40, at 401–04; 1 CHITTY, *supra* note 40, at 60.

offenses were not bailable, meaning that people accused of such offenses were committed.<sup>66</sup> If the charged offense *was* bailable, the magistrate decided the number of sureties the defendant had to procure and the amount of money that they, and the defendant, had to promise to forfeit if the defendant failed to appear.<sup>67</sup> The sureties, in other words, were individuals whose pledges, along with the defendant's own pledge, served as security for the defendant's appearance.<sup>68</sup> The law also provided for complainants and witnesses to be bailed to guarantee their own appearance.<sup>69</sup> Each surety and each party admitted to bail executed a "recognizance bond" (what we would call an "unsecured bond" today) that stipulated the amount of the pledge and the date of the required court appearance.<sup>70</sup>

If the offense was non-bailable or the defendant could not find sureties, the justice executed a *mittimus* writ to commit the defendant to the custody of the sheriff and the local public jail.<sup>71</sup> In rural jurisdictions, that might mean a side apartment in the home of the justice or the sheriff.<sup>72</sup> Larger jurisdictions built standalone jails that tended to follow a common architectural plan (and elicited common complaints). They were often three- or four-story buildings with convicted prisoners housed in the upper apartments, pretrial detainees kept in the middle, and imprisoned debtors housed on the ground floor, sometimes with the most impoverished kept in a squalid basement.<sup>73</sup>

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<sup>66</sup> See, e.g., *United States v. Johns*, 4 U.S. (4 Dall.) 412, 413 (C.C.D. Pa. 1806) (finding, on challenge to pretrial commitment by habeas corpus petition, that the evidence was sufficient to support a finding of probable cause for the capital charge of destroying a ship, such that the prisoner should be "remanded for trial").

<sup>67</sup> 1 CHITTY, *supra* note 40, at 67–69.

<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., *An Act About Binding to the Peace* (1700), reprinted in 2 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 23 (James T. Mitchell & Henry Flanders eds., Pennsylvania, Clarence M. Busch 1896) (requiring recognizances from both the accused and accuser); JOHN FREDERICK ARCHBOLD, THE LAW RELATIVE TO COMMITMENTS & CONVICTIONS BY JUSTICES OF THE PEACE 12–13 (London, W. Benning 1828) (form "recognizance to prosecute and give evidence" and form "recognizance to give evidence").

<sup>70</sup> For early examples of the form of a criminal bail bond (usually under the heading of "recognizances"), see JOHN GOODRICH, THE CIVIL AND EXECUTIVE OFFICERS' ASSISTANT 194 (Hartford, Hudson & Goodwin 2d ed. 1798); THE YOUNG CLERK'S VADE MECUM: OR, COMPLEAT LAW-TUTOR 66–70 (New York, H. Gaine 1726). Both volumes can be found in the collections of the New-York Historical Society or the libraries of Columbia University.

<sup>71</sup> If defendants were not prepared to produce sureties on the spot, they could be temporarily committed until the proper recognizances were posted. VAN SANTVOORD, *supra* note 40, at 402; 1 CHITTY, *supra* note 40, at 60–61.

<sup>72</sup> VAN SANTVOORD, *supra* note 40, at 410.

<sup>73</sup> See BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 16, 85–89 (2002). Grand juries, whose job it was to report on criminal justice matters generally, frequently complained about conditions in local jails. See, e.g., DAVID MURRAY, COLONIAL JUSTICE: JUSTICE, MORALITY, AND CRIME IN THE NIAGARA DISTRICT, 1791–1849, at 62–63 (2015); PAUL CRAVEN, PETTY JUSTICE: LOW LAW AND THE

Sureties were released from their pledge when the defendant answered to his name on the opening day of the court session.<sup>74</sup> At that point, custody transferred back to the court, which could commit the defendant to jail until the day of trial or release him on another recognizance.<sup>75</sup> If sureties lost their faith in the defendant before the defendant's required appearance, they could surrender custody back to the sheriff, and were entitled to use the same degree of force a sheriff could use to arrest and deliver up the defendant.<sup>76</sup>

What happened when a defendant failed to appear is surprisingly difficult to determine.<sup>77</sup> It appears that most jurisdictions followed the same procedures for forfeited recognizances as they used for civil debt. While that sometimes meant the government proceeded straightaway in a regular action for debt, more commonly it appears that the government first sought a writ of *scire facias*.<sup>78</sup> *Scire facias* was a kind of all-purpose judicial order to the recipient to appear before the court and show cause why a penalty should not issue against them.<sup>79</sup> *Scire facias* procedure was not speedy. The writ had to be returned undelivered at two successive terms of court before the missing defendant or their sureties could suffer a default judgment.<sup>80</sup> As most jurisdictions convened criminal terms only twice a year, that typically meant a full year had to elapse before collection proceedings could even begin.<sup>81</sup>

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SESSIONS SYSTEM IN CHARLOTTE COUNTY, NEW BRUNSWICK, 1785–1867, at 324–29 (2014); Charleston Grand Jury Presentments, Series S165010, Item 3, South Carolina Department of Archives and History, Columbia, South Carolina [hereinafter SCDAH].

<sup>74</sup> VAN SANTVOORD, *supra* note 40, at 408.

<sup>75</sup> *Id.* at 294–95.

<sup>76</sup> *Id.* at 407; CHARLES PETERSDORFF, A PRACTICAL TREATISE ON THE LAW OF BAIL, IN CIVIL AND CRIMINAL PROCEEDINGS 514 (London, Joseph Butterworth and Son 1824); Commonwealth v. Brickett, 25 Mass. (25 Pick.) 138, 138 (1829).

<sup>77</sup> Statutes were often silent on this point, and American treatises just parroted the old English manuals: a forfeited recognizance bond was “estreated” by sending the record to the Court of Exchequer for collection. *E.g.*, PETERSDORFF, *supra* note 76, at 536; MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 231 (London, W. Strahan and M. Woodfall 4th ed. 1778). But this was plainly inapplicable in the United States. As Chief Justice Marshall explained, riding circuit: “In the United States, there is no separate court of exchequer; and recognizances are put in suit in that court in which they are originally filed. They are never estreated.” United States v. Feely, 25 F. Cas. 1055, 1057 (Marshall, Circuit Justice, C.C.D. Va. 1813) (No. 15,082).

<sup>78</sup> See, e.g., Scire Facias Executions, Kershaw County Court, 1792–1797 and 1800–1811, Collection 28, Series L.28032 and L.28211, SCDAH; Colburn v. Downes, 10 Mass. (10 Tyng) 20, 20 (1813). In criminal bail, an action for debt ordinarily did not lie until a forfeiture had been ordered, and *scire facias* was the main device for perfecting the forfeiture. PETERSDORFF, *supra* note 76, at 371–82. For a sample writ, see BAIL AT THE FOUNDING, <https://bailatthefounding.net/sample-scire-facias-writs-returns-kershaw-county/> [<https://perma.cc/C6X5-EN42>].

<sup>79</sup> See generally THOMAS CAMPBELL FOSTER, A TREATISE ON THE WRIT OF SCIRE FACIAS 41–52 (Philadelphia, T. & J. W. Johnson 1851).

<sup>80</sup> *E.g.*, Craddock v. Commonwealth, 28 Ky. (5 J.J. Marsh) 58, 58 (1830); State v. Dunbar, 10 La. 99, 100 (1836).

<sup>81</sup> Once the second writ returned unserved, the absent party had a window of time in which to enter a plea, after which the execution could issue as in cases of confessed or default judgment. An



While this basic process was consistent across the states, the substantive law of bail was not. Given that admission to bail at least theoretically meant release, the core substantive issue was who must or could be admitted to bail. As the following sections explain, the early states inherited a set of rules from English law that restricted access to bail quite narrowly, but the growing republic rapidly departed from that tradition.

### C. Access to Bail on the Common Law Model

The inherited English model prohibited bail in the most serious cases, mandated it in the least serious cases, and made it discretionary for the great majority of cases in between.<sup>82</sup> For defendants who had a right to bail, the rules all but guaranteed release. But where magistrates had discretion to bail or not — which was in most cases — the rules tolerated detention even when it resulted from an impossible bail demand.

1. *Mandatory Detention and Release.* — The English statutes prohibited bail for those charged with the most serious crimes, including treason, intentional homicide, prison breaking, and arson.<sup>83</sup> They also deemed lesser crimes like theft and burglary non-bailable if the defendant had been caught in the act or confessed.<sup>84</sup> Detention was mandatory in all of these cases.

Magistrates were subject to penalty for violating the rules.<sup>85</sup> The magistrate who typically made bail determinations was a justice of the peace, a local official — usually a well-propertied magnate in his own right — who exercised a kind of small-claims jurisdiction in both criminal and civil cases.<sup>86</sup> A justice who accepted bail in a non-bailable case could be charged with a misdemeanor and fined.<sup>87</sup> Only the judges of

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Act Concerning Bail in Civil and Criminal Cases, 1796 CONN. LAWS 39. See also *Dillingham v. United States*, 7 F. Cas. 708, 710 (C.C.D. Pa. 1810) (No. 3,913) (“For we hold it to be essential to a breach of the condition, upon which the forfeiture is to arise, that the party who is recognized to appear, should be solemnly called before his default is entered.”).

<sup>82</sup> See 1 CHITTY, *supra* note 40, at 64–65.

<sup>83</sup> 3 HAWKINS, *supra* note 40, at 203–04; 1 CHITTY, *supra* note 40, at 64; see also 2 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 129–34 (London, E. & R. Nutt & R. Gosling 1736); 4 BLACKSTONE, *supra* note 59, at \*295.

<sup>84</sup> 3 HAWKINS, *supra* note 40, at 200–02; 1 CHITTY, *supra* note 40, at 64–65; see also 2 HALE, *supra* note 83, at 129–34; 4 BLACKSTONE, *supra* note 59, at \*296.

<sup>85</sup> See, e.g., 3 HAWKINS, *supra* note 40, at 187–89; 4 BLACKSTONE, *supra* note 59, at \*294; 1 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 149 (London, T. Cadell, 15th ed. 1785).

<sup>86</sup> See LANGBEIN, LERNER & SMITH, *supra* note 42, at 229–38; STEINBERG, *supra* note 14, at 6–20; MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* 3–28 (2003) (providing detailed descriptions of justices of the peace in Cook County, Illinois, toward the end of the nineteenth century).

<sup>87</sup> 1 CHITTY, *supra* note 40, at 69; 3 HAWKINS, *supra* note 40, at 188–89.

King's Bench were exempt from the bail prohibitions since they sat as the court of final resort.<sup>88</sup>

At the other end of the spectrum, admission to bail was mandatory for a narrow class of minor crimes, like petty theft and trespasses punishable only by fines.<sup>89</sup> Bail was also mandatory for a person accused of homicide if there was only “a bare suspicion of manslaughter” and the accused was “of good fame.”<sup>90</sup> In these cases, a justice could not, “under the pretence of demanding sufficient surety, make so excessive a requisition, as in effect, to amount to a *denial* of bail.”<sup>91</sup> An unaffordable bail that resulted in detention gave grounds to charge a justice with a misdemeanor or hold him liable in a private trespass action.<sup>92</sup> And a justice who denied bail outright when there was a right to it owed “a grievous americiament [fine] to the king.”<sup>93</sup> In other words, where English law guaranteed a right to bail, it guaranteed release, and a magistrate who prevented release was subject to penalty. On the other hand, the magistrate was still charged with requiring a bail pledge “sufficient” to ensure the defendant’s appearance.<sup>94</sup> If a defendant failed to appear, the justice who had accepted the bail could be held liable for “a negligent escape at common law.”<sup>95</sup>

2. *Discretion to Bail.* — Between the categories of mandatory detention and mandatory bail lay the great middle ground of judicial discretion. In the vast majority of cases, the magistrate had to decide both whether to admit the defendant to bail and, if so, what sureties were “sufficient.”

Admission to bail turned largely on the magistrate’s estimation of the defendant’s probable guilt. “[B]ail is only proper,” a leading treatise advised, “where it stands indifferent whether the person accused were guilty or innocent.”<sup>96</sup> Hence the rule that those who confessed to a crime were unbailable — their guilt was certain.<sup>97</sup> As Bishop later recognized,

<sup>88</sup> 1 CHITTY, *supra* note 40, at 64–65; 3 HAWKINS, *supra* note 40, at 204, 222–23.

<sup>89</sup> 1 CHITTY, *supra* note 40, at 65; *see also* 2 HALE, *supra* note 83, at 127; 4 BLACKSTONE, *supra* note 59, at \*295.

<sup>90</sup> 4 BLACKSTONE, *supra* note 59, at \*296; *see* 1 CHITTY, *supra* note 40, at 87; *see also* 3 HAWKINS, *supra* note 40, at 212.

<sup>91</sup> 1 CHITTY, *supra* note 40, at 69; 4 BLACKSTONE, *supra* note 59, at \*296; *see also* 3 HAWKINS, *supra* note 40, at 187.

<sup>92</sup> 1 BURN, *supra* note 85, at 149.

<sup>93</sup> Statute of Westminster I 1275, 3 Edw. c. 15 (Eng.); 3 HAWKINS, *supra* note 40, at 189.

<sup>94</sup> 3 HAWKINS, *supra* note 40, at 189–90.

<sup>95</sup> 1 CHITTY, *supra* note 40, at 69; 1 WILLIAM DICKINSON, A PRACTICAL EXPOSITION OF THE LAW RELATIVE TO THE OFFICE AND DUTIES OF A JUSTICE OF THE PEACE 138–39 (London, Reed & Hunter 1813).

<sup>96</sup> 3 HAWKINS, *supra* note 40, at 207; *see also* 1 BISHOP, *supra* note 39, at 702 (“[U]nder the common law as it used to be held, in the case of [judicial discretion], if the court could see no reasonable doubt of the defendant’s guilt, it would not admit him to bail.”).

<sup>97</sup> *See* 3 HAWKINS, *supra* note 40, at 200–01. Indeed, probability of guilt was such an all-determining factor that it could even override the normal rules of admission to bail in extraordinary

the distinction between pretrial and trial, regulatory and punitive detention tended to blur in English common law practice. Justices were asked to prejudge the case based on the available evidence. A jury verdict did not so much *initiate* a postconviction sentencing phase as it *confirmed* the propriety of a sentence already being served.<sup>98</sup>

Reputational considerations also mattered. Thieves “openly defamed and known” could be denied bail even if the charged theft was of little consequence.<sup>99</sup> Misdemeanor defendants could be denied bail if they were “not . . . of good fame”; likewise for criminal accessories who “labor under the same want of reputation.”<sup>100</sup>

If a justice planned to admit a defendant to bail, he had to determine what counted as a “sufficient” surety. The rule was that “[t]he sureties ought to be at least two men of ability.”<sup>101</sup> A single surety was acceptable if the defendant could also pledge sufficient property.<sup>102</sup> Judging a surety’s sufficiency was no easy task. Because property was merely pledged in a recognizance and not posted upfront, the justice had to guess what property might be available to collect if a forfeiture ever came due. To aid his guess, he could put sureties under oath and examine them about their holdings,<sup>103</sup> but there is very little evidence showing whether and how often this happened before the mid-nineteenth century.

Ultimately, though, the magistrate had discretion to determine the amount of the pledge, and the treatises were clear that while magistrates should consider a defendant’s means, a “sufficient” pledge in a discretionary-bail case might well be an unaffordable one.<sup>104</sup> Hawkins’s

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circumstances. Those accused of treason on only a “slight suspicion” could be left at large on a bail bond even though the statutes made treason a non-bailable charge. On the other hand, those accused of trifling misdemeanors could be committed to jail, despite their ostensible right to bail, if guilt was clear “on plain and unquestionable evidence.” *Id.* at 203, 212.

<sup>98</sup> See 1 BISHOP, *supra* note 39, at 495–99.

<sup>99</sup> 1 CHITTY, *supra* note 40, at 65; see also 3 HAWKINS, *supra* note 40, at 196; 4 BLACKSTONE, *supra* note 59, at \*296.

<sup>100</sup> 1 CHITTY, *supra* note 40, at 65; see also 3 HAWKINS, *supra* note 40, at 202–03; 4 BLACKSTONE, *supra* note 59, at \*296.

<sup>101</sup> 1 CHITTY, *supra* note 40, at 67; 2 HALE, *supra* note 83, at 125.

<sup>102</sup> See, e.g., OLIVER L. BARBOUR, *THE MAGISTRATE’S CRIMINAL LAW* 502 (Albany, WM. & A. Gould & Co. L. Booksellers 1841). And it usually was “men” who were sureties, because married women could not enter into recognizances based upon estates controlled by their husbands. *Id.* at 503.

<sup>103</sup> 1 CHITTY, *supra* note 40, at 67–69; cf. 4 BLACKSTONE, *supra* note 59, at \*372 (describing similar limits to judicial discretion in assessing fines and amercements). Some treatises advised justices to assess sufficiency based on real property, which unlike chattel property, was less likely to be alienated or wasted before trial. See BARBOUR, *supra* note 102, at 502. Aaron Burr’s defense counsel suggested that courts “always” inquired into a defendant’s means, see *infra* p. 1878, but that assertion finds little support in the evidence of local justices’ routine administration, see *infra* section II.B, pp. 1848–69.

<sup>104</sup> See, e.g., JOHN A. DUNLAP, *THE NEW-YORK JUSTICE* 41 (New York, Isaac Riley 1815); JOHN C.B. DAVIS, *THE MASSACHUSETTS JUSTICE* 289 (Worcester, Warren Lazell 1848). The Pennsylvanian jurist James Wilson deemed it a “disagreeable necessity” to jail defendants who “cannot find sureties.” 2 WILSON, *supra* note 60, at 499.

implacable rule was ubiquitous in American treatises: “[F]or that insufficient sureties are as no sureties.”<sup>105</sup> The tolerance for unattainable bail requirements in discretionary-bail cases contrasts with the intolerance for it where bail was mandatory. In this discretionary middle ground, magistrates were not liable for bail errors made in good faith: so long as a justice acted “without partiality and malice, he will be fully justified.”<sup>106</sup>

In summary, the common law classification of bail rights was of paramount importance. In the few cases where bail was mandated by statute, the burden was on magistrates to find a way to release defendants on any surety that could be deemed sufficient. An unaffordable bail was in effect a denial of bail and could trigger harsh penalties against the offending magistrate.<sup>107</sup> But in the vast class of cases in which the magistrate could deny bail outright, demanding a surety that was beyond the defendant’s means appears to have been legally inconsequential. While some lawmakers advised against such a course, their appeals sounded in moralistic, not legal tones. The choice to jail outright entailed a discretion to jail for impecunity. Whether supported by the seriousness of the charge or a disreputable defendant’s low estate, such imprisonments would leave magistrates — in the words of the treatises — justified.

#### D. *The Dissenter Model Takes the Field*

This English bail system came under fierce criticism by religious dissenters in the seventeenth century who experienced pretrial detention as an arbitrary and abusive persecution for their beliefs. Two of these, the Puritan lawyer Nathaniel Ward and the Quaker William Penn, would play significant roles in the colonial Founding of America, where their first experiments in written constitutionalism would dramatically overhaul the English law of bail. Instead of a limited right to bail and a broad category of discretion, the dissenters’ bail system reversed the poles: prisoners were to enjoy the right to bail by default, while magistrates retained discretion to detain only in cases of capital crimes.

*i. Nathaniel Ward and the Body of Liberties.* — The first iteration of the dissenter model was drafted by Nathaniel Ward as part of an

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<sup>105</sup> 3 HAWKINS, *supra* note 40, at 187; *see also* DAVIS, *supra* note 104, at 289.

<sup>106</sup> DANIEL DAVIS, A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS 130 (Boston, Cummings, Hilliard & Co. 1824). Some contemporary commentators have overlooked this point. *See, e.g.*, Brief for Amicus Curiae Cato Institute Supporting Plaintiff-Appellee and Affirmance of the Preliminary Injunction, *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) (No. 16-10521).

<sup>107</sup> *See, e.g.*, 1 CHITTY, *supra* note 40, at 69 (suggesting punishments may arise “in cases where they are bound by law to bail the prisoner”).

early law reform effort in the Massachusetts Bay Colony.<sup>108</sup> Ward, a Puritan exile, arrived in Massachusetts in 1634 at a moment of political ferment. The colony's government relied on local magistrates who exercised vast discretion; in administering justice, they "had few guidelines other than Scripture and their own sense of moral equity."<sup>109</sup> But by the 1630s, frustration at these expansive powers had galvanized efforts to codify a basic law.<sup>110</sup> Ward was appointed to the committee charged with doing so.<sup>111</sup>

The project was fraught. Among other obstacles, Governor John Winthrop, himself a former justice of the peace, continually interfered.<sup>112</sup> But in 1641 the Massachusetts General Council adopted the Body of Liberties, which Ward had drafted.<sup>113</sup> The bail clause appeared in Liberty 18:

No mans person shall be restrained or imprisoned by any Authority whatsoever, before the law hath sentenced him thereto, If he can put in sufficient securitie, bayle, or mainprise, for his appearance, and good behaviour in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it.<sup>114</sup>

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<sup>108</sup> Ward, a lawyer, was an exile from Archbishop Laud's anti-Puritan measures in England. SAMUEL ELIOT MORISON, BUILDERS OF THE BAY COLONY 223, 226, 229 (1930); HASKINS, *supra* note 14, at 60. In a semi-autobiographical work, Ward commented that he had read "almost all the Common Law of England, and some Statutes." NATHANIEL WARD, THE SIMPLE COBLER OF AGGAWAM 92 (Salem Press 1905) (1647). He had earned a law degree from Emmanuel College, Cambridge, a "nursery of Puritanism." Scott A. McDermott, *Body of Liberties: Godly Constitutionalism and the Origin of Written Fundamental Law in Massachusetts, 1634–1666*, at 32, 55 (2014) (Ph.D. dissertation, Saint Louis University).

<sup>109</sup> EDGAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS, 1620–1692, at 4 (1993).

<sup>110</sup> 1 JOHN WINTHROP, HISTORY OF NEW ENGLAND FROM 1630 TO 1649, at 160 (James Savage ed., Boston, Phelps & Farnham 1825); HASKINS, *supra* note 14, at 115–21.

<sup>111</sup> "[I]t was agreed that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta" and serving as "fundamental laws." 1 WINTHROP, *supra* note 110, at 191; see also Daniel R. Coquillette, *Radical Lawmakers in Colonial Massachusetts: The "Countenance of Authoritie" and the Lawes and Libertyes*, 67 NEW ENGLAND Q. 179, 187 (1994).

<sup>112</sup> FRANCIS J. BREMER, JOHN WINTHROP: AMERICA'S FORGOTTEN FOUNDING FATHER 304–06 (2003); GEORGE L. HASKINS, LAY JUDGES: MAGISTRATES AND JUSTICES IN EARLY COLONIAL MASSACHUSETTS, in LAW IN COLONIAL MASSACHUSETTS, 1630–1800, at 39, 44 (1984).

<sup>113</sup> McDermott, *supra* note 108, at 181; BREMER, *supra* note 113, at 304–06; see also John Witte, Jr., *A New Magna Carta for the Early Modern Common Law: An 800th Anniversary Essay*, 30 J.L. & RELIGION 428, 438 (2015); JOHN WITTE, JR., THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM 289 (2007); AVIHU ZAKAI, THEOCRACY IN MASSACHUSETTS: REFORMATION AND SEPARATION IN EARLY PURITAN NEW ENGLAND 23 (1994); MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 40–46 (2004). Ward's draft was eventually adopted over John Cotton's "Moses his Judicials," a draft deriving the government's powers from scriptural sources. Coquillette, *supra* note 111, at 188. Cotton's draft largely ignored judicial process, which was, by contrast, the longest of the sections of Ward's Body of Liberties. JEAN BÉRANGER, NATHANIEL WARD 104 (1969).

<sup>114</sup> BODY OF LIBERTIES § 18 (1641).

This clause represented a dramatic check on the discretion (to bail or commit) that magistrates had previously exercised. Rather than allow discretion in the mine run of cases, Ward's bail clause made bail mandatory except in narrowly drawn categories.

Ward left no commentary, so his motivations must be gleaned from context. Although he was a fervent Puritan, Ward also had a deep sense of the legal boundedness of government.<sup>115</sup> He had been briefly jailed in England for his religious and political views and had seen his fellow Puritans jailed without bail.<sup>116</sup> His experience, combined with his strict Puritan commitments, instilled a deep disdain for arbitrary government.<sup>117</sup> As a whole, Ward's Body of Liberties was a "colossal rebuke"<sup>118</sup> to the governance approach that deferred to the divinely sanctioned authority of magistrates.<sup>119</sup> It would remain the New England law of bail for the next two centuries.<sup>120</sup> And perhaps the model of Ward's bail clause played some role in the remarkably similar story that soon unfolded in the Quaker colonies to the south.

2. *William Penn and the Frame of Government.* — The Quaker William Penn came from privilege, but his religious convictions led to experiences with arrest and detention that would shape Pennsylvania's

<sup>115</sup> See McDermott, *supra* note 108, at 171. In *The Simple Cobler*, Ward wrote, "[t]hey that well end ill warrs, must have the skill, To make an end by Rule, and not by Will." WARD, *supra* note 108, at 46. Lamenting the civil strife in England, he characterized the factions as "*Majestas Imperii*" and "*Salus Populi*" — the crown and the people — "the one fighting for Prerogatives, the other defending Liberties." *Id.*

<sup>116</sup> McDermott, *supra* note 108, at 99–100, 118–19; RICHARD CUST, *THE FORCED LOAN AND ENGLISH POLITICS, 1626–1628*, at 218–52 (1987) (documenting the many notable Puritans jailed for resisting Charles I's "Forced Loan" of 1626).

<sup>117</sup> MORISON, *supra* note 108, at 234–38. This is not to say that Ward was a liberal reformer. A Winthrop scholar once described him as "the narrowest and most intolerant[] of the writers and speakers of New England." 2 WINTHROP'S JOURNAL: HISTORY OF NEW ENGLAND, 1630–1649, at 36 n.1 (James Kendall Hosmer ed., 1908). His attachment to the rule of law arose from his Puritan political theology, not contractarian or democratic commitments. See, e.g., McDermott, *supra* note 108, at 170–71; BÉRANGER, *supra* note 113, at 86–87.

<sup>118</sup> McDermott, *supra* note 108, at 183.

<sup>119</sup> See *id.* at 160–62, 177, 183. Ward might also have been influenced by Coke's *Little Treatise on Baile*, published the year he emigrated, which directed magistrates to pursue "neither Law without discretion, lest it should incline to rigour, nor discretion without Law, lest confusion should follow, should bee put in use." KNIGHT [COKE], *supra* note 58, at 31. Another possible influence was a high-profile habeas corpus argument that John Selden made in 1627. JOHN SELDEN, *Speeches and Arguments*, in 3.2 THE WORKS OF JOHN SELDEN, ESQ. 1934 (2006). Selden claimed that all offenses fell into two categories for purposes of bail: serious offenses meriting blood punishments in which bail is discretionary and less serious offenses in which a defendant must be bailed if he offers "good" surety, *id.* at 1939–40, a structure highly similar to Liberty 18.

<sup>120</sup> Connecticut law copied Ward's Liberty 18 until 1808, when the state adopted the Penn formulation by statute. See Christopher Collier, *The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition*, 15 CONN. L. REV. 87, 91 n.14 (1982). Massachusetts' revolutionary Constitution of 1780 omitted an express right to bail and forbid only excessive bail in Article XXVI. Nevertheless, courts in the Commonwealth appear to have adhered to a common law right of bail long into the nineteenth century that strictly followed the structure of Liberty 18. See *Dunlap v. Bartlett*, 76 Mass. (10 Gray) 282 (1857).

law and, ultimately, the new nation's.<sup>121</sup> His first arrest occurred in 1667 in Cork, Ireland, where he was briefly jailed with eighteen other Quakers for worshipping in violation of the 1664 Conventicles Act.<sup>122</sup> The second imprisonment was longer — nearly eight months, from December 1668 to July 1669, in the Tower of London, where he was jailed for publishing a theological polemic titled *The Sandy Foundation Shaken*.<sup>123</sup>

Penn's third arrest had enduring importance for constitutional history. On August 14, 1670, Penn and another Quaker, William Mead, preached outside a locked meetinghouse in contravention of a renewed Conventicles Act.<sup>124</sup> The two were arrested and held in Newgate Prison until trial two weeks later at the Old Bailey.<sup>125</sup> Famously, the jury refused to convict, and the judges' fine on the jury was eventually overturned in the foundational case on freedom of the jury, known as *Bushell's Case*.<sup>126</sup> Penn was returned to detention nevertheless, in contempt for refusing to doff his hat to the court.<sup>127</sup> In total, he was detained for a little over a month.<sup>128</sup>

Penn's freedom after the conventicle trial was brief. He was arrested again in February 1671 for illicit preaching, quietly tried without a jury, and sentenced to six additional months.<sup>129</sup> He may have been arrested several more times for violating religious meeting laws.<sup>130</sup> During and

<sup>121</sup> Penn was the son of an English admiral and a royalist supporter of Charles II and James II before the Glorious Revolution. WILLIAM WISTAR COMFORT, WILLIAM PENN AND OUR LIBERTIES 65–66 (1947).

<sup>122</sup> ANDREW R. MURPHY, WILLIAM PENN: A LIFE 44, 49–50 (2019); Conventicles Act of 1664, 16 Car. 2 c. 4 (Eng.).

<sup>123</sup> MURPHY, *supra* note 122, at 59. He was held “close,” meaning without “exercise, fresh air, and most visitors.” *Id.* at 60. Penn wrote his most notable works on religious toleration during his imprisonment, concluding with a tract that satisfied the authorities that Penn was not a blasphemer. *Id.* at 60–62. He was then released “into the custody of his father.” *Id.* at 62. For the release order, see Release from the Tower, in 1 THE PAPERS OF WILLIAM PENN 97, 97 (Richard S. Dunn & Mary Maples Dunn eds., 1981).

<sup>124</sup> MURPHY, *supra* note 122, at 75–76; Conventicles Act of 1670, 22 Car. 2 c. 1 (Eng.).

<sup>125</sup> MURPHY, *supra* note 122, at 76.

<sup>126</sup> (1670) 124 Eng. Rep. 1006 (P.C.). On the significance of the case, see generally K. Crosby, *Bushell's Case and the Juror's Soul*, 33 J. LEGAL HIST. 251 (2012); Simon Stern, Note, *Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification After Bushell's Case*, 111 YALE L.J. 1815 (2002). See Scott Turow, *Best Trial: Order in the Court*, N.Y. TIMES MAG., Apr. 18, 1999 (arguing the Penn-Mead trial “probably did more than any other case to refine the trial tradition in England and the United States”).

<sup>127</sup> MURPHY, *supra* note 122, at 77, 80.

<sup>128</sup> *Id.* at 75–80.

<sup>129</sup> *Id.* at 82.

<sup>130</sup> An early biographer reported Penn frequently arguing in court between 1673 and 1678 to object to magistrates breaking up his religious meetings and arresting close friends like George Fox. SAMUEL M. JANNEY, THE LIFE OF WILLIAM PENN 103–47 (1852). The editors of the Penn papers, however, say that Penn was not imprisoned again between 1671 and his imprisonment for debt in 1708. See 1 THE PAPERS OF WILLIAM PENN, *supra* note 123, at 192. But the latter statement is clearly mistaken as it overlooks Penn's imprisonments on treason charges in the 1690s. See *infra* note 131 and accompanying text.

after the fall of James II, between June 1689 and November 1690, he was arrested and jailed twice more on suspicion of being a Jacobite traitor.<sup>131</sup>

These experiences had a profound influence on Penn's political thought, and so on American history. Unlike his contemporaries John Locke and Thomas Hobbes, Penn left no systematic treatment of his thought on government and liberty. But it is possible to piece together his views from his arguments during the trial with Mead and his various writings.<sup>132</sup> And as Penn's intellectual biographer Andrew Murphy has shown, Penn developed a constitutional theory that is surprisingly resonant with modern constitutional thought.

In an age of deference to Parliament, Penn saw the legislature "as ultimately bound by fundamental law."<sup>133</sup> He asserted a fundamental right:

to your own Lives, Liberties, and Estates: In this, every man is a sort of little sovereign to himself: No man has power over his *Person*, to imprison or hurt it, or over his *Estate*, to invade or usurp it: Only your own transgression of the laws, (and those of your own making too) lays you open to loss . . . . So that the Power of England is a *legal* power, which truly merits the name of *Government*. That which is not legal, is a *Tyranny*, and not properly a Government.<sup>134</sup>

This conception of fundamental law meant that even legislation duly enacted might be unlawful.<sup>135</sup>

<sup>131</sup> See 3 THE PAPERS OF WILLIAM PENN, *supra* note 123, at 217, 251 n.1, 284 n.3; MURPHY, *supra* note 122, at 202–06. Penn's life effectively ended in prison as well, but this time because of civil imprisonment for debt. *Id.* at 332–55.

<sup>132</sup> See William Penn & William Mead, The People's Ancient and Just Liberties, in 1 THE SELECT WORKS OF WILLIAM PENN 79 (London, James Phillips, 3d ed. 1782) [hereinafter *Ancient and Just Liberties*]. Penn was likely assisted by Thomas Rudyard, a Quaker lawyer who became a co-drafter with Penn of the Frame of Government. See *infra* note 143 and accompanying text; MURPHY, *supra* note 122, at 88; DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA 458 n.5 (1989). Rudyard the same year published his own account of trial arguments in a tract borrowing Penn's title. THOMAS RUDYARD, THE SECOND PART OF THE PEOPLES ANCIENT AND JUSTICE LIBERTIES ASSERTED IN THE PROCEEDINGS AGAINST, AND TRYALS OF THOMAS RUDYARD, FRANCIS MOOR, RICHARD MEW ET AL. (London, n.p. 1670).

<sup>133</sup> ANDREW R. MURPHY, LIBERTY, CONSCIENCE, AND TOLERATION: THE POLITICAL THOUGHT OF WILLIAM PENN 256 (2016). Penn also referred to "fundamental law" as "the people's ancient and just liberties." See *Ancient and Just Liberties*, *supra* note 132, at 92 ("Must I therefore be taken away because I plead for the Fundamental Laws of England?").

<sup>134</sup> William Penn, England's Great Interest in the Choice of This New Parliament (1679), *reprinted in* 4 THE SELECT WORKS OF WILLIAM PENN, *supra* note 132, at 243, 245–46; see generally *Ancient and Just Liberties*, *supra* note 132.

<sup>135</sup> Penn, for instance, counseled magistrates enforcing the Conventicle Acts "to look, not so much whether they act Regularly according to the late Act against *Conventicles*, as whether the Act itself be Regular and according to the fundamental laws" — a striking admonition to lesser magistrates to ignore legislative decrees that contravened "fundamental laws." WILLIAM PENN, THE ENGLISHMAN, OR, A LETTER FROM A UNIVERSAL FRIEND 12 (London, n.p. 1670).



For Penn, the essential source of fundamental law was Magna Carta,<sup>136</sup> and his pretrial detentions violated Magna Carta's guarantee that "[n]o freeman shall be taken, or imprisoned" except "by the lawful judgment of his 'peers.'"<sup>137</sup> He quoted this clause at least five separate times in his trial with Mead,<sup>138</sup> where his chief claim was that "[t]he prisoners were taken, and imprisoned, without presentment of good and lawfull men of the vicinage, or neighbourhood, but after a military and tumultuous manner, contrary to the grand charter."<sup>139</sup> He was of course making this argument *in* a jury trial. The implication was that any imprisonment *before* trial contravened Magna Carta.<sup>140</sup>

In 1680, Penn petitioned Charles II for a colony in America as a way for the crown to pay off significant debts to Penn's family.<sup>141</sup> He received his charter for Pennsylvania in 1681 and set to work on the colony's constitution, which he titled the Frame of Government.<sup>142</sup> Thomas Rudyard, a Quaker lawyer who had served as Penn's legal counsel during the Penn-Mead trial, became a kind of co-author toward the end.<sup>143</sup>

It was Rudyard's first revision of the Frame that contained a bail clause,<sup>144</sup> which the two authors eventually refined to provide: "*That all Prisoners shall be Bailable by sufficient Sureties, unless for Capital Offences where the Proof is evident or the Presumption great.*"<sup>145</sup> The

<sup>136</sup> See MURPHY, *supra* note 133, at 64.

<sup>137</sup> See Ancient and Just Liberties, *supra* note 132, at 128.

<sup>138</sup> *Id.* at 94, 100, 126, 128–29.

<sup>139</sup> *Id.* at 124. Writing about the trial later, Penn crassly complained that "Magna Charta is magna farta with the recorder of London; and to demand right, an affront to the court. Will and power are their great charter; but to call for England's, is a crime, incurring the penalty of their bale-dock and nasty hole; nay, the menace of a gag, and iron shackles too." *Id.* at 81.

<sup>140</sup> Cf. William Penn, England's Present Interest Considered (1675), reprinted in 3 THE SELECT WORKS OF WILLIAM PENN, *supra* note 132, at 197, 208 (3rd ed. 1782) (King Henry I "particularly took such care of continuing *this part of property* inviolable, that, in his time, no person was to be imprisoned for committing of moral crime itself, unless he were first attainted by the verdict of twelve men.").

<sup>141</sup> MURPHY, *supra* note 122, at 137–39; 2 THE PAPERS OF WILLIAM PENN, *supra* note 123, at 22. Many Quakers had become interested in colonization as the surest route to religious freedom and a means to live out their ideals as a model society for the world. See *id.* at 113–19; JEAN R. SODERLUND, SEPARATE PATHS: LENAPES AND COLONISTS IN WEST NEW JERSEY 65 (2022); JON R. KERSHNER, JOHN WOOLMAN AND THE GOVERNMENT OF CHRIST: A COLONIAL QUAKER'S VISION FOR THE BRITISH ATLANTIC WORLD 7 (2018). Penn "became a colonizer quite by accident" when he was asked to arbitrate disputes between Quaker colonizers of New Jersey beginning in 1675. 1 THE PAPERS OF WILLIAM PENN, *supra* note 123, at 383.

<sup>142</sup> For a detailed guide to the drafting history of the Frame, as well as transcriptions of various drafts of the Frame, see 2 THE PAPERS OF WILLIAM PENN, *supra* note 123, at 135–238.

<sup>143</sup> *Id.* at 137; MURPHY, *supra* note 133, at 136–43 (describing the iterative revisions).

<sup>144</sup> See 2 THE PAPERS OF WILLIAM PENN, *supra* note 123, at 189–90.

<sup>145</sup> The Frame of Government of Pennsylvania, art. xi (1682) (emphasis added). The Frame as ultimately published is reprinted in 2 PAPERS OF WILLIAM PENN, *supra* note 123, at 214–20. Alongside the Frame, Penn published a supplemental constitution now known as the Laws Agreed Upon in England, containing additional enumerated rights. See *id.* at 220–26. Earlier Penn had

clause dramatically expanded the right to bail vis-à-vis the common law, leaving magistrates discretion to deny bail only in capital cases. This change was quite radical. Although Ward's clause for Massachusetts also provided a right to bail "unlesse it be in Crimes Capitall," the list of capital crimes in Puritan Massachusetts was relatively long.<sup>146</sup> Penn, on the other hand, limited capital punishment to cases of treason and intentional murder.<sup>147</sup>

In correspondence with Irish Quakers after completing his first draft constitution, Penn wrote that he intended "that whch is extreordinary, & to leave myselfe & successors noe powr of doeing mischief."<sup>148</sup> The bail clause was one of a number of self-imposed restraints on government and was intended to be enforced and supported by the others. Frequent, local court sessions were required "to prevent tedeous and expensive Pilgramages" and so that "Justice may be Speedely as well as Impartially done."<sup>149</sup> Every person could "freely Plead" claims without lawyers, and courts were bound "to Inform him or her what they can [do] to his or her assistance in the matter before them, that none be prejudic'd through Ignorance in their own business."<sup>150</sup> Penn stringently protected the right to a jury and access to the writ of habeas corpus to prevent the "undue Imprisonents of Persons upon mere Surmisees."<sup>151</sup>

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signed onto the Fundamental Laws of West New Jersey, which forbid arrest or imprisonment "for or by reason of any debt, duty, or thing whatsoever (cases felonious criminal and treasonable Excepted)." The Charter or Fundamental Laws of West New Jersey, [also known as The West New Jersey Concessions and Agreements], ch. xviii (1676); 1 THE PAPERS OF WILLIAM PENN, *supra* note 123, at 387–88. Rudyard, in turn, originally proposed an article that more nearly tracked Penn's arguments based on Magna Carta: "That all persons for Criminal Causes shall & may be bayled by sufficient suretyes, untill Conviction by the verdict of 12 persons of the neighbourhood." Thomas Rudyard, *The Fundamentall Constitutions of the Province of Pensilvania in America*, § 123 (Jan. 1682), in 2 THE PAPERS OF WILLIAM PENN, *supra* note 123, at 193.

<sup>146</sup> It included blasphemy, adultery, and bearing false witness. NATHANIEL WARD, *BODY OF LIBERTIES* Nos. 18, 94 (1641), reprinted in WILLIAM H. WHITMORE, *A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686*, at 30, 37, 55 (1890). *But see* Jules Zanger, *Crime and Punishment in Early Massachusetts*, 22 WM. & MARY Q. 471, 471–72 (1965) (surveying data showing capital punishment was exceedingly rare in practice).

<sup>147</sup> The Frame of Government of Pennsylvania, art. xxv (1682) (listing only treason and murder as capital offenses); Herbert William Keith Fitzroy, *The Punishment of Crime in Provincial Pennsylvania*, 60 PA. MAG. HIST. & BIOGRAPHY 242, 247 (1936). Indeed, Penn abhorred blood punishments and imprisonments of all types, and "considering the tenderness of the holy merciful Christian Law," attempted to replace these devices with restitution and bonded labor in Pennsylvania. William Penn, *The Fundamentall Constitutions of Pennsylvania* (draft, 1681), in 2 THE PAPERS OF WILLIAM PENN, *supra* note 123, at 141, 148–49 [hereinafter *Fundamentall Constitutions*].

<sup>148</sup> William Penn to Robert Turner, Anthony Sharp, and Roger Roberts (Apr. 12, 1681) in 2 THE PAPERS OF WILLIAM PENN, *supra* note 123, at 88, 88–89.

<sup>149</sup> Penn, *Fundamentall Constitutions*, *supra* note 147, at 149.

<sup>150</sup> *Id.*; *Laws Agreed upon in England*, art. vi (1682).

<sup>151</sup> Penn, *Fundamentall Constitutions*, *supra* note 147, at 141, 151, 171–72. The final draft of the Frame replaced an earlier provision for habeas corpus relief with actions for double damages against wrongful imprisonment. *See* *Laws Agreed upon in England*, art. xii. (1682).

In all, Penn aimed to prevent the government from jailing one of its citizens upon a mere accusation. Convinced that the fundamental law of Magna Carta required no less, Penn drastically curtailed the government's ability to detain prior to a jury verdict. Arrestees had a right to bail in all but a narrow category of capital cases, and even then magistrates had discretion to bail. Swift access to habeas corpus and a requirement that courts provide legal advice to unrepresented defendants were designed to keep the right to bail from becoming an unenforced paper promise.

3. *The Scope and Significance of the Dissenters' Model.* — “[E]very state that entered the Union after 1789, except West Virginia and Hawaii, guaranteed a right to bail in its original state constitution.”<sup>152</sup> With slight variations, these constitutional rights to bail closely followed Penn’s text from the Frame: All prisoners are bailable by sufficient sureties, except in capital cases where the proof is evident or the presumption great — what one commentator has called the “Consensus Right to Bail.”<sup>153</sup> The Confederation Congress incorporated the Penn clause into the Northwest Ordinance of 1787, thus making it the rule for the federal territories.<sup>154</sup> And the First Congress included a version of it in the Judiciary Act of 1789, making it the rule for federal procedure as well.<sup>155</sup>

It is important to note, however, that although the dissenters’ clause enjoyed broad support at the time of the Founding, its destiny as the “consensus text” would not yet have been clear by 1792, when the Bill of Rights was ratified. Every new state incorporated the Penn clause into its constitution, but not all of the old states did. New York, New Hampshire, Maryland, Virginia, and South Carolina followed the common law model through most or all of the nineteenth century.<sup>156</sup> So at

<sup>152</sup> Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 351 (1982).

<sup>153</sup> Hegreness, *supra* note 14, at 924.

<sup>154</sup> Northwest Ordinance of 1787, 1 Stat. 50, 52. The clause was drawn up by the Massachusetts jurist Nathan Dane. See Letter from Nathan Dane to Rufus King (July 16, 1787), in 24 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 357, 358 (Paul H. Smith ed., 1996). His encyclopedic digest of American law canvassed the law of bail with a fair degree of detail but was rarely cited or copied by other treatise literature at the time. See 5 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 276–305 (1824).

<sup>155</sup> Judiciary Act of 1789, § 33, 1 Stat. 73, 91.

<sup>156</sup> See *People ex rel. Devore v. Warden of N.Y.C. Prison*, 244 N.Y.S.2d 505, 507 (N.Y. Sup. Ct. 1963); *State v. Ricciardi*, 123 A. 606, 606 (N.H. 1924); *Fischer v. Ball*, 129 A.2d 822, 825–26 (Md. 1957); Act of Dec. 5, 1785, ch. XIV in A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE 20, 20–21 (Augustine Davis ed., 1794); GRIMKÉ, *supra* note 64, at 45–53. Georgia adopted the dissenter framework after the Civil War. See GA. CODE OF 1867, § 4649. Massachusetts retained Ward’s clause, and the following states adopted the Penn clause: North Carolina, N.C. CONST. of 1776, art. 39.; Delaware, DEL. CONST. of 1792, art. 1, § 12; Connecticut, CONN. CONST. of 1818, art. 1, § 14; see also An Act Relative to Bail and the Writ of Habeas Corpus, 1808 Conn. Pub. Acts 69 (adopting the Penn clause by statute ten years before its ratification in the state constitution); Rhode Island, R.I.

the time of ratification, the federal government and about half of the new nation recognized the dissenters' right to bail, while the other half followed the English common law model. The proportion shifted in favor of the dissenters' model as Delaware, Connecticut, and all the states admitted from Vermont onwards adopted the Penn clause.<sup>157</sup>

The dissenters' clause inverted the English law of bail. The common law model sandwiched a broad range of magisterial discretion between narrow bands of cases in which bail was either prohibited or mandatory.<sup>158</sup> The dissenters' clause eliminated the mandatory-detention category, shrank the discretionary category down to capital crimes, and made the right to bail the default. Pursuant to the extant legal authorities, magistrates were under an obligation to find a way to release defendants who had a right to bail, and unrealistic pledge demands were impermissibly "excessive."

We have emphasized the origins of this system in religious dissent because claims of religious liberty were never far from the principles of pretrial liberty worked out by the system's architects. A state that could jail on a mere accusation was a state that could — and did — hale disfavored worshippers into dungeons, separate pastors from their flocks, and punish private belief as blasphemous with or without trial. Whatever the government's legitimate interests in protecting life and property through criminal penalties, the premise of the dissenter model was that those interests could be sufficiently realized in a system of bonded sureties that limited pretrial incarceration to the absolute minimum of necessity. The original dissenters did not think of their work as merely a statutory experiment in the New World. They instead believed

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CONST. of 1843, art. 1, § 9. At Penn's instigation, the first legislation of East Jersey contained his clause. FUNDAMENTAL LAWS AND CONSTITUTIONS OF NEW JERSEY, 1664–1964, at 17–19 (Julian P. Boyd ed. 1964); AARON LEAMING & JACOB SPICER, THE GRANTS, CONCESSIONS AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 235 (2d ed. 1881). New Jersey's Revolutionary Constitution omitted the Penn bail clause but it returned in the state constitution of 1844. Compare N.J. CONST. of 1776 (bearing no mention of bail), with N.J. CONST. of 1844, art. 1, § 10 (enumerating the Penn bail clause). In between, New Jersey courts appear to have followed the common law model. See *State v. Mairs & Mairs*, 1 N.J.L. 385, 388 (N.J. Sup. Ct. 1795).

<sup>157</sup> For the newly admitted states in chronological order until the Civil War, see VT. CONST. of 1777, ch. 2, § XXV; VT. CONST. of 1786, ch. 2, § XXX; VT. CONST. of 1793, ch. 2, § XXXIII; KY. CONST. of 1792, art. 12, § 16; KY. CONST. of 1799, art. 10, § 16; TENN. CONST. of 1796, art. 11, § 15; OHIO CONST. of 1803, art. 8, § 12; LA. CONST. of 1812, art. 6, § 19; IND. CONST. of 1816, art. 1, § 14; MISS. CONST. of 1817, art. 1, § 17; ILL. CONST. of 1818, art. 8, § 13; ALA. CONST. of 1819, art. 1, § 17; ME. CONST. of 1820, art. 1, § 10; MO. CONST. of 1820, art. 13, § 11; ARK. CONST. of 1836, art. 2, § 16; MICH. CONST. of 1835, art. 1, § 12; FLA. CONST. of 1838, art. 1, § 11; Declaration of Rights, CONSTITUTION OF THE REPUBLIC OF TEX. (1836), Decl. 10, TEX. CONST. of 1845, art. 1, § 9; IOWA CONST. of 1846, art. 2, § 12; WISC. CONST. of 1846, art. 16, § 10 (unenacted), WISC. CONST. of 1848, art. 1, § 8; CAL. CONST. of 1849, art. 1, § 7; MINN. CONST. of 1857, art. 1, § 7; ORE. CONST. of 1857, art. 1, § 14; KAN. CONST. of 1855, art. 1, § 9 ("Topeka Constitution"), KAN. CONST. OF 1857, Bill of Rights, § 14 ("Lecompton Constitution"), KAN. CONST. of 1858, art. 1, § 9 ("Leavenworth Constitution"), KAN. CONST. of 1859, Bill of Rights, § 9 ("Wyandotte Constitution").

<sup>158</sup> See *supra* notes 82 to 106 and accompanying text.

that their approach to bail was the only legitimate implementation of the fundamental law of England, especially the principle from Magna Carta that no free man could be detained and punished without — or before — trial by jury. A government based on fundamental law was one in which official discretion — the rule of will — had to be restrained.

Whether Founding-era states imported Penn's full meaning along with his text is difficult to determine. Very few constitutional conventions in the Revolutionary period published transcripts or even notes of their deliberations. While we know there was discussion about some of the Federal Judiciary Act's bail provisions, the adoption of the dissenters' clause was not among them, and we can only infer that the Act's drafter, Oliver Ellsworth, was familiar with the dissenters' clause, if not its history, from his extensive government service in Connecticut.<sup>159</sup>

The effect of the dissenter-model bail clause also varied according to which crimes each jurisdiction classified as capital. In Pennsylvania, where capital punishment was reserved for first-degree murder, the capital-case exception was exceedingly narrow.<sup>160</sup> But the penal codes of other Founding states included longer lists of capital crimes.<sup>161</sup> The more capital crimes, the more expansive the exception to the right to bail. Still, among nearly all the states that adopted Penn's clause, the right was much broader than it had been at common law.

In addition to the states' constitutional bail clauses, each state also enacted a multitude of statutes governing bail process and bail in other settings. The Pennsylvania legislature, for instance, periodically enacted statutes directing that persons convicted of certain offenses, or who defaulted on certain obligations, be imprisoned without bail until their

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<sup>159</sup> See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 50, 107 (1923); WILLIAM GARROTT BROWN, *THE LIFE OF OLIVER ELLSWORTH* 51–52 (1905); RONALD J. LETTIERI, *CONNECTICUT'S YOUNG MAN OF THE REVOLUTION, OLIVER ELLSWORTH* 16, 18 (1978). The dissenter clause remained unamended from Ellsworth's first draft. See PENNSYLVANIA PACKET (Phila.), June 29, 1789. Connecticut adopted Massachusetts's form of the dissenters' clause until 1808, when it adopted the Penn formulation by statute. Collier, *supra* note 120, at 91 n.14.

<sup>160</sup> As in many states, the list of crimes deemed capital in Pennsylvania expanded and contracted over time, but in 1794 “the punishment of death, except for murder in the first degree, was abolished.” PHILADELPHIA SOCIETY FOR ALLEVIATING THE MISERIES OF PUBLIC PRISONS, *A STATISTICAL VIEW OF THE OPERATION OF THE PENAL CODE OF PENNSYLVANIA, TO WHICH IS ADDED, A VIEW OF THE PRESENT STATE OF THE PENITENTIARY AND PRISON IN THE CITY OF PHILADELPHIA* 9 (1817) [hereinafter *PRISON SOCIETY STATISTICAL VIEW*]; see also MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835*, at 21 (1996).

<sup>161</sup> John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1227–28 & nn.22, 24 (1969). For a response to Mitchell, including with respect to the logic of the capital-case exception, see Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 377–78 (1970).

finances were paid.<sup>162</sup> For the criminally accused, though, the state constitution set the parameters for the pretrial right to bail.

Thus by the 1790s the states were in the process of broadly adopting a reformed approach to pretrial bail that severely limited magisterial discretion and protected the fundamental rights of the criminally accused. Paired with the guarantees of Magna Carta and the robust procedural protections that inhered in the common law right to bail, the dissenters' clause was originally intended to free almost every noncapital criminal defendant on a bail pledge within their means. That, at least, was the law on the books.

## II. BAIL IN PRACTICE: A TWO-TIERED SYSTEM

For some Americans, the law on the books was also the law in practice. But not for everyone. In practice, not just bail but a whole range of pretrial interventions and outcomes involved a kind of two-tiered citizenship.<sup>163</sup> This Part illustrates the law of bail in practice primarily with reference to the new nation's capital city. Section A situates criminal bail practice in the larger landscape of bonded suretyship. Section B describes the two-tiered system of criminal bail as it operated in Philadelphia from 1790 to 1800, when the city was the seat of the national government. Section C takes up the most prominent case of first-class citizenship in the Early Republic, the treason trial of Aaron Burr. Section D, finally, turns to the mechanism designed to check practices on the ground when they diverged too far from the law on the books: judicial review.

### A. *The World of Bonds*

Today the criminal pretrial bail bond is the dominant representative of the surety bond in practice.<sup>164</sup> The term "bail bond" conjures images of seedy shops with neon signs by the local courthouse, and our cultural

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<sup>162</sup> E.g., An Act for the Prevention of Vice and Immorality, and of Unlawful Gaming, and to Restrain Disorderly Sports and Dissipation (Apr. 22, 1794), reprinted in 15 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 110, 112 (James T. Mitchell & Henry Flanders eds., 1911). For a digest of Pennsylvania statutes concerning bail between 1701 and 1810, see BAIL AT THE FOUNDING, <https://bailatthefounding.net/statutes-at-large-pennsylvania/> [https://perma.cc/K7VQ-LN99].

<sup>163</sup> We are sensitive to the risk of anachronism in using the word "citizenship" to describe late eighteenth-century Anglo-American legal culture. To be clear, we find the term useful not in its technical sense, either today or at the time, but for the sense of "belonging" to a political community it invokes. See generally BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES 3–13 (2010) (describing the relationship between citizenship and belonging).

<sup>164</sup> Commercial bonding practices persist in a few domains. On construction bonds, see generally Cindy Barton-Coombs, *Contractor's Licensing Bonds and Interpleader*, 2 NEV. LAW. 10 (1994). For appeal bonds, see FED. R. CIV. P. 62; FED. R. APP. P. 8; Elaine A. Carlson, *Mandatory Supersedeas Bond Requirements: A Denial of Due Process Rights?*, 39 BAYLOR L. REV. 29, 30 (1987).

touchstone for a bonded surety goes about as a black-clad mercenary calling himself a “bounty hunter.”<sup>165</sup>

In the Early Republic, by contrast, criminal bail bonds represented a tiny fraction of court-ordered surety agreements, which were themselves but a small island in the world of bonds. Bond pledges were, quite simply, ubiquitous, and even an average citizen might have as many sureties as one has credit cards today. That was in part because suretyship served as a major mode of American governance before the erection of large bureaucracies in the twentieth century. Bonds were a crucial way for a strong government to work “out of sight”<sup>166</sup> and for private persons to participate in public life. One needed a bond to, for instance, serve as a postmaster,<sup>167</sup> maintain a tavern,<sup>168</sup> dock a ship or warehouse goods,<sup>169</sup> serve in municipal or state office,<sup>170</sup> come ashore as a sailor,<sup>171</sup> or resettle in another state (a rule that would increasingly apply only to free African Americans).<sup>172</sup> Just about any activity requiring a license or a public commission today required the posting of a bond, guaranteed by two or more sureties, back then.

It should come as no surprise, then, that surety agreements were a key device for enforcing obligations to appear at trial. But even in this narrower context, criminal bail bonds were not the most prevalent. Bail bonds for debtors facing civil trial take up much more space in the archives. Before the reform of imprisonment for debt,<sup>173</sup> arrest was a common procedure for launching a civil suit.<sup>174</sup> Debtors who could not pay their liabilities could at least implore friends or kin to stand surety

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<sup>165</sup> See generally *Dog the Bounty Hunter* (A&E Networks 2004–2012); Shane Bauer, *Inside the Wild, Shadowy, and Highly Lucrative Bail Industry*, MOTHER JONES, May/June 2014, <https://www.motherjones.com/politics/2014/06/bail-bond-prison-industry/> [https://perma.cc/F2H4-K9DP] (describing “Dog the Bounty Hunter” Duane Chapman as an emblematic celebrity on bail bond convention circuits).

<sup>166</sup> BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009).

<sup>167</sup> CAMERON BLEVINS, *PAPER TRAILS: THE US POST AND THE MAKING OF THE AMERICAN WEST* 27–32, 107–08 (2021).

<sup>168</sup> See, e.g., 1 REVISED STATUTES OF THE STATE OF NEW YORK 679 (1829); *Margoley v. Commonwealth*, 60 Ky. (3 Met.) 405, 406 (1861) (“The Revised Statutes . . . require all licensed tavern-keepers to enter into a bond for the performance of their duties therein set forth; and also require that they shall give surety for the discharge of such duties.”).

<sup>169</sup> See, e.g., CHARLES POPE, *THE MERCHANT, SHIP-OWNER, AND SHIP-MASTER’S IMPORT AND EXPORT GUIDE* 327 (13th ed. 1827).

<sup>170</sup> See generally MONTGOMERY H. THROOP, *A TREATISE ON THE LAW RELATING TO PUBLIC OFFICERS AND SURETIES IN OFFICIAL BONDS* (1892).

<sup>171</sup> See, e.g., ANDREW URBAN, *BROKERING SERVITUDE: MIGRATION AND THE POLITICS OF DOMESTIC LABOR DURING THE LONG NINETEENTH CENTURY* 25 (2017).

<sup>172</sup> See, e.g., KATE MASUR, *UNTIL JUSTICE BE DONE: AMERICA’S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION* 4, 17–18 (2021).

<sup>173</sup> See Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 24, 29 (1926).

<sup>174</sup> See MANN, *supra* note 73, at 24–25; Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 61 (1968).

for their release pending trial.<sup>175</sup> Civil bail bonds were devices that helped keep credit flowing and the commercial economy running.<sup>176</sup>

Indeed, criminal bail bonds were not even the second most common use of surety agreements in courts at the time. That honor fell to a rarely studied device known as the “peace bond.”<sup>177</sup> A peace bond pledged that its principal would keep the peace, often in reference to some specified claimant or alleged victim.<sup>178</sup> Usually, the term of compliance lasted for a year, or a year and a day.<sup>179</sup> One or two sureties typically signed the bond, each for half the amount pledged by the principal.<sup>180</sup> Peace bonds were often made out on pre-printed recognizance forms (even as early as the 1790s), and in practice the prewritten requirement to appear at court was crossed out or otherwise omitted.<sup>181</sup> They could be ordered independently of any criminal charge or in connection with one, at any stage in the case — pretrial, postconviction, or even post-acquittal as a kind of compromise measure.<sup>182</sup> They were an all-purpose supervisory device, especially for local courts.<sup>183</sup> Depending

<sup>175</sup> See MANN, *supra* note 73, at 15–16.

<sup>176</sup> *Id.* at 6–7, 15–16.

<sup>177</sup> LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* 90 (2009); Paul Lermack, *Peace Bonds and Criminal Justice in Colonial Philadelphia*, 100 PA. MAG. HIST. & BIOGRAPHY 173, 174–75 (1976); GOEBEL & NAUGHTON, *supra* note 14, at 485–88.

<sup>178</sup> Descriptions in this and the following paragraph come from EDWARDS, *supra* note 177, Lermack, *supra* note 177, and GOEBEL & NAUGHTON, *supra* note 14, as well as collections of peace bonds held by the SCDAH. See Kershaw County Peace Bonds, 1792–1799, County and Intermediate Court, Record 28, Series L28026; Camden District Peace Bonds, 1786–1799, Court of General Sessions, Record 49, Series L49063; Charleston County Recognizances, 1823–1832, Court of General Sessions, Record 10, Series L10163.

<sup>179</sup> See Lermack, *supra* note 177, at 187. Out of fifty-six Charleston and twenty-nine Camden recognizances, only one contained a two-year term. All others set the term at one year or one year and a day. See also GOEBEL & NAUGHTON, *supra* note 14, at 498, 517.

<sup>180</sup> In the South Carolina records, typical amounts were £40 or £50 per principal (£20 or £25 per surety) just after the Revolution, \$100 to \$200 per principal (half as much per surety) in subsequent years. Lermack found that £40 was also a common amount in pre-Revolutionary Philadelphia. Lermack, *supra* note 177, at 180. Goebel and Naughton found it rare for fewer than two sureties to appear on a bond in New York, GOEBEL & NAUGHTON *supra* note 14, at 518, though single sureties or no sureties at all were fairly common in South Carolina. Lermack reported frequent resort to fictitious sureties. Lermack, *supra* note 177, at 175.

<sup>181</sup> All of the Charleston and Camden bonds appear on printed forms. Indeed, the Camden papers were Charleston forms with the location crossed out and Camden written in. Out of fifty-six Charleston bonds, appearance was excused in all but thirteen cases. See also GOEBEL & NAUGHTON, *supra* note 14, at 489 (similar findings for pre-Revolutionary New York).

<sup>182</sup> See *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 453 (1806) (approving the use of standalone peace bonds so long as the “proceedings are regular”); *Respublica v. Donagan*, 2 Yeates 437, 438 (Pa. 1799); Lermack, *supra* note 177, at 188 (“Peace bonds were routinely imposed on acquitted defendants.”).

<sup>183</sup> See Jacob Schuman, *Revocation at the Founding*, 122 MICH. L. REV. (forthcoming 2024) (manuscript at 4) (on file with the Harvard Law School Library) (describing peace bonds as the closest Founding-era analogue to modern “probation, parole, and supervised release”); GOEBEL & NAUGHTON, *supra* note 14, at 517 (“A much bolder use of the [peace bond] was in cases where



on the wording of the bond, any subsequent criminal charge might forfeit it.<sup>184</sup> And particularly in jurisdictions that did not permit arrest in misdemeanor cases, the peace bond gave the victim immediate recourse should the accused strike again.

Summing it all up, bonded suretyship was a common part of public life in the Early Republic. People from all social classes had to condition their performance of public duties on the forfeiture of their property, co-signed and pledged by one or more sureties, for all kinds of purposes and in all kinds of public spaces. In the courts, suretyship took the form of bail bonds that secured commercial credit, guaranteed court appearance, and freed debtors from civil imprisonment. Courts and magistrates used similar bonds to supervise individuals they deemed threatening pretrial, post-trial, and in lieu of trial. Only once one shuffles past large piles of civil bonds does one arrive at the comparatively slight stack that is the focus of our study: the criminal bail bond.

### B. *Bail in Philadelphia, 1790–1810*

Philadelphia is an apt case study of Founding-era bail practices because it served as the new nation's capital between 1790 and 1800 and was the most populous city in the nation until New York City overtook it in the 1790s.<sup>185</sup> It was also, of course, the birthplace of Penn's original dissenter bail clause.<sup>186</sup> And finally, Philadelphia has relatively intact archival records from the Founding era. Even so, there are no official records documenting daily bail practice. The offices of the magistrates who made bail determinations were not courts of record. Yet it is possible to piece together a picture of how this process worked by drawing on an array of primary sources. For reasons we explain in greater length below, we believe this picture illuminates bail practice beyond Philadelphia as well.<sup>187</sup>

We rely on three sources in particular. The first is a Record Book kept by Justice of the Peace Ebenezer Ferguson.<sup>188</sup> Ferguson was a

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proceedings against a defendant had at some stage failed, and the courts deemed it prudent to keep a finger upon him.”). Certain features of the peace bond bear a striking resemblance to the bureaucratized supervision of low-level defendants in what Professor Issa Kohler-Hausmann calls “misdemeanorland.” See ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 3, 8–9 (2018).

<sup>184</sup> See GOEBEL & NAUGHTON, *supra* note 14, at 488. Goebel and Naughton detect a difference between bonds to keep the peace (violated only if the bailee acted violently towards an identified victim) and bonds for good behavior (violated for incurring any further criminal charge). See *id.* at 492. The form-printed South Carolina bonds required both keeping the peace and maintaining good behavior. See also Lermack, *supra* note 177, at 177.

<sup>185</sup> See sources cited *supra* note 21.

<sup>186</sup> See *supra* section I.D, pp. 1835–45.

<sup>187</sup> See *infra* pp. 1868–69.

<sup>188</sup> EBENEZER FERGUSON, *RECORD BOOK OF EBENEZER FERGUSON, JUSTICE OF THE PEACE, PHILADELPHIA, PENNSYLVANIA, DECEMBER 1790–JULY 1800* [hereinafter *FERGUSON RECORD BOOK*], <https://catalog.archives.gov/id/155501037> [<https://perma.cc/9K93-D4YJ>].

longtime magistrate for the Philadelphia district of Southwark and actively engaged in other civic affairs.<sup>189</sup> The book itself is a “day book,” Ferguson’s private record, covering a seven-month period from 1799 to 1800 and containing 288 entries relating to individual defendants.<sup>190</sup> The second source is the Prisoners for Trial (PFT) docket of the Walnut Street Prison, the nation’s first penitentiary.<sup>191</sup> To our knowledge, the PFT docket is the only comprehensive record of pretrial detainees in the Early Republic. Third, we draw on records of the Pennsylvania Prison Society, a private charitable organization founded in 1787 as the Philadelphia Society for Alleviating the Miseries of Public Prisons.<sup>192</sup>

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<sup>189</sup> See 1 J. THOMAS SCHARF & THOMPSON WESTCOTT, HISTORY OF PHILADELPHIA, 1609–1884, at 554 (Philadelphia, L.H. Everts & Co. 1884) (noting that Colonel Ferguson commanded an artillery regiment in the War of 1812); Joseph J. McCadden, *Joseph Lancaster and the Philadelphia Schools*, 3 PA. HIST. 225, 228, 229–36 (1936) (noting that Ferguson was a justice of the peace and lumber inspector and noting his role in educational reforms); Proceedings of the Citizens of Philadelphia and Adjoining Districts at a Town Meeting Held on the 26th of August, 1814, and the Proceedings of the General Committee Appointed by the Citizens at the Said Meeting, in 8 MEMOIRS OF THE HISTORICAL SOCIETY OF PENNSYLVANIA 7, 13 (Hist. Soc’y of Pa. ed., 1867) (chronicling a town hall attended by Ferguson, *id.* at 7–15, and noting that “Ferguson, it is believed, was born in Ireland [and] was for many years a magistrate in the District of Southwark, and an active member of the Democratic Party,” *id.* at 13); PA. CNTY. PRISON BD. OF INSPECTORS, THE EIGHTH ANNUAL REPORT OF THE INSPECTORS OF THE PHILADELPHIA COUNTY PRISON MADE TO THE LEGISLATURE FEBRUARY, 1855, at 49–50 (1855) (noting that Ferguson was a member of the Board in 1802 and 1806–1809); *Ebenezer Ferguson, A NEW NATION VOTES: AM. ELECTION RETURNS 1787–1825*, <https://elections.lib.tufts.edu/catalog/FE0054> [<https://perma.cc/PA8E-LDBE>] (showing Ferguson’s candidacy for sheriff in 1803 and inspector in 1808 and 1815).

<sup>190</sup> See generally FERGUSON RECORD BOOK, *supra* note 188. Presumably, the information was supposed to be entered more neatly afterward in official records. Many of the entries in the book are crossed out, which Ferguson may have done either when the matter was resolved or when he had completed the formal documentation of that entry somewhere else. For cases involving multiple defendants, we count a separate “entry” for each defendant. As recorded by Ferguson, allegations by different accusers get separate entries, even if they accuse the same defendant and relate to the same event, so there are occasionally several entries against a single defendant on the same date. There are also a few people who show up on multiple dates within this seven-month period. Excluding repeat-defendant entries, the book contains entries against 249 individuals. See generally *id.*

<sup>191</sup> Prisoners for Trial Docket of the Walnut Street Prisons, 1790–1802, Record Group 38, Inspectors of the Jail and Penitentiary House/County Prison, City of Philadelphia Department of Records, City Archives, Philadelphia [hereinafter PFT Docket 1790–1802], available at BAIL AT THE FOUNDING <https://bailatthefounding.net/prisoners-for-trial-docket-walnut-st-jail-1790-1802/> [<https://perma.cc/5YKP-XHP7>]. We have digitized and transcribed the docket in its entirety between 1790 and 1800. See *id.* A sample page appears in Appendix II. See also G.S. Rowe & Billy G. Smith, *The Prisoners for Trial Docket for Philadelphia County, 1795*, 53 PA. HIST. 289 (1986) (transcribing docket entries from 1795).

<sup>192</sup> Minutes of the Philadelphia Society for Alleviating the Miseries of Public Prisons, 1785–1793, Collection Am. 3229, Historical Society of Pennsylvania, Philadelphia [hereinafter PSAMPP Minutes 1785–1793], available at BAIL AT THE FOUNDING, <https://bailatthefounding.net/philadelphia-prison-society-minute-books> [<https://perma.cc/UQ44-MZK8>]; Minutes of the Philadelphia Society for Alleviating the Miseries of Public Prisons, 1787–1809 [hereinafter PSAMPP Minutes 1787–1809], available at BAIL AT THE FOUNDING, <https://bailatthefounding.net/philadelphia-prison-society-minute-books> [<https://perma.cc/37F3-6AUA>]. The Prison Society records

We round out the discussion with information from other original records and newspaper reports.

In combination, the primary sources reveal a bail system that was really two systems. For those with access to sureties, bail meant unsecured release. But for those living outside the reputational economy, a criminal charge meant jail.

*I. Bail as a System of Unsecured Release.* — Justice of the Peace Ebenezer Ferguson heard many complaints. Each time that a complainant or constable came to him to report a crime he had to decide whether to bail, commit, or discharge the accused person and, if relevant, what bail to require of the accused — as well as of the complainant and witnesses. He recorded the institution of these criminal proceedings and his custody dispositions in his Record Book.<sup>193</sup>

Nearly every entry records a series of bail arrangements. The entry for *Commonwealth v. Sarah Ludley*<sup>194</sup> on January 16, 1800, is typical. It reads: “Charged on the oath of Susanah Weaver with committing an assault & battery on her.” Sarah was “bound in 30£ for her appearance.” Her surety, James Bodin, was “bound in 30£ for the Defendant’s good behavior and appearance.” A witness, Ann Thomas, was “bound in 10£ to give Evidence,” and the complainant, Susanah, was “bound in 15£ to Prosecute.”

Figure 2: *Commonwealth v. Sarah Ludley*, Entry from the Ferguson Record Book.



have been mined before, but not with a focus on pretrial detainees specifically. See generally, e.g., MERANZE, *supra* note 160, at 1–2, 143–145, 177–79; STEINBERG, *supra* note 14, at 96–98, 124–25.

<sup>193</sup> See generally FERGUSON RECORD BOOK, *supra* note 188.

<sup>194</sup> *Id.* at 8.

There are several facts of note about this typical entry. First, it was standard practice for the accuser to appear in person before the magistrate and swear an oath.<sup>195</sup> Nearly all of the entries in the Record Book begin: “Charged on the oath of . . .” or “[Accuser], being duly sworn, saeth . . .” The accused person was also brought before the magistrate for this event and a bail or commitment determination, unless they could not be found.<sup>196</sup>

Second, the entry reflects the bail system as it was designed to operate, as a system of unsecured release. Note that *all parties* to a legal proceeding were bailed, not just the accused. Each defendant typically had one surety, who was bound for the defendant’s appearance and/or good behavior in the same amount as the defendant. Witnesses were bound to appear and give evidence. Accusers were bound to prosecute.<sup>197</sup>

We have no surviving bail-piece issued by Ferguson, but presumably they took the same form as recognizances issued by other courts and judges. A standard recognizance bond stipulated the amount “to be raised and levied on [the] Goods and Chattels, Lands and Tenements” of the defendant or surety and stated that “[t]he Condition . . . is such, that if the above named . . . shall and do personally appear” at the relevant date and time in court, “then this Recognizance to be void.”<sup>198</sup> At least by around 1800, Philadelphia sheriffs and justices of the peace were using pre-printed recognizance forms that could be customized in each case.<sup>199</sup>

As the recognizance language makes clear, the bonds were pledges only — conditional debts. *If* the principal on the bond violated its terms, the state could seek to enforce the default through a debt action. But no cash or other collateral secured the bond upfront. There is no evidence, in the Ferguson Record Book or elsewhere in the primary sources, of any accused person (or other party to a proceeding) providing collateral to secure a criminal bail bond.

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<sup>195</sup> See *supra* p. 1829.

<sup>196</sup> See STEINBERG, *supra* note 14, at 127.

<sup>197</sup> See GOEBEL & NAUGHTON, *supra* note 14, at 509–12 (describing the use of the recognizance “*ad prosequendum*” (to prosecute) and the recognizance “*ad testificandum*” (to testify) in colonial New York). See generally FERGUSON RECORD BOOK, *supra* note 188; *supra* p. 1830. The practice of binding complainants and witnesses for trial appears to have originated with the sixteenth-century Marian statutes in England. See John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 321–22 (1973) (explaining how the Marian committal statute directed justices of the peace to bind witnesses over for trial, “consciously appropriat[ing]” bail procedure, *id.* at 321, as a “means to remedy the more troublesome deficiencies of a system of merely gratuitous citizen prosecution,” *id.* at 322); see also *supra* p. 1830.

<sup>198</sup> GOEBEL & NAUGHTON, *supra* note 14, at 509 n.97; see also *infra* Appendix IV (providing example recognizance bonds).

<sup>199</sup> See *infra* Appendix IV.

The Ferguson Record Book does illuminate several aspects of Founding-era bail practice that do not conform to the ideal on the books. First, Ferguson did not set carefully individualized bond amounts. He set bonds quite uniformly: the vast majority of defendants and their sureties were required to pledge £30 each.<sup>200</sup> It is difficult to ascertain the value of that amount in real terms, but it was probably the equivalent of around \$3,000 today.<sup>201</sup> Accusers were typically bound in £15, and witnesses were bound in £10.<sup>202</sup> Ferguson occasionally varied the bond amounts according to the severity of the charges, and sometimes set higher bonds for recidivist defendants.<sup>203</sup> The Record Book suggests that, like magistrates of the present, he was also susceptible to using bond amounts to exact retribution. The highest bond amount in pounds in the book — £60 — is for the surety of Elizabeth Minahan, “[c]harged on the oath of Elizabeth Carey with Receiving goods which was Stolen from her by John Robinson.”<sup>204</sup> The apparent explanation is that “[s]aid Elizabeth insulted me very much in the office.”<sup>205</sup>

Table 1: Distribution of Bond Amounts by Party<sup>206</sup>

	£10	£15	£20	£25	£30	£35	£40	£45	£50
Defendants	0	1	9	0	117	0	15	0	8
D. Sureties	1	4	12	0	112	0	12	0	8
Complainants	46	109	3	7	1	0	0	0	2
Witnesses	120	18	3	1	0	0	0	0	0

<sup>200</sup> See generally FERGUSON RECORD BOOK, *supra* note 188.

<sup>201</sup> According to one analysis, £1 in Pennsylvania was worth about \$93 (in 2021 terms) on average between 1766–1772. See John J. McCusker, *How Much Is that in Real Money? A Historical Price Index for Use as a Deflator of Money Values in the Economy of the United States*, 101 PROC. AM. ANTIQUARIAN SOC’Y 297, 314 (1991) (reporting that “on the average over the years 1766–72, £100 Pennsylvania currency was roughly the value of \$4,600 in 1991 terms,” such that “£10 Pennsylvania currency would be worth about \$460, and £1 currency \$46”). Accounting for inflation, \$46 in 1991 terms is worth around \$100 as of 2023. U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com> [<https://perma.cc/4646-4SCU>]. If that value held until 1800, then the standard £30 bond would be the equivalent of around \$3,000 today.

<sup>202</sup> See generally FERGUSON RECORD BOOK, *supra* note 188.

<sup>203</sup> See, e.g., *id.* at 12–13, 17, 39, 46.

<sup>204</sup> *Id.* at 59.

<sup>205</sup> *Id.*

<sup>206</sup> For each actor (defendants, defendants’ sureties, complainants, witnesses), the table reports the number who were assigned each bail amount. For example, 117 defendants in the Ferguson Record Book were bound in £30, fifteen were bound in £40, and so forth. The table represents our best effort at tabulation from the source, which is sometimes difficult to decipher.

A second wrinkle is that, contrary to the conventional academic wisdom,<sup>207</sup> bail clearly served a public safety function as well as the purpose of guaranteeing appearance at trial. The majority of bonds that Ferguson issued to defendants and their sureties were to guarantee a defendant's "good behavior" as well as their appearance. It is apparent that there was a very fuzzy line between bail and peace bonds.<sup>208</sup>

A last point to note is that there may have been a few quasi-professional sureties operating in this community. At least, Peter Bell, John Brown, and John Smith recur frequently as sureties in the Ferguson Record Book.<sup>209</sup> (Peter Bell also appears three times as a defendant, once accused of domestic assault and twice for illegally selling "Licker."<sup>210</sup>) They may well have been tavernkeepers who were "clandestinely reimbursed for performing this service."<sup>211</sup>

The repeated presence of the unsavory Peter Bell as surety also highlights the question of how exactly Ferguson, and other magistrates, determined whether a proffered surety was "sufficient." The law directed magistrates to "examine" putative sureties to ensure that they had the means to guarantee the bond,<sup>212</sup> but also warned that a magistrate must not, "under the pretence of demanding sufficient surety, make so excessive a requisition, as in effect, to amount to a *denial of bail*."<sup>213</sup> We have been able to locate nothing that indicates precisely how contemporary magistrates approached this task. The frequent appearance of relatives of the accused as sureties in the Ferguson Record Book, including

<sup>207</sup> See, e.g., Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 731 (2011) ("Bail historically served the sole purpose of returning the defendant to court for trial, not preventing her from committing additional crimes.") (citing numerous modern case opinions).

<sup>208</sup> Some cases in the Record Book are peace bond cases only. On May 6, 1800, for instance, Ferguson committed Rachel, "a black girl," for fighting in the street until she could give "security for her good behavior." FERGUSON RECORD BOOK, *supra* note 188, at 52. There are also cases that have a deferred-prosecution structure; the accusing party is bound in some amount to prosecute if the defendant should break the law. On May 29, 1800, for example, Edward Smith was "[c]harged on the oath of Samuel Weasey with assaulting him." Weasey was bound in £15 to prosecute "if he should break the Law." *Id.* For similar observations about justice-of-the-peace records from colonial New York, see GOEBEL & NAUGHTON, *supra* note 14, at 494 (noting that it is "impossible to ascertain any reasons of policy behind the choice of conditions of the security — peace, good behavior or mere appearance at [the Court of] Sessions"). The FERGUSON RECORD BOOK, *supra* note 188, and PFT Docket 1790–1802, *supra* note 191, contradict Lermack's conclusion that peace bonds fell out of use in Philadelphia after about 1780, although otherwise Lermack's findings are consistent with ours. Lermack, *supra* note 177, at 190; see also STEINBERG, *supra* note 14, at 7, 47, 122, 127 (describing peace bond practice in Philadelphia between 1800 and 1880).

<sup>209</sup> FERGUSON RECORD BOOK, *supra* note 188, at 17, 18, 33, 42, 57, 59, 71, 72, 75 (Peter Bell); *id.* at 25, 34, 35, 56, 71, 72 (John Brown); *id.* at 47, 50, 56, 60 (John Smith).

<sup>210</sup> *Id.* at 38, 50.

<sup>211</sup> Lermack, *supra* note 14, at 507 n.213 (noting "indications" of such practice in colonial Philadelphia records, *id.* at 507); see also STEINBERG, *supra* note 14, at 17 (asserting that, in mid-nineteenth-century Philadelphia, "[p]eople eager to serve as someone's bail loitered about [outside aldermen's offices] looking for business").

<sup>212</sup> 1 CHITTY, *supra* note 40, at 67; PETERSDORFF, *supra* note 76, at 508 (on the examination of the bail).

<sup>213</sup> 1 CHITTY, *supra* note 40, at 69.

women — not to mention the sometimes-defendant Bell — suggests that Ferguson was not applying stringent financial criteria.<sup>214</sup> On the other hand, not every accused person was able to proffer “sufficient sureties,” as we will shortly see. Our supposition is that “sufficiency” was more a matter of character and reputation than access to capital.<sup>215</sup>

Overall, the Ferguson Record Book demonstrates bail in action, and for many of those accused before Justice Ferguson, the system appears to have functioned as it was intended to. As for what happened when someone failed to appear, recognizances were regularly deemed forfeited.<sup>216</sup> But forfeited bonds and unpaid fines were also regularly remitted on petition to the state legislature (the Supreme Executive Council, at this time) or governor.<sup>217</sup> We have found little evidence that forfeited bonds were actually collected from sureties’ or defendants’ property.<sup>218</sup> For suretied citizens, bail was not likely to entail any transfer of property at any time.

2. *The Reality of Pretrial Detention.* — The glaring reality that leaps from the pages of the Ferguson Record Book and city jail records, however, is that many of those legally eligible for bail were not actually bailed. They were committed to jail instead. Of the 288 entries in the Record Book, 132 — just under half — involve a commitment. It is impossible to say whether this rate of commitment is representative for

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<sup>214</sup> Accord GOEBEL & NAUGHTON, *supra* note 14, at 519 (“We have found nothing to indicate that sureties were carefully examined before an undertaking was accepted . . .”). The only instance Goebel and Naughton found of a surety being disapproved was a case in which a New York judge reprimanded a magistrate for allowing two codefendants to serve as *each other’s* sureties, and ordered the magistrate to replace them with “good security.” *Id.*

<sup>215</sup> Cf. Lermack, *supra* note 14, at 506 (“[I]t was generally impossible to determine if a surety would be able to pay the required sum on demand, and the sums were occasionally too high for anyone to pay whatever his means.”). Lermack’s view is that “[t]he cash value of the bail, impressed on the mind of the surety, existed solely to provide a motive for vigilant supervision of the bonded person.” *Id.*

<sup>216</sup> See, e.g., Mayor’s Court Docket 1798–1802, Record Group 130, City of Philadelphia, Department of Records, City Archives, Philadelphia., at 558–61 (for December 1801 Sessions, listing new recognizances for defendants, complainants, and witnesses; then listing “forfeited recognizances” of both defendants and witnesses, presumably those who failed to show); *id.* at 578–79 (new and forfeited recognizances for January 1802 Sessions); *id.* at 602–04 (recognizances taken and forfeited for April 1802 Sessions).

<sup>217</sup> The minutes of the Supreme Executive Council between February 7, 1789, and December 20, 1790, for example, document at least six grants of petitions to remit a recognizance forfeited because of nonappearance. 16 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 30, 91, 156, 296–97, 411, 480 (Harrisburg, Theo. Fenn & Co. 1853). That volume does not appear to contain any instance when such a petition was denied. There are many more instances of remission of fines, as well as of pardons. *Id.*

<sup>218</sup> See *supra* p. 1831 (describing enforcement process); *Dillingham v. United States*, 7 F. Cas. 708, 710 (C.C.D. Pa. 1810) (No. 3,913) (“For we hold it to be essential to a breach of the condition, upon which the forfeiture is to arise, that the party who is recognised to appear, should be solemnly called before his default is entered.”).

the time, but there is no reason to assume it was anomalous.<sup>219</sup> This is especially so given that Philadelphia's jail population climbed steadily between 1791 and 1800.<sup>220</sup>

There were three grounds for commitment to jail, illustrated both by the Ferguson Record Book and by the jail records. The first was a pending criminal charge, if one could not produce sureties. The second was pursuant to summary conviction for "vagrancy" or other petty offenses. The third was for outstanding court debt. Our primary concern is with pretrial detention, but that is impossible to understand without considering broader detention practices. The following discussion therefore takes up each ground for detention in turn.

For a defendant who lacked sureties, a criminal charge meant jail.<sup>221</sup> Commitment "for want of bail" could be temporary; sometimes Ferguson committed a defendant who was released within a few days, once he or she found someone to make the requisite pledge.<sup>222</sup> Or the detention could last until trial. On occasion, witnesses and even complainants were also committed for inability to meet a bail demand.<sup>223</sup> The fact that this was rare, however, suggests that Ferguson did not require much assurance that witnesses and accusers would fulfill their obligations.

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<sup>219</sup> Ferguson was one of at least ten officials making bail and commitment decisions at the time. During the time covered by the Record Book, the PFT docket reports Robert Wharton (the Mayor) as responsible for forty-one commitments, Ferguson as responsible for thirty-one, Joseph Bird as responsible for twenty-two, John Jennings as responsible for nineteen, and other men as responsible for fewer. <sup>2</sup> PFT Docket 1790–1802, *supra* note 191, at 171–248. These numbers do not tell us anything about their relative *rates* of commitment, given that the magistrates may have handled widely varying numbers of cases. *See also* STEINBERG, *supra* note 14, at 28 (discussing commitment practices of three Philadelphia magistrates based on docket books covering periods between 1820 and 1870).

<sup>220</sup> *See infra* Table 2.

<sup>221</sup> A few of Ferguson's entries note that a defendant was "committed for want of bail." Many just say "committed," but since none of these involve homicide charges, the likeliest explanation is that the defendant was unable to procure sureties. *See generally* FERGUSON RECORD BOOK, *supra* note 188.

<sup>222</sup> For example, on April 28, 1800, Saly Canon was "[c]harged on the oath of Wm [William] Pidgeon with Keeping a Disorderly house & suffering gamblers to Play for money in her house." Ferguson wrote that Saly was "[c]ommitted for want of bail," but that phrase is crossed out, and the entry notes that Saly was bound in £30 for her own appearance and that Amelia German, alias George, was bound as her surety in the same amount. *Id.* at 40.

<sup>223</sup> Ferguson committed Mariam Conely "for want of bail" when she accused Elizabeth McDonald of assault. *Id.* at 33. Poor Mariam appears several times in the Record Book, under various spellings of her name, as both accuser and accused in public-disorder type cases.



Figure 3: *Mary Williams*, Entry No. 4,487 from the PFT Docket

Mary Williams	1790 10 <sup>th</sup>	Charged on the oath of Christ with committing an assault by beating on her the house of	Eben: Tayson Capt.	100 44 21	61 Halt
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Those committed pending trial were held in the Walnut Street Prison between 1790 and 1803, then in the adjacent Prune Street Apartment during the construction of the Arch Street Prison between 1803 and 1823, and finally at Arch Street between 1823 and 1837.<sup>224</sup> Conditions were abysmal at each location. The conditions at Walnut Street inspired the founding of the Philadelphia Society for Alleviating the Miseries of Public Prisons (later renamed the Pennsylvania Prison Society) in 1787.<sup>225</sup> The Society spearheaded a 1790 legislative reform that purportedly transformed the prison into an institution of discipline and redemption for those serving sentences, but did not change conditions for pretrial detainees.<sup>226</sup> After a 1798 prison fire and yellow fever epidemic, life at Walnut Street deteriorated for everyone.<sup>227</sup> Untried prisoners and vagrants were moved to Prune Street to ease overcrowding, but conditions there were likely no better.<sup>228</sup> In 1811, James Mease reported that “[v]agrants, run-away servants, and disorderly persons, are committed for a term not exceeding thirty days, in the same apartment with those for trial. . . . Characters of all descriptions, and all degrees of vice are here mixed in one mass . . . .”<sup>229</sup> And in 1817, a rueful Prison Society

<sup>224</sup> For a chronicle of the Walnut Street Prison, see generally NEGLEY K. TEETERS, *THE CRADLE OF THE PENITENTIARY: THE WALNUT STREET JAIL AT PHILADELPHIA, 1773-1835* (1955); see also Kristin O’Brassill-Kulfan, “Severe Punishment for Their Misfortunes and Poverty”: *Philadelphia’s Arch Street Prison, 1804-1837*, 143 *PA. MAG. HIST. & BIOGRAPHY* 247, 247-52 (2019) (explaining the relationship between the Walnut Street and Arch Street prisons).

<sup>225</sup> PSAMPP Minutes 1785-1793, *supra* note 192, at 2-5; see JAMES MEASE, *THE PICTURE OF PHILADELPHIA* 243 (Philadelphia, B. & T. Kite 1811); Shapiro, *supra* note 15, at 552-53.

<sup>226</sup> See MEASE, *supra* note 225, at 164-86; PSAMPP Minutes 1787-1809, *supra* note 192, at 38 (explaining that, although “condemned prisoners” have access to ample clothing and food, pretrial detainees are frequently “destitute of Shirts & Stockings and warm coverings” and only receive “the half of a four penny loaf” once a day); see also *supra* p. 1830.

<sup>227</sup> PSAMPP Minutes 1787-1809, *supra* note 192, at 94 (noting that when the Society’s Acting Committee renewed its visits to the prison after the epidemic and fire, it “observed much apathy to prevail, and a considerable derangement of the usual order of that place”); see also MERANZE, *supra* note 160, at 211-12 (transcribing the report of Prison Society delegation).

<sup>228</sup> O’Brassill-Kulfan, *supra* note 224, at 252 (reporting that between 1812 and 1821, “more than two hundred vagrants and prisoners awaiting trial per month were sentenced to serve their time at Prune Street”). Starting around 1816, magistrates sent some vagrants to the almshouse and others to jail. *Id.* The Arch Street Prison eventually held vagrants and untried prisoners from 1823 to 1837, when it was demolished. *Id.* at 252, 269.

<sup>229</sup> MEASE, *supra* note 225, at 181.

report described the regression in the Walnut Street buildings, which had not been improved since 1795:

[F]rom thirty to forty are lodged in rooms of eighteen feet square. So many are thus crowded together in so small a space, and so much intermixed, the innocent with the guilty, the young offender, and often the disobedient servant or apprentice, with the most experienced and hardened culprit; that the institution already begins to assume, especially as respects untried prisoners, the character of a European prison, and a seminary for every vice . . . .<sup>230</sup>

The Prisoners for Trial docket recorded the names of those jailed pending trial, along with their charges, the dates of their incarceration, the grounds for their eventual release, and the names of the committing and discharging magistrates. Between January 1, 1791, and December 31, 1800 — the years for which we have complete data — the PFT docket records 5,416 distinct detentions. As one might expect of a growing city, the number of detentions increased each year. The *rate* of detention also increased, however. The following table and chart show detention numbers and rates by year (note that these figures count incidents of detention, not the number of individuals detained, since some individuals were detained more than once).

Table 2: Total Pretrial Detention Numbers & Rates

	Total Pretrial Admissions	Phila. Cnty. Pop. <sup>231</sup>	Per 1,000 People
1791	294	57,003	5.2
1792	378	59,671	6.3
1793	380	62,338	6.1
1794	484	65,005	7.4
1795	531	67,673	7.8
1796	546	70,340	7.8
1797	671	73,007	9.2
1798	551	75,674	7.3

<sup>230</sup> PRISON SOCIETY STATISTICAL VIEW, *supra* note 160, at 5–6.

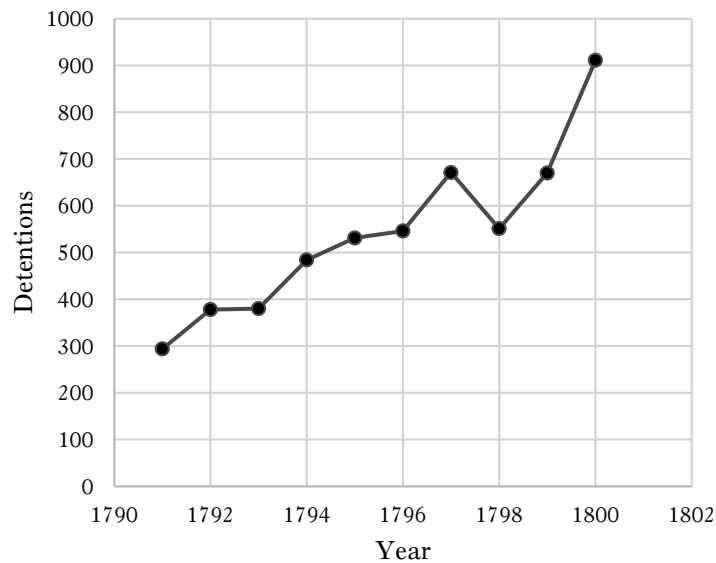
<sup>231</sup> As recorded by the census, the population of Philadelphia County was 54,336 in 1790 and 81,009 in 1800. See U.S. CENSUS BUREAU, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790: PENNSYLVANIA 10 (1970) <https://www.census.gov/library/publications/1907/dec/heads-of-families.html> [<https://perma.cc/C4FR-BPXF>]; U.S. CENSUS BUREAU, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES 42 (1800), <https://www.census.gov/library/publications/1801/dec/return.html> [<https://perma.cc/KTC7-JW6R>]. We interpolated population figures for the intervening years assuming linear population growth, rounding the estimated population for each year to the nearest whole number. The per capita detention numbers do not account for repeat detentions of the same person.

1799	670	78,342	8.6
1800	911	81,009	11.2

Most pretrial detainees were jailed for a month or less. The median detention time was seventeen days; the mean was thirty-seven. The longest detention in the docket during this period appears to be a detention that lasted 1,088 days.<sup>232</sup>

In total, eighty-seven individuals appear as committing magistrates. They include mayors, aldermen, military and naval officers, judges, city officials who also held commissions as justices of the peace, and men whose primary official duty appears to have been to serve as a judicial magistrate. Table 3 lists the magistrates responsible for most commitments. (Note that these are absolute commitment numbers, not commitment rates.)

Figure 4: Total Pretrial Detention Numbers, 1791–1800<sup>233</sup>



<sup>232</sup> This was a detention for inability to guarantee a peace bond. William Martin was committed on July 21, 1800, for being “a convict [and] dangerous character following no viable means of support” who apparently could not procure sureties for the peace bond the magistrate (Mayor Robert Wharton) demanded of him. He was held for nearly three years, until July 14, 1803, when he was “handed over to Debtors Jail.” 2 PFT Docket 1790–1802, *supra* note 191, at 254 (Entry No. 4,978). The longest *pretrial* detention documented in the docket was for 540 days. James Kilner was committed on July 20, 1797, on a burglary charge and discharged in January 1799 with a notation that he had “timed out.” 1 *id.* at 400 (Entry No. 2,968).

<sup>233</sup> This figure reflects the total number of pretrial detentions as recorded in the PFT docket.

Table 3: Detentions by Magistrate, 1790–1801<sup>234</sup>

Hilary Baker	1,122
John Jennings	431
Mathew Clarkson	410
Gunning Bedford	393
Ebenezer Ferguson	385
Robert Wharton	369
Joseph Bird	342
Michael Hillegas	242
William Coats	241
Jonathan Penrose	219
William McMullin	204
Reynold Keen	160

As for the charges that led to detention, theft and assault and battery swamp all the other charge types. Of 6,386 total charges in the PFT docket between 1790 and 1801, 1,218 involved an assault and battery charge (19%) and 1,794 involved a theft charge (28%). Together, these two charge categories account for approximately half of the detentions. The other charges that appear at least 100 times in the docket are threats, fraud/forgery, disturbing the peace/disorderly conduct, possession of stolen property, keeping a disorderly house, robbery, burglary, rioting/fighting, desertion by a servant/slave, desertion by a sailor, and bastardy. Table 4 lists the total number of appearances for each charge, and Figure 5 shows charge-type totals at a higher level of generality.

<sup>234</sup> In addition to the magistrates listed in the table, 75 other magistrates detained fewer than 100 people each (ranging from 1–91), for a total of 982 detentions. For approximately 82 detentions, no committing magistrate was listed.

Table 4: Grounds for Detention<sup>235</sup>

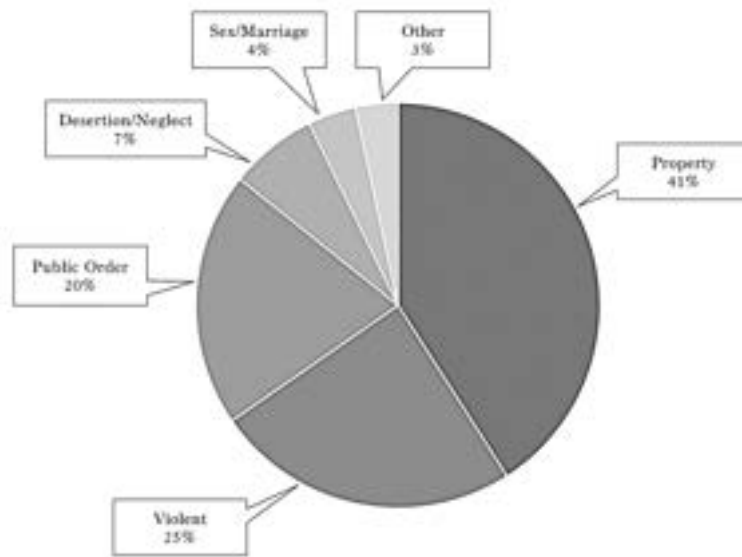
Charge Type	No.	Charge Type	No.	Charge Type	No.
Theft	1,794	Peace Bond	88	Desertion (army)	21
Assault & Battery	1,218	Disorderly Person	78	Home Invasion	21
Threats	241	Vagrancy	78	Brothel/Bawdy House	20
Fraud/Forgery	234	Neglect (family)	59	Neglect (servant/slave/apprentice)	20
Rioting/Fighting	231	Fornication	48	Delivered by Bail	19
Stolen Property	198	Treason	45	Neglect (sailor)	18
Disorderly Conduct	194	Property Damage	42	Arson	17
Disturbing the Peace	190	Refusing to Give Security	42	Breach of the Peace	16
Disorderly House	189	Escape	38	Trespass	13
Robbery	179	Desertion (navy)	33	Kidnapping	12
Burglary	158	Murder	32	Bigamy	11
Desertion (servant/slave)	133	Adultery	28	No Charge	11
Desertion (sailor)	127	Desertion (family)	28	Prostitution	10
Bastardy	111	Swearing	27	Rape	10
Drunkenness	90	Harboring	25	Other Charges*	

\* The following charges had fewer than ten detentions each: "suspicion" and homicide (9); "felony" (8); assault on a constable, desertion (apprentice), gambling, perjury, tipping house, unlicensed liquor sales (7); embezzlement, "misdemeanor," prisoner of war, illegible/unclear (6); conspiracy, insulting a magistrate, material witness (5); absconding from bail, carnal knowledge, duel, mutiny, nuisance, "previous conviction," quarantine violation, violation of pardon conditions (4); drunk on Sabbath, piracy, violation of peace bond (3); "being in the company of a convict," bribery, extradition, "federal charge,"

<sup>235</sup> This table reflects a tabulation of all charges listed in the PFT docket between 1790 and 1801. The PFT docket records specific allegations, which we classified by crime category. There is a great deal of variation in some of these categories. "Theft" includes both horse theft, a serious offense, and extremely minor incidents of pickpocketing and shoplifting. Assault and battery likewise includes both minor and serious incidents. The charge categories themselves also involve a degree of unavoidable subjectivity.

firing guns, indecent exposure, “misconduct,” neglect (apprentice), neglect (master), resisting arrest or a constable, sedition (2); apprentice marriage, attempted murder, breach of the health law, burglary tools, detained for questioning, discharged by mistake, false imprisonment, flight from recognizance, forfeited peace bond, illegal docking, illegal selling, insulting a constable, insanity, interference with arrest, pregnant out of wedlock, private soldier, refusing to testify, seduction (1).

Figure 5: Detentions by General Charge Category<sup>236</sup>



To look at pretrial detention in isolation, though, is to miss the bigger picture, because a pending criminal charge was only one ground for incarceration without trial. The second genre of commitment was a major feature of criminal justice at the Founding: the summary conviction and incarceration of “vagrants,” “vagabonds,” runaways, “disorderly” persons, and others accused of minor offenses.<sup>237</sup> Ferguson committed a

<sup>236</sup> This figure reflects charges listed in the PFT docket between 1790 and 1801. Once again, the construction of these categories involves subjective judgments. Most notably, we include the charges of “disorderly house” and “disorderly person” in the category of “public order/disorder” offenses, although both phrases were frequently understood to refer to prostitution and could, on that basis, qualify as sex offenses. With both offenses classified as sex-related offenses, sex-related offenses would constitute 8% of the total.

<sup>237</sup> KRISTIN O’BRASSILL-KULFAN, *VAGRANTS AND VAGABONDS: POVERTY AND MOBILITY IN THE EARLY AMERICAN REPUBLIC 2* (2019) (“Arrests for vagrancy — a category reserved for the poor, wanderers, beggars, and those lacking ‘legal settlement’ — were the ubiquitous result of a complex system of bureaucracy and policing of the poor and transient in the early American republic.”).

significant number of people on these grounds, pursuant to a justice's summary jurisdiction over petty offenses.<sup>238</sup> Sometimes they were charged on oath according to normal criminal process,<sup>239</sup> but in other cases, they were simply "taken up" by a constable.<sup>240</sup> For this group, there was no bail and no trial. Runaways (apprentices, indentured servants, sailors, and slaves) were jailed until they could be transferred back to the custody of their legally recognized masters. Vagrants and disorderly people were sentenced to thirty days' imprisonment at hard labor, or they were sent to the poor house.<sup>241</sup>

The third ground for commitment, finally, was for inability to pay fines imposed as a sentence or fees for various aspects of legal proceedings. The original records document a whole economy of legal fees and costs.<sup>242</sup> A convicted person was required to pay the costs of prosecution.<sup>243</sup> All parties — accusers, accused parties, sureties, and witnesses — were required to pay magistrates' fees for things like issuing bail-pieces and handling commitments and releases, and some of the money went to pay constables for their services.<sup>244</sup> Failure to pay meant

<sup>238</sup> MEASE, *supra* note 225, at 102; *id.* at 181 ("Vagrants, run-away servants, and disorderly persons, are committed for a term not exceeding thirty days, in the same apartment with those for trial . . .").

<sup>239</sup> For instance: On December 10, 1799, Thomas Fell was "[c]harged on oath of [page torn] with stealing wood out of his yard" and "[c]ommitted for 30 days to hard Labour." FERGUSON RECORD BOOK, *supra* note 188, at 1. On February 8, 1800, Fell was charged again, this time "on the oath of Robert Taylor with being a Disorderly Vagabond that Has No visabel means of making a Living." He was "committed for 30 Days." *Id.* at 18.

<sup>240</sup> For instance: On April 11, 1800, Jane McGovern was "[t]aken up by the Constables along with the women of bad fame & could not give a good account of herself." She was "committed for another hearing" and discharged six days later "on her mother's promise to take better care of her." *Id.* at 34; 2 PFT Docket 1790–1802, *supra* note 191, at 214 (Entry No. 4,726). On April 11, 1800, William Tuly was "[c]harged on the oath of Martin Casper & David Combs [constables] with being a common vagabond that is constantly fighting & [going] from one bawdy house to another." Ferguson committed Tuly for "30 days to hard labour." FERGUSON RECORD BOOK, *supra* note 188, at 34.

<sup>241</sup> See, e.g., FERGUSON RECORD BOOK, *supra* note 188, at 34; O'Brassill-Kulfan, *supra* note 224, at 255–58.

<sup>242</sup> See An Act Establishing an Explicit Fee Bill (Apr. 20, 1795), reprinted in 15 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, *supra* note 162, at 365–66 (specifying the fees due to a justice of the peace for each task).

<sup>243</sup> E.g., 2 PFT Docket 1790–1802, *supra* note 191, at 209 (Entry Nos. 4,691–4,692) (noting, about a convicted defendant, that he shall "pay costs of prosecution"); *id.* at 238 (Entry No. 4,873) (noting that Marian Ralph, convicted of keeping a "Disorderly House," was "[s]entenced to be imprisoned Three Months & be kept at hard labor, Pay a fine of Two Dollars — pay costs of Prosecution & stand committed").

<sup>244</sup> For example, Ferguson's entry from April 30, 1800, includes the following accounting notation: "Wit 3/9; Commit 3/9; Release 3/9; Recog 1/6; [Total] 12/9." FERGUSON RECORD BOOK, *supra* note 188, at 42. The fractional notations are monetary amounts, and we believe that "3/9" means three shillings, nine pence. See also STEINBERG, *supra* note 14, at 39 ("Whenever an alderman returned a case to the court, made a commitment to prison, or held someone to bail, he was compensated by fees paid by the parties to the case."). For a detailed study of the economy of fees that funded most courts and government services in the early United States, see generally NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013).

jail.<sup>245</sup> Those committed as vagrants or for court debt were jailed with pretrial detainees at Walnut Street and tracked in a record book called the “Vagrancy docket.”<sup>246</sup>

The bigger picture, then, is of a complex system of incarceration without trial in which liberty was contingent on social and financial status.<sup>247</sup> The Ferguson Record Book suggests — and it stands to reason — that the people accused before Ferguson were disproportionately poor. The largest category of charges in the Record Book (44%) is assault and battery. The second largest is minor public-order offenses (38%): keeping a disorderly house (a brothel), being a disorderly person, disturbing the peace, fighting and rioting, being drunk and disorderly, selling alcohol illegally, keeping a tippling house, and being a vagabond. Overall, it seems that poverty, alcohol, prostitution, and fights were primary contributors to Ferguson’s daily docket. And once before the magistrate, there were many paths into the jail.

The data suggest that, between 1780 and 1810, pretrial detainees substantially outnumbered convicted prisoners, but were outnumbered by those incarcerated for vagrancy. Between November 1794 and November 1798, for instance, the Prison Society reported that 3,698 people were committed as vagrants and 490 to serve a felony sentence,<sup>248</sup> while the PFT docket records 2,962 commitments pending trial.<sup>249</sup>

The incarcerated population was also skewed by race. Even in these earliest years of the nation’s history, race was a major structural force in Philadelphia’s detention practices. In the 1790s the city was home to more than one thousand free Black people, as well as several hundred

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<sup>245</sup> *E.g.*, An Act for the Prevention of Vice and Immorality, and of Unlawful Gaming, and to Restrain Disorderly Sports and Dissipation (Apr. 22, 1794), reprinted in 15 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, *supra* note 162, at 112 (“[I]f the person so convicted refuse or neglect to satisfy such forfeiture immediately, with costs . . . then the said justices or magistrates shall commit the offender, without bail or mainprise . . . there to be fed upon bread and water only, and to be kept at hard labor.”); see also GOEBEL & NAUGHTON, *supra* note 14, at 513 (noting that, in colonial New York, the “standard order upon judgment [of conviction] was that the defendant be committed until fine and fees were paid”); 2 NEWSPAPER REPORTS OF DECISIONS IN COLONIAL, STATE, AND LOWER FEDERAL COURTS BEFORE 1801, at 1098 (Stanton D. Krauss ed., 2018) (reprinting from *Pennsylvania Evening Herald*, July 14, 1787, about *Respublica v. Jones* (Pa. Sup. Ct. 1787), a case concerning two Quakers committed pending payment of a fine).

<sup>246</sup> Of those marked committed in Ferguson’s Record Book, thirty-two do not show up in the PFT docket; they likely were documented in the Vagrancy docket instead, which does not survive for this year. Conversely, eight people appear in the PFT docket as committed by Ferguson during the relevant period but do not appear in the Record Book.

<sup>247</sup> See STEINBERG, *supra* note 14, at 28 (“One of the most regular features of criminal prosecution was imprisonment, both before and after conviction, both legal and not.”).

<sup>248</sup> PSAMPP Minutes 1787–1809, *supra* note 192, at 106.

<sup>249</sup> Jen Manion, reporting on women documented in the PFT docket, finds that in 1795 the docket recorded 94 pretrial detainees, 21 convicts, and 134 vagrants; in 1807, 458 pretrial detainees, 23 convicts, and 213 vagrants; and in 1823, 968 pretrial detainees, 92 convicts, and 482 vagrants. JEN MANION, LIBERTY’S PRISONERS: CARCERAL CULTURE IN EARLY AMERICA 201 (2015). Note that these numbers reflect only incarcerated women and do not include those recorded on the Vagrancy rather than the PFT docket.



unfree Black people.<sup>250</sup> It was, on the one hand, a site of relative freedom; and, on the other, a community that still adhered to an explicit racial hierarchy. When the 1793 yellow fever epidemic ravaged the city, for instance, medical luminary Benjamin Rush and Mayor Matthew Clarkson asked the founders of the Free African Society, Absalom Jones and Richard Allen, to take the lead in caring for the sick because African Americans were (inaccurately) reputed to be immune.<sup>251</sup> The free Black community took on an outsized role in fighting the epidemic, suffered a corresponding loss of life, and was rewarded for its heroism with the publication of a popular pamphlet accusing Black nurses of exploiting sick patients.<sup>252</sup> That was the same year that Congress enacted the Fugitive Slave Act of 1793.<sup>253</sup>

After 1793, a Black person could be arrested in Philadelphia for actual or suspected flight from slavery, as well as for actual or suspected flight from a position as a servant or apprentice, not to mention for vagrancy or other amorphous quasi-criminal charges. The records suggest that this was a frequent occurrence. As historian Jen Manion explains, “[c]olonial vagrancy statutes were modified to criminalize the early national poor just as African Americans rushed to the city in search of freedom,”<sup>254</sup> and the number of African Americans arrested as vagrants was vastly disproportionate to their share of the general population.<sup>255</sup> When the Prison Society sent a delegation to visit the Walnut Street Prison after the 1798 yellow fever surge, the delegation reported: “In the Ward allotted to the men vagrants we found upwards of One hundred persons, a large Proportion of them Black, some confined for tryal, some

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<sup>250</sup> In 1790, Philadelphia had 1,630 nonwhite residents, about 5.7% of its population. BUREAU OF THE CENSUS, U.S. DEP’T OF COM. & LAB., HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790: PENNSYLVANIA 10 (1908), <https://hdl.handle.net/2027/uc2.ark:/13960/t9gwors6v> [<https://perma.cc/KA9K-PNYX>] (reporting 210 slaves and 1,420 free nonwhite residents in the city of Philadelphia, and a total city population of 28,522).

<sup>251</sup> Kenneth R. Foster et al., *The Philadelphia Yellow Fever Epidemic of 1793*, 279 SCI. AM. 88, 90–91 (1998); MANION, *supra* note 249, at 124.

<sup>252</sup> ABSALOM JONES & RICHARD ALLEN, A NARRATIVE OF THE PROCEEDINGS OF THE BLACK PEOPLE, DURING THE LATE AWFUL CALAMITY IN PHILADELPHIA, IN THE YEAR 1793: AND A REFUTATION OF SOME CENSURES, THROWN UPON THEM IN SOME LATE PUBLICATIONS 3–8 (Philadelphia, William W. Woodward 1794).

<sup>253</sup> See An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of Their Masters, ch. 7, 1 Stat. 302 (1793).

<sup>254</sup> MANION, *supra* note 249, at 13.

<sup>255</sup> *Id.* at 140–52. It is hard to get an empirical grip on this phenomenon, because until 1816 magistrates had discretion to send vagrants either to jail or to the almshouse, and the population likely to be so committed continually cycled between the two institutions. *Id.* at 68–69 (chronicling cases of women who cycled between the almshouse and jail in the 1790s). Historian Billy Smith counts 694 entries as unambiguously referring to African Americans in the Vagrancy docket between 1790 and 1797. G.S. Rowe & Billy G. Smith, *Prisoners: The Prisoners for Trial Docket and the Vagrancy Docket*, in LIFE IN EARLY PHILADELPHIA, *supra* note 21, at 57, 63–65.

as Runaways, some as Vagrants and some as Convicts in a very dirty and generally ragged Condition.”<sup>256</sup>

The designations “Negro” and “Negress” appear frequently in the PFT and Vagrancy dockets. Although precise calculations are not possible, given how incomplete the archival records are, it seems clear that Black people were arrested and imprisoned at significantly higher rates than members of other racial groups.<sup>257</sup>

Philadelphians were not indifferent to the increasingly high rates of detention of the poor and marginalized. Criticism of magistrates and constables exploded in the Philadelphia press in the 1780s, galvanized by the extortion conviction of High Constable Alexander Carlisle.<sup>258</sup> Citizens complained of magistrates charging illegally high fees, calling unnecessary witnesses, and otherwise manipulating the system for financial gain.<sup>259</sup> Constables allegedly made unfounded or unnecessary arrests.<sup>260</sup> The fines-and-fees system excluded the poor from access to justice and led accused people to plead guilty to avoid the costs of trial.<sup>261</sup> The magistrates and constables could be tyrannical and cruel.<sup>262</sup> The problem was perceived to be, in part, an “excess of democracy,” and some commentators argued that judicial officers should be appointed rather than elected.<sup>263</sup> Overall, from the 1790s to the 1820s, the Board of Prison Inspectors was “engaged in a constant struggle with magistrates to control the numbers of vagrants, prisoners for trial, and so forth.”<sup>264</sup>

<sup>256</sup> PSAMPP Minutes 1787–1809, *supra* note 192, at 94.

<sup>257</sup> Cf. Leslie Patrick-Stamp, *Numbers that Are Not New: African Americans in the Country's First Prison, 1790–1835*, 119 PA. MAG. HIST. & BIOGRAPHY 95, 100–02 (1995) (reporting that Black people were overrepresented relative to city demographics among those sentenced to imprisonment at Walnut Street *after* conviction, as documented in the Prison Sentence Dockets).

<sup>258</sup> MERANZE, *supra* note 160, at 117.

<sup>259</sup> *Id.* at 117–18; STEINBERG, *supra* note 14, at 94, 96–97.

<sup>260</sup> MERANZE, *supra* note 160, at 118 (“Justices and their helpers, these critics believed, turned simple poverty or revelry into criminality.”).

<sup>261</sup> *Id.* at 117.

<sup>262</sup> *Id.* at 119, 158–59.

<sup>263</sup> *Id.* at 158.

<sup>264</sup> *Id.* at 190 (citing Prison Society Minutes of the Acting Committee, Oct. 9, 1806, Jan. 10, 1820, Oct. 3, 1822, July 10, 1822). The Board of Prison Inspectors, an innovation of the 1790s, visited the prison regularly and tried to remedy egregious conditions. On December 28, 1801, for instance, the Board resolved to solicit charitable donations for untried prisoners and detained vagrants: “[M]any of them are destitute of almost every article of clothing or bedding, at this inclement season, their situation being truly distressing.” Minutes of the Board of Inspectors of the Prison, 1801–1803, at 47, Record Group 38, Inspectors of the Jail and Penitentiary House/County Prison, City of Philadelphia Department of Records, City Archives, Philadelphia. The appeal was published in *Poulson's American Daily Advertiser* on January 4, 1802. *The Charity*, POULSON'S AM. DAILY ADVERTISER (Phila.), Jan. 4, 1802. *Poulson's* published a similar appeal on November 13, 1805 (reporting that “[t]here is at this time a great number of persons confined in prison (a large proportion of whom are females) committed as vagrants and prisoners for trial, almost totally destitute of clothing,” and soliciting donations). John Connelly, Chairman of the Board of Inspectors of the

The Prison Society, for its part, took an active role in trying to mitigate unnecessary pretrial detention and incarceration for poverty.<sup>265</sup> With respect to pretrial detainees, the organization operated essentially as a community bail fund. Prisoners would send missives pleading their cases, Society officers would investigate, and in cases that the Society's Acting Committee deemed deserving, it would sponsor bail for the affected prisoner or provide other forms of aid.<sup>266</sup> On November 2, 1787, for instance, Joseph Adam Flemming wrote to the Society pleading for help in obtaining release.<sup>267</sup> Flemming had "got a free holder and another to go Bail for me last week but Judge Brian wanted another which I could not get."<sup>268</sup> He asked the Society to convince the judge "to take such Bail as I can in reason procure."<sup>269</sup> Another supplicant, Tobias Crosedale, received a bad character reference from the magistrate who had committed him "on suspicion of stealing wheat."<sup>270</sup> The magistrate had made inquiries and reported that Crosedale had "shewn himself to be so unworthy that [his former master] thinks it is impossible for any person who knows him to think of being his Bail."<sup>271</sup> Crosedale probably received no succor from the Prison Society. But in March of 1788, the Acting Committee reported that it had been "instrumental in liberating thirty-five persons."<sup>272</sup> The Society continued to play this role through the early nineteenth century.<sup>273</sup>

Besides pretrial detainees, the Society focused its efforts on those detained for court debt — it was particularly aghast at the "very great hardship of a prisoner's being detained for his fees after being legally

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Prison, Advertisement, POULSON'S AM. DAILY ADVERTISER (Phila.), Nov. 13, 1805. During the late summer yellow fever epidemic of 1802, the Board sought to remove untried prisoners and other convicts to other prisons to stem contagion, Minutes of the Board of Inspectors of the Prison, 1801–1803, *supra*, at 77; and the following September, for the same reason, importuned the magistrates to stop committing people for vagrancy and petty crime, *id.* at 120.

<sup>265</sup> Its constitution explained that its purpose was to "prevent illegal and unjust confinement, administer individualized charity to prison inmates, and investigate and propose new 'modes of punishment' that would be the 'means of restoring our fellow-creatures to virtue and happiness.'" MERANZE, *supra* note 160, at 2 (quoting PSAMPP Minutes 1785–1793, *supra* note 192, at 2–5).

<sup>266</sup> See, e.g., PSAMPP Minutes 1785–1793, *supra* note 192, at 65 (noting that a list of prisoners "appearing on inquiry to be persons of ill fame & bad character, their cases are all dismissed"; but noting that the Society would pursue relief for other prisoners); MERANZE, *supra* note 160, at 151 (explaining the Society's practice). See generally PSAMPP Minutes 1785–1793, *supra* note 192; PSAMPP Minutes 1787–1809, *supra* note 192 (recording the Society's efforts).

<sup>267</sup> Prison Society Correspondence, Folder 10, at 5, in Prison Society Records, Collection 1946, Historical Society of Pennsylvania, Philadelphia [hereinafter Prison Society Correspondence].

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* He concluded: "Sir let me intreat you for the sake of humanity to consider the miserable situation I am in in a strange country without money or friends at this appalling season and assist in having me enlarged." *Id.*

<sup>270</sup> *Id.*, Folder 9, at 19.

<sup>271</sup> *Id.* The magistrate thought that Crosedale's "view in getting security is only to get an opportunity to flee both from justice & his Bail." *Id.*

<sup>272</sup> PSAMPP Minutes 1785–1793, *supra* note 192, at 66.

<sup>273</sup> See MERANZE, *supra* note 160, at 151 n.44.

acquitted of the crime he had been committed for"<sup>274</sup> — and witnesses jailed for lack of sureties: “[A] stranger accidentally present at the commission of a criminal action without friends to enter security for his appearance . . . is committed to Goal [sic] for the benefit of the community and suffers more than the actual criminals.”<sup>275</sup> The Society worked to identify such unfortunate souls and, one by one, to free them.

3. *Precarious Liberty and Blurry Lines.* — For a substantial proportion of those accused of crime in Founding-era Philadelphia, the guarantee of Penn’s dissenter bail clause was illusory. Bail might not have required an upfront transfer of collateral, but access to capital — social and financial — was still central to the operation of bail and commitment in practice. On the ground, moreover, the lines between bail bonds and peace bonds, criminal and civil detention, were blurred at best, and a criminal charge was just one among a set of almost-interchangeable grounds for detention.

Newspaper reports on jail commitments help to convey this reality. On June 2, 1791, for instance, *Claypoole’s Daily Advertiser* reported:

Since Sunday last, Justice Penrose committed to the jail of this city, a man for an assault on his wife. A man and woman for breaking the peace, and another man and woman for stealing a silver watch and three dollars. Alderman Bedford also committed two men for assault and battery on a woman and her husband. And another woman was committed to the work-house for disorderly behaviour. The Mayor committed a woman to jail for passing a counterfeit dollar, and a man of bad character to the work-house. Justice Baker committed two vagrants, and Justice Wharton committed an abandoned prostitute to the work-house.<sup>276</sup>

Shortly after the period of our study, the *Public Ledger* began reporting on daily proceedings in the Mayor’s office. On March 23, 1836, for example, the *Public Ledger* reported that “Mr. Robert Robbinet, whose contumacious conduct in the Mayor’s office was noticed in our police report of Saturday, continued obstinate and was committed to prison.”<sup>277</sup> Nathan Sullivan, “a colored man,” was arrested “coming down Walnut street in great haste” late at night and found to be “in the full exercise of a very mendacious talent,” such that “[i]t was deemed

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<sup>274</sup> PSAMPP Minutes 1787–1809, *supra* note 192, at 39; *see also, e.g.*, Prison Society Correspondence, *supra* note 267, Folder 9, at 13 (letter from prisoner acquitted of larceny charge but held for nine weeks for inability to pay fees); *id.*, Folder 10, at 3 (letter from another acquitted prisoner held because he could not pay fees); *id.* at 7 (letter from prisoner who could not afford fees); *id.*, Folder 11, at 8–10 (letters vouching for the character of Mary Fischer, who was acquitted but still incarcerated for inability to pay court fees); *id.*, Folder 13, at 10 (report of another prisoner detained for inability to pay fees); *id.* at 11–12 (reports of several prisoners discharged because the Committee paid their fees); MERANZE, *supra* note 160, at 151 & nn.43–44 (aggregating examples of Society aid to individual prisoners as well as of cases deemed unworthy of aid).

<sup>275</sup> PSAMPP Minutes 1787–1809, *supra* note 192, at 38.

<sup>276</sup> CLAYPOOLE’S DAILY ADVERTISER (Phila.), June 2, 1791.

<sup>277</sup> *Mayor’s Office*, PUB. LEDGER (Phila.), Mar. 23, 1836. Thank you to Kristin O’Brassill-Kulfan for alerting us to this source.

proper to detain him.”<sup>278</sup> Upon telling the Mayor that he had been drunk, Sullivan was “bound over in the sum of \$100, for future good behavior.”<sup>279</sup> John Ray, “a poor, and piteous looking wight,” “a son of the Emerald Isle,” and “a stranger in the city,” was found “lying drunk in the street” but “plead quite affectingly for forgiveness” and was ordered simply to leave the city.<sup>280</sup> Three “very young men” accused of “riotous and disorderly conduct” gave peace bonds for their future good behavior.<sup>281</sup> Sarah Quinn, “a white woman, exhibiting a bloated countenance, and evidently a graduate in crime,” was charged with petty theft and committed to jail pending trial.<sup>282</sup> Jane Hutton, “a female vagrant” who had recently been discharged from the almshouse and had since “lived with a set of negroes” was reportedly “in search of a lodgement”; “his honor thought her old quarters, the almshouse, a better residence” than her mixed-race rooming situation and committed her again.<sup>283</sup>

These short samples of magistrates’ daily decisionmaking illustrate the overlap between criminal and civil, peace-bond and bail-bond procedures. They also highlight the profound discretion that magistrates exercised, as well as the deep race, gender, and class divides that structured the process.

These dynamics of pretrial process were not unique to Philadelphia. No two jurisdictions are identical, of course, and there were surely differences in local legal institutions, culture, and practice across the Early Republic. But we are confident that the basics of pretrial practice documented here are, nonetheless, fairly representative. Detailed studies of early criminal procedure in New York and the Carolinas touch on all the major themes of our study, including the centrality and discretion of justices of the peace; the use of personal sureties and unsecured pledges as the mechanism of bail, with emphasis on reputation rather than capital; the prevalence of peace bonds and summary proceedings; the overlap between criminal and civil proceedings; and the routine commitment of multiply marginalized populations.<sup>284</sup> We have also perused partial

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> With respect to colonial New York, see GOEBEL & NAUGHTON, *supra* note 14, at 340–43 (describing the initiation of criminal proceedings by complainants); *id.* at 379–83 (describing summary proceedings “employed in dealing with the vast morass of petty misdemeanors,” and attributing colonists’ tolerance for such minimal process “to the sharp distinctions in social and economic status which prevailed in the colony”); *id.* at 381 (reporting on summary proceedings documented in justice-of-the-peace records); *id.* at 485–553 (describing the use of recognizance bonds — including both appearance and peace bonds — in detail); *id.* at 501 (noting that “defendants in petit larceny cases were frequently committed,” “due either to their incapacity to

court and justice-of-the peace records from other jurisdictions, including Georgia,<sup>285</sup> Maine,<sup>286</sup> New York,<sup>287</sup> Ohio,<sup>288</sup> and South Carolina,<sup>289</sup> and newspaper reports of criminal proceedings across all the states.<sup>290</sup> They all use similar terminology and document similar procedures. Of course, there is always more to investigate, and we hope that future scholarship will further illuminate local practices across the new republic.

### C. *The Many Bails of Aaron Burr, 1806–1808*

To complete our survey of bail in practice, we shift our attention to a different level of the criminal justice system: the federal courts. Federal criminal prosecutions were rare in the nation's first decade, and the few bail decisions federal judges rendered were largely unreported and left little mark on the law of bail in practice. Then came the "Great Case." Aaron Burr, third Vice President of the United States, was tried for treason in 1807.<sup>291</sup> Pretrial proceedings lasted nearly a year and

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furnish a recognizance or to the fact that they were persons of ill fame"). With respect to local legal practice in the Carolinas between 1787 and about 1820, see generally EDWARDS, *supra* note 177 (contrasting "state law," that is, the law on the books, with "localized law," that is, the law on the ground); *id.* at 4 ("Where state law protected the rights of legally recognized individuals, localized law maintained the social order — the 'peace' . . ."); *id.* at 74–86 (describing informality of proceedings and the power and discretion of magistrates); *id.* at 90 ("A peace bond was the favored remedy for minor offenses."); *id.* at 96 (elaborating on peace bonds); *id.* at 100 (discussing a vagrancy prosecution); *id.* at 7, 100–32 (discussing centrality of "credit," or reputation, to legal proceedings); *id.* at 129 ("Reliance on personal reputation elevated the importance of the social connections required to establish and maintain credit, since everyone's credit depended on fulfilling others' expectations.").

<sup>285</sup> We scanned the following records for mentions of bail and recognizances: Elbert County Superior Court Minutes, 1794–1797; Elbert County Superior Court Minutes, 1796–1800; Jackson County Inferior Court Minutes, 1796–1802; Columbia County Superior Court Minutes, 1792–1805. All are publicly available in Georgia's Virtual Vault maintained by the University System of Georgia, <https://vault.georgiaarchives.org> [<https://perma.cc/NQ2H-GY66>].

<sup>286</sup> Maine, York County, Berwick, Justice of the Peace Records, 1789–1798, <https://www.familysearch.org/search/catalog/1779334> [<https://perma.cc/Z4JK-L2GW>] (consisting of Benjamin Chadbourn's (Justice of the Peace) Records, 1789–1798 and John Hill's (Justice of the Peace) Records, 1790–1798).

<sup>287</sup> In addition to the detailed study of GOEBEL & NAUGHTON, *supra* note 14, cited throughout this Article, we reviewed sheriffs' and justices' papers at the New-York Historical Society, including the papers of U.S. Attorney Nathan Sanford, Sheriffs William Cutting and James Morris, and Attorney General Josiah Ogden Hoffman.

<sup>288</sup> Washington County Court Records, Justice of the Peace General Quarter Sessions, 1783–1795.

<sup>289</sup> We scanned or, where the materials were too fragile, noted records from the 1760s to 1810s in Charleston County, Camden District, and Kershaw County, including Grand Jury Presentments (Series S165010); Charleston County Recognizances (Series L10163); Charleston County Criminal Dockets (Series L10169); Kershaw County Peace Bonds (Series L28026); Kershaw County Scire Facias Executions (Series L28032); Kershaw County Bail Bonds (Series L28101); Camden District Rough Criminal Journals (Series L49061); Camden District Peace Bonds (Series L49063); Camden District Sheriff's Returns of Prisoners in Jail (Series L49071), SCDAH.

<sup>290</sup> 1 NEWSPAPER REPORTS OF DECISIONS IN COLONIAL, STATE, AND LOWER FEDERAL COURTS BEFORE 1801, *supra* note 245, at 926; 2 *id.* at 1524–35.

<sup>291</sup> R. KENT NEWMYER, *THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION* 3–4 (2012).

consumed the attention of the Jefferson Administration.<sup>292</sup> Without federal justices of the peace, pretrial decisions had to be made by the available circuit judge, which in Burr's case was the Chief Justice of the United States, John Marshall.<sup>293</sup> There are many excellent accounts of the trial.<sup>294</sup> Prosecution of Burr's coconspirators established the Supreme Court's early jurisprudence on habeas corpus,<sup>295</sup> and an encrypted letter from Burr provided the federal courts with their first case applying the Fifth Amendment to government decryption efforts.<sup>296</sup> Yet so far, no one has considered what the proceedings can tell us about the expectations that the most elite jurists of the Founding generation brought to criminal bail. This section undertakes that project.

*I. Kentucky and Mississippi: Arrest and First Bail.* — Handsome, wealthy, with great family connections, an elite education, and a devoted political following, Aaron Burr Jr. moved easily within the social circles of elite New York merchants and government insiders.<sup>297</sup> Burr narrowly lost the presidential election of 1800 and the New York

<sup>292</sup> See *id.* at 41–42; see also *Trump v. Vance*, 140 S. Ct. 2412, 2422 (2020) (“Jefferson, intent on conviction, orchestrated the prosecution from afar, dedicating Cabinet meetings to the case, peppering the prosecutors with directions, and spending nearly \$100,000 from the Treasury on the five-month proceedings.”).

<sup>293</sup> Chief Justice Marshall's circuit-riding duties consisted mostly of presiding over the Fifth Circuit a short distance from his home in Richmond, Virginia, with two brief biennial trips to Raleigh, North Carolina. See Charles F. Hobson, *John Marshall, Chief Justice on Circuit in Richmond and Raleigh*, VA. CAVALCADE, Winter 2001, at 4, 7. At the time, the Supreme Court Justice riding circuit presided with the local district judge. For the 1807 term, that judge was Cyrus Griffin who, going by the transcript, operated mostly as Chief Justice Marshall's silent partner. See NEWMYER, *supra* note 291, at 5.

<sup>294</sup> See, e.g., JAMES E. LEWIS JR., *THE BURR CONSPIRACY: UNCOVERING THE STORY OF AN EARLY AMERICAN CRISIS* (2017); NEWMYER, *supra* note 291; DAVID O. STEWART, *AMERICAN EMPEROR: AARON BURR'S CHALLENGE TO JEFFERSON'S AMERICA* (2011); PETER CHARLES HOFFER, *THE TREASON TRIALS OF AARON BURR* (2008); BUCKNER F. MELTON, JR., *AARON BURR: CONSPIRACY TO TREASON* (2002); WALTER FLAVIUS MCCAULEY, *THE AARON BURR CONSPIRACY: A HISTORY LARGELY FROM ORIGINAL AND HITHERTO UNUSED SOURCES* (1903). The *Richmond Enquirer* reported daily on the proceedings, with verbatim transcriptions taken down in shorthand. Most of the *Enquirer* material is now collected in T. CARPENTER, *THE TRIAL OF COL. AARON BURR, ON AN INDICTMENT FOR TREASON* (Washington City, Westcott & Co. 1807). A separate dictation was taken down by David Robertson, whose reports became the official account cited by subsequent courts. DAVID ROBERTSON, *REPORTS OF THE TRIALS OF COLONEL AARON BURR, FOR TREASON, AND FOR A MISDEMEANOR* (Philadelphia, Hopkins & Earle 1808). We follow the convention in relying mostly on Robertson's reports, except for certain proceedings after verdict, which appear only in Carpenter's.

<sup>295</sup> See *Ex parte Bollman and Ex parte Swartwout*, 8 U.S. (4 Cranch) 75, 100–01, 126 (1807) (establishing the Supreme Court's jurisdiction to issue “original” writs of habeas corpus and requiring an overt act of levying war to establish probable cause to charge treason). On the legal significance of *Bollman and Swartwout*, see generally Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So: Ex Parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000).

<sup>296</sup> See Orin S. Kerr, *Decryption Originalism: The Lessons of Burr*, 134 HARV. L. REV. 905, 949–50 (2021).

<sup>297</sup> On the romanticized portrayals of Aaron Burr, see generally CHARLES J. NOLAN JR., *AARON BURR AND THE AMERICAN LITERARY IMAGINATION* (1980).

governorship in 1804.<sup>298</sup> The latter campaign was the impetus for his famous duel with Alexander Hamilton, but firing the fatal shot did not seriously weaken Burr's popularity in many Republican circles, and even many Federalists rallied to Burr as Jefferson's disaffection with the ambitious New Yorker grew.<sup>299</sup> Financial panics in the late 1790s seriously strained Burr's overextended credit, but like many of his wealthy contemporaries, Burr found he could satisfy old debts with new credit so long as he had "confidential friends" of high reputation.<sup>300</sup> Thus Burr, unsurprisingly, was no stranger to suretyship and bail. As Gordon Wood has noted, other Founders wrote letters of statesmanship to be read by future generations; Burr left behind scrawled notes to business partners assuring them that "I will be your Bail to any amount."<sup>301</sup>

Burr's need for land to satisfy his mounting debts set him on the path that ended in his trial for treason in 1807. To this day, historians have not settled on what exactly Burr was up to.<sup>302</sup> What is clear is that Burr organized a quasi-military expedition to launch from Blennerhassett Island on the Virginia side of the Ohio River and land outside of New Orleans.<sup>303</sup> From there, Burr may have aimed to invade Spanish Texas the moment war broke out between Spain and the United States, as it was daily rumored to do at the time.<sup>304</sup> Others accused Burr of planning to invade regardless of authorization, or even of targeting New Orleans and leading a western secession movement.<sup>305</sup> At any rate, in the autumn of 1806, Burr set out from Blennerhassett Island to rendezvous with at least a hundred armed troops near New Orleans.<sup>306</sup>

The first effort to arrest him was by Kentucky prosecutor Joseph Hamilton Daveiss in December of 1806, but the effort failed. The court denied Daveiss's motion to hold Burr to bail on the ground that Daveiss lacked adequate evidence that Burr had taken overt acts demonstrative

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<sup>298</sup> NANCY ISENBERG, *FALLEN FOUNDER: THE LIFE OF AARON BURR* 207, 219–20, 255 (2007).

<sup>299</sup> *See id.* at 268–69, 276–77.

<sup>300</sup> *Id.* at 155–58.

<sup>301</sup> Gordon S. Wood, *The Real Treason of Aaron Burr*, 143 *PROC. AM. PHIL. SOC'Y* 280, 282–83 (1999).

<sup>302</sup> *See* ROBERT W. COAKLEY, *THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878*, at 78 (1988) ("Historians have never been able to define Burr's intentions with any degree of precision, and it is even possible that he himself could not have done so."); Julius W. Pratt, *Aaron Burr and the Historians*, 26 *N.Y. HIST.* 447, 447–48 (1945).

<sup>303</sup> HOFFER, *supra* note 294, at 37, 49–57.

<sup>304</sup> *See* NEWMYER, *supra* note 291, at 181.

<sup>305</sup> *See id.* ("The unanswered question was whether Burr's plan was contingent on a war with Spain (in which case it would have been legal), or whether he continued his military activities after it became clear there would be no war (in which case he committed a high misdemeanor for violating the Neutrality Act of 1794)."); ISENBERG, *supra* note 298, at 299–303.

<sup>306</sup> *See* HOFFER, *supra* note 294, at 49–50. It was the departure from Blennerhassett Island, at the western boundary of Virginia, that established jurisdiction for the treason trial to come. Burr's counsel would complain that he was "[d]rugged before this court, which derives its only jurisdiction from a little speck of land on the Ohio. Yes! Sir; but for that little spot of an island, Virginia never would have enjoyed this honour!" 1 ROBERTSON, *supra* note 294, at 71.



of treason and a “preventative” arrest, no matter how salutary, was unlawful.<sup>307</sup> The following month, however, the Attorney General of the Mississippi Territory, George Poindexter, had Burr arrested again.<sup>308</sup> The federal judge for the territory, Judge Thomas Rodney, cajoled two local notables into standing surety for Burr, each in the amount of \$2,500, while Burr himself pledged \$5,000.<sup>309</sup> But the federal grand jury empaneled in Mississippi declined to indict.<sup>310</sup> Taken aback, Judge Rodney refused to release Burr from his recognizance and ordered him to appear at the next court session to face a fresh grand jury.<sup>311</sup> While Burr’s counsel protested that his recognizance was now void, Burr fled.<sup>312</sup> He was captured attempting to leave the Territory and extradited to Richmond for the spring term of the federal circuit court.<sup>313</sup>

2. *Pretrial Proceedings in Richmond.* — It was an oddity of federal procedure at the time that the Chief Justice of the United States could find himself playing the role of a lowly magistrate deciding questions of probable cause and setting bail. But Virginia was within Marshall’s assigned circuit and Richmond was where the Chief Justice lived when the Supreme Court was not in session.<sup>314</sup> When Burr arrived under military escort, Marshall traveled the few blocks from his home to the Eagle Tavern to interview Burr in a private room.<sup>315</sup> Henceforth, Marshall would make the bail determinations in Burr’s case.

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<sup>307</sup> W.E. Beard, *Colonel Burr’s First Brush with the Law: An Account of Proceedings Against Him in Kentucky*, 1 TENN. HIST. MAG. 3, 11 (1915). William Ewing Beard’s article provides reprints of most of the primary sources for the Kentucky episode. Daveiss’s affidavit can also be found in *Motion in the Federal Court of the Kentucky District, Against Aaron Burr, Esq. Late Vice President of the U.S. for Crimes of High Misdemeanors*, IMPARTIAL REV. & CUMBERLAND REPOSITORY (Nashville), Nov. 22, 1806. Beard omits some of the technical discussion from the opinion in Beard, *supra*, at 10–11. The court’s full opinion can be found at *The United States Versus Aaron Burr*, IMPARTIAL REV. & CUMBERLAND REPOSITORY (Nashville), Nov. 29, 1806; or *The United States Versus Aaron Burr*, NAT’L INTELLIGENCER & WASH. ADVERTISER (D.C.), Dec. 15, 1806.

<sup>308</sup> Thomas Perkins Abernethy, *Aaron Burr in Mississippi*, 15 J.S. HIST. 9, 9–10, 12 (1949). The agreement for Burr’s safe conduct can be found at Agreement Between Cowles Meade, Acting Governor of Mississippi Territory, and Aaron Burr (Jan. 16, 1804), [https://collections.carli.illinois.edu/digital/collection/nby\\_graff/id/15609](https://collections.carli.illinois.edu/digital/collection/nby_graff/id/15609) [<https://perma.cc/R9EG-7G5Q>].

<sup>309</sup> ROBERT V. HAYNES, *THE MISSISSIPPI TERRITORY AND THE SOUTHWEST FRONTIER, 1795–1817*, at 158 (2010).

<sup>310</sup> *Id.* at 161–62; WILLIAM BASKERVILLE HAMILTON, *ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY & HIS TERRITORIAL CASES 261–63* (1953).

<sup>311</sup> HAYNES, *supra* note 309, at 163. Judge Rodney’s colleague on the judicial panel, Judge Peter Bruin, dissented from the order to continue the recognizance. HAMILTON, *supra* note 310, at 81. But since the exonerated of the bail was technically the defendant’s motion, a divided court meant the motion was denied. *Id.* at 81, 262–63. Incidentally, Burr hid himself during this time at the home of Dr. John Cummins, Judge Bruin’s son-in-law, *id.* at 81, and one of Burr’s future sureties in the Richmond proceedings, *see infra* note 369.

<sup>312</sup> HAYNES, *supra* note 309, at 163; *see* HAMILTON, *supra* note 310, at 263–64.

<sup>313</sup> *See* HAYNES, *supra* note 309, at 164–66.

<sup>314</sup> *See* Hobson, *supra* note 293, at 7.

<sup>315</sup> *See Examination of Colonel Burr*, ALEXANDRIA DAILY ADVERTISER, Apr. 3, 1807.

Historians have generally been complimentary of Chief Justice Marshall's evenhandedness during the proceedings.<sup>316</sup> Certainly no friend to the Jefferson Administration, Marshall had no particular regard for Hamilton's slayer either. Throughout, Marshall showed that he was thinking hard about precedents for the future. Try Burr under too expansive a definition of treason, or keep him under too onerous conditions of detention, and who could guess which Federalists would next be charged and jailed for crimes against the state? Spurred on by President Jefferson himself,<sup>317</sup> the government pressed for Burr's commitment to jail from the outset and at multiple other points during the pretrial proceedings.<sup>318</sup> As arguments and rulings proceeded over the course of several days, Marshall preliminarily admitted Burr to bail on a \$5,000 bond to secure his appearance from day to day until the question of whether to commit him pending trial was resolved.<sup>319</sup>

Burr faced two charges: treason, a capital offense, and conspiracy, a misdemeanor.<sup>320</sup> The Judiciary Act of 1789 followed the dissenters' model for bail, providing a right to bail in all but capital cases, and even there permitting bail at the judge's discretion.<sup>321</sup> Burr thus had a right to bail on the misdemeanor charge. Marshall never wavered from his view that, on this charge, Burr had a virtually absolute entitlement to release. If Burr could not procure sureties in the amount demanded by the court, he encouraged Burr to return (within a day or less) to have the amount adjusted downward.<sup>322</sup>

The (capital) treason charge, on the other hand, put Marshall in the politically awkward position of having to weigh the evidence to determine whether to bail or commit Burr pending trial. Recognizing this, Burr's counsel suggested the decision could be offloaded to the grand jury<sup>323</sup> (no doubt expecting Burr's success with grand juries to continue). But the text of the Judiciary Act was clear that discretion rested with

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<sup>316</sup> See, e.g., HOFFER, *supra* note 294, at 8; MELTON, *supra* note 294, at 166–67; see also NEWMYER, *supra* note 291, at 148–50, 154.

<sup>317</sup> Letter from Thomas Jefferson to James Bowdoin, U.S. Minister to Spain (Apr. 2, 1807), in 10 WORKS OF JEFFERSON 379, 382–83 (Paul Leicester Ford ed., Federal Ed. 1905).

<sup>318</sup> See 1 ROBERTSON, *supra* note 294, at 51, 306; 2 *id.* at 359.

<sup>319</sup> *Arrest of Aaron Burr*, ENQUIRER (Richmond), Mar. 31, 1807. Burr's initial sureties were Thomas Taylor and John G. Gamble. *Id.* Up until his release on March 30, Burr had been kept under military guard at the Eagle Tavern. *Id.* After his release, Burr relocated nearby to the Swan Tavern. See LEWIS, *supra* note 294, at 321.

<sup>320</sup> See NEWMYER, *supra* note 291, at 3–4.

<sup>321</sup> Ch. 20, § 33, 1 Stat. 73, 91 (“[U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases . . . [federal judges] shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.”).

<sup>322</sup> See 1 ROBERTSON, *supra* note 294, at 20 (“If bail for ten thousand dollars cannot be had, I will hear an application to reduce the sum.” (quoting Chief Justice Marshall)).

<sup>323</sup> *Id.* at 51–52 (“Every one will agree, that a judge, should, if possible, come to the office of trial as free from prepossession, as if he never heard of the case before.” *Id.* at 52.).

the judge.<sup>324</sup> Marshall solved the dilemma with a *Marbury*-like epiphany: the court need not decide between bail or detention if it had no jurisdiction to proceed because the treason charge lacked probable cause. Chief Justice Marshall held that this was the case.<sup>325</sup> He faulted the government for compiling only a threadbare record in the “five weeks” it had to assemble its case after Burr’s arrest; all it could proffer was an encrypted letter whose authenticity could not be established and the promise of witnesses to come.<sup>326</sup>

Burr had to be admitted to bail on the remaining misdemeanor charge. Perhaps to mollify the government after the probable cause ruling, Marshall set bail at the extraordinary sum of \$10,000<sup>327</sup> — that is, a \$10,000 bond pledge required of Burr *and* an additional \$10,000 worth of bonds aggregated across whatever sureties he could find. Burr protested that his credit might not extend so far in Richmond, but by the end of the day the bonds had been posted by Burr and five sureties.<sup>328</sup> Burr was free to return to his lodgings to await the grand jury. Later in the spring he joined his counsel Luther Martin in a rented apartment across the street from the courthouse.<sup>329</sup>

As the grand jury assembled and rumors grew that the government’s star witness, General John Wilkinson, was drawing nearer to Richmond, the government renewed its motion to commit Burr to jail on the capital treason charge.<sup>330</sup> Burr’s counsel protested that custody could not be reargued every time the government believed it had acquired better evidence, for:

Facts like polypi, are easily cut into two or three pieces; each of which may be made to form a new and entire body; and each of those atoms is to require a new recognisance. For one affidavit there must be a bail of 1,000 dollars: another affidavit, another 1,000 dollars; until the burden of bail is so oppressive as to leave no other resource, but in the four walls of a prison.<sup>331</sup>

The government responded that with trial imminent, Burr’s “regard for the safety of his own life” might well “prevail over his regard for the

<sup>324</sup> See § 33, 1 Stat. at 91 (“[B]ail shall be admitted . . . by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court.”).

<sup>325</sup> 1 ROBERTSON, *supra* note 294, at 15, 18.

<sup>326</sup> *Id.* at 12, 17. President Jefferson was livid about this ruling. “As if an express could go to Natchez, or the mouth of Cumberland, [and] return in 5 weeks, to do which has never taken less than twelve,” he grumbled in private correspondence. Letter from Thomas Jefferson to William Branch Giles, in 10 WORKS OF JEFFERSON, *supra* note 317, at 383, 385.

<sup>327</sup> 1 ROBERTSON, *supra* note 294, at 20.

<sup>328</sup> *Id.* The five Richmond sureties were Thomas Taylor, John G. Gamble, John Hopkins, Henry Heth, and William Langborn (elsewhere Langburn or Langbourne). See *The Conspiracy, ENQUIRER* (Richmond), Apr. 3, 1807.

<sup>329</sup> See LEWIS, *supra* note 294, at 307, 321.

<sup>330</sup> 1 ROBERTSON, *supra* note 294, at 66–67.

<sup>331</sup> *Id.* at 71–72.

interest of his securities.”<sup>332</sup> Speaking up in his own defense, Burr brokered a compromise. Chief Justice Marshall would let the question of probable cause for the treason charge go to the grand jury, the government would drop its motion for committal in the meantime, and Burr would post an additional bond of \$10,000 with four new sureties.<sup>333</sup>

Burr’s luck with grand juries ran out in June 1807, when the Richmond grand jury returned true bills for both the misdemeanor conspiracy charge and the capital treason charge.<sup>334</sup> The government immediately renewed its motion to commit Burr to jail.<sup>335</sup>

It was not clear whether Marshall would let Burr remain at liberty or whether he even had discretion to do so, but, perhaps in the mistaken belief that trial was imminent, Burr offered to submit to commitment so as not to sidetrack proceedings.<sup>336</sup> The same day as the indictment, June 24, Burr entered the Richmond jail.<sup>337</sup> He immediately regretted his decision. Less than two days later, Burr’s counsel was back before Chief Justice Marshall, asking the court “to remove Mr. Burr from the public gaol, to some comfortable and convenient place of confinement.”<sup>338</sup> The unsanitary city jail was overcrowded, and Burr had been housed in the same cell with a married couple.<sup>339</sup> Private conferences with counsel were impossible.<sup>340</sup> On behalf of Burr, his lawyers offered to pay the expenses of alternative confinement and the posting of a guard.<sup>341</sup> With Marshall’s blessing, the U.S. Surveyor of the Public

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<sup>332</sup> *Id.* at 101–02. At another point, government counsel opined that “I do not pretend to say what effect it might produce upon colonel Burr’s mind; but certainly colonel Burr would be able to effect his escape, merely upon paying the recognizance of his present bail.” *Id.* at 55. The suggestion appears to be that Burr — or any defendant dead set on absconding — might pay his sureties an indemnity in anticipation of the eventual enforcement of the forfeiture. Certain abolitionists did employ this tactic in the early 1850s. See, e.g., THE CASE OF WILLIAM L. CHAPLIN: BEING AN APPEAL TO ALL RESPECTERS OF LAW AND JUSTICE 41, 44–45 (Boston, Chaplin Comm. 1851). But we have seen no evidence that defendants actually paid their sureties an indemnity in advance of trial during the Founding era.

<sup>333</sup> 1 ROBERTSON, *supra* note 294, at 105–06. Three of the sureties were the same as before (that is, each pledged an additional \$2,500 bond): Thomas Taylor, John G. Gamble, and William Langborn. Burr’s defense counsel, the Baltimore lawyer Luther Martin, supplied the fourth recognizance. See *id.* at 106.

<sup>334</sup> *Id.* at 305–06. The jury simultaneously indicted Burr’s alleged co-conspirator Harman Blennerhassett (first name variously given as Herman, Harmon, and Harmen) on the same charges. *Id.* at 306.

<sup>335</sup> *Id.* at 306.

<sup>336</sup> See *id.* at 312. Whether a federal court retained discretion to bail after indictment by a grand jury was a question of first impression. Even the government’s lawyers divided on the answer. *Id.* at 306–07. With neither side prepared to present American case law, Chief Justice Marshall suspended final judgment until precedents could be produced. *Id.* at 310–12. The record of the arguments may be truncated; it only alludes to “a considerable desultory discussion on this point” before introducing Chief Justice Marshall’s opinion. *Id.* at 310.

<sup>337</sup> *Id.* at 312.

<sup>338</sup> *Id.* at 350.

<sup>339</sup> *State of the Trial of Col. Burr*, IMPARTIAL OBSERVER (Richmond), July 2, 1807.

<sup>340</sup> 1 ROBERTSON, *supra* note 294, at 350–51.

<sup>341</sup> *Id.* at 365–66 (reiterating the offer of indemnification later in the summer).

Buildings barred the windows and padlocked the door of the dining room in Luther Martin's rented apartment, and before sunset Burr found himself back in the dining parlor of his defense counsel.<sup>342</sup> A seven-member guard was posted around the clock at hefty expense.<sup>343</sup>

After the weekend, it was the government's turn to protest. Granting a motion to commit gave the choice of jail conditions to the government, not the court, the prosecution argued. Marshall conceded the point after another day of frenzied activity. The federal prosecutors convened the Richmond city council to pass a resolution permitting federal marshals to jail inmates in the newly constructed penitentiary outside of town.<sup>344</sup> Marshall ordered Burr to be lodged at the new penitentiary until trial began, at which point he could return to his lawyer's padlocked dining room.<sup>345</sup>

Compared to the city jail, the penitentiary was a stately retreat.<sup>346</sup> "His situation in the penitentiary was extremely agreeable," one biography reports. "He had a suite of three rooms in the third story, extending one hundred feet, where he was allowed to see his friends without the presence of a witness."<sup>347</sup> Many visitors attended what Burr jokingly called his *levée*, while the ladies of the city sent him "oranges, lemons, pineapples, raspberries, apricots, cream, butter, [and] ice" with which to pass the summer days.<sup>348</sup> When his daughter Theodosia arrived in town, she visited Burr at all hours and stayed overnight at least once.<sup>349</sup> The jailor kept up a running joke asking Burr's permission to lock him in at night.<sup>350</sup> Even after Burr was relocated to Luther Martin's comparatively cramped dining room for trial in August, guests continued to pile in.<sup>351</sup>

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<sup>342</sup> *Trial of Aaron Burr*, ENQUIRER (Richmond), June 27, 1807.

<sup>343</sup> See 1 ROBERTSON, *supra* note 294, at 351, 365–66 (report of the marshal on the cost of seven dollars a day for the guard).

<sup>344</sup> *Id.* at 357.

<sup>345</sup> *Id.* at 359; see also LEWIS, *supra* note 294, at 321.

<sup>346</sup> See JAMES PARTON, *THE LIFE AND TIMES OF AARON BURR* 479 (New York, Mason Bros. 1858). For a description of the Benjamin Latrobe–designed penitentiary, see DALE M. BRUMFIELD, *VIRGINIA STATE PENITENTIARY: A NOTORIOUS HISTORY* 19–25 (2017).

<sup>347</sup> PARTON, *supra* note 346, at 479.

<sup>348</sup> *Id.*

<sup>349</sup> See LEWIS, *supra* note 294, at 324.

<sup>350</sup> PARTON, *supra* note 346, at 479–80.

<sup>351</sup> See LEWIS, *supra* note 294, at 324–25.

Figure 6: Early Twentieth-Century Photograph of the Kind of Cell Burr Occupied in the Richmond Penitentiary



3. *After the Verdict.* — The treason trial concluded on September 1, 1807, with a verdict of not guilty.<sup>352</sup> But the misdemeanor conspiracy charge remained pending.<sup>353</sup> Chief Justice Marshall maintained that Burr had to be released, but also that a sufficient recognizance had to be taken.<sup>354</sup> What did a sufficient recognizance look like now? Burr had been acquitted of treason, but the government argued that the verdict was due to the exclusion of evidence on technical grounds, and further proceedings with the evidence admitted could well prove Burr's guilt.<sup>355</sup>

But Burr had already pledged two bonds of \$10,000.<sup>356</sup> Speaking personally to the court, Burr alleged that “circumstances had

<sup>352</sup> NEWMYER, *supra* note 291, at 3; HOFFER, *supra* note 294, at 171.

<sup>353</sup> See 2 ROBERTSON, *supra* note 294, at 447.

<sup>354</sup> Burr's counsel argued Burr could not be held to bail on the misdemeanor charge alone, since Virginia did not permit arrest and detention on misdemeanor charges. See 2 ROBERTSON, *supra* note 294, at 457–80. Chief Justice Marshall ruled that since the Judiciary Act did not distinguish between felony and misdemeanor charges, a general common law of bail applied in place of the forum state's particular policies. See *id.* at 481–84.

<sup>355</sup> See 2 CARPENTER, *supra* note 294, at 125–26.

<sup>356</sup> See *supra* pp. 1874–75.

considerably varied since bail had been first demanded of him.”<sup>357</sup> Since “it was well known that there were several claims against him; and he had incurred great expenses,” Burr complained that “he was not able to give bail in as large a sum as he had given at first; that his ability being lessened, the same sum would be now much more oppressive than it had been then.”<sup>358</sup> Burr’s counsel followed on with the argument that sufficiency of a surety had to be measured not by the charge but by the accused’s property:

[I]n this country the only mode of establishing a criterion to regulate the amount of bail to be taken from any individual is by looking at the state of his property. A man of no property ought not to be required to give bail in a large sum of money. The court has always inquired into the amount of the estate of the party accused. In taking recognisances for breaches of the peace [that is, peace bonds], the court always inquires what the accused is worth, and makes him give security accordingly. Colonel Burr’s circumstances are well known; and I should apprehend that a very small sum would be accepted by the court . . . .<sup>359</sup>

Chief Justice Marshall was cagey in his ruling. He observed that “[c]laims of a civil nature have come against [Burr] which have necessarily increased the difficulty of his procuring bail in this case,” but Marshall claimed that this circumstance did not influence his ruling.<sup>360</sup> Instead he pronounced his conviction that “I always thought, and still think, the former bail a very high sum.”<sup>361</sup> Concerned that \$10,000 had itself been an excessive bail in violation of the Constitution,<sup>362</sup> Marshall ruled that he “shall therefore be contented with bail in the sum of five thousand dollars.”<sup>363</sup> With bonds posted the same day, Burr’s two-month confinement came to an end on September 3.<sup>364</sup>

Still the case was not over. Marshall, having stricken most of the key evidence, essentially directed a verdict of not guilty on the misdemeanor charge on September 15.<sup>365</sup> But over a month of argument followed on whether the government could bring the prosecution again in another venue closer to where it could gather firm evidence of the

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<sup>357</sup> 2 ROBERTSON, *supra* note 294, at 485.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* at 485–86.

<sup>360</sup> *Id.* at 487.

<sup>361</sup> *Id.* at 486.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 487.

<sup>364</sup> *Id.* at 503–04. Burr had only two sureties this time: William Langborn, his surety on prior occasions, *see supra* pp. 1874–75, and Jonathan Dayton, a New Jersey general in the Revolutionary War who was charged but not indicted of conspiring in Burr’s treason. *See* 2 ROBERTSON, *supra* note 294, at 503–04; Mrs. Abner S. Coriell, *Major-General Elias Dayton, 1737–1807*, in 2 PROCEEDINGS OF THE UNION COUNTY HISTORICAL SOCIETY OF UNION COUNTY, N.J. 204, 204–11 (1934).

<sup>365</sup> *See* 2 ROBERTSON, *supra* note 294, at 539. Here Robertson’s account ends. Further transcription of the proceedings can be found in 3 CARPENTER, *supra* note 294, at 111.

conspiracy.<sup>366</sup> Marshall raised numerous difficulties that should be of interest to historians of extradition, while Burr pressed to subpoena the President's correspondence concerning his case.<sup>367</sup> Reluctant to condone the unusual procedures, Marshall nevertheless ordered Burr and a co-conspirator, Harman Blennerhassett (owner of the eponymous island), bound for retrial in the District of Ohio.<sup>368</sup> Instead of committing either to custody, the court accepted bails of \$3,000 each to secure their appearances.<sup>369</sup>

When the Ohio circuit term opened on January 23, 1808, Burr and Blennerhassett were thousands of miles away.<sup>370</sup> Burr had fled to London in June 1808.<sup>371</sup> For some time after, newspapers continued to report rumors of his arrival in Ohio to vindicate his sureties.<sup>372</sup> But it was not to be. Neither Burr nor Blennerhassett ever submitted to the circuit court's jurisdiction, while the government, embarrassed enough over the treason trial in Virginia, quietly gave up the Ohio prosecution.<sup>373</sup>

What became of Burr's forfeited bail? There is no evidence the government ever collected a dollar from Burr, Blennerhassett, or any of their sureties. The Ohio court duly notified the Attorney General of the forfeiture, but no action to recover the debt appears to have commenced, and no receipts for a forfeited bail appear on the Treasury rolls.<sup>374</sup> The defendants anticipated this outcome. In October 1807 Blennerhassett wrote to his wife describing his and Burr's plans to forfeit their Ohio

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<sup>366</sup> See 3 CARPENTER, *supra* note 294, at 111, 407 (establishing that Chief Justice Marshall closed the case on October 20, over a month after the verdict had been rendered on September 15). Much of the time was taken up with examination of witnesses and documents. For the principal legal arguments on the commitment and extradition, see *id.* at 111–52, 377–79, 407–18.

<sup>367</sup> See *Trump v. Vance*, 140 S. Ct. 2412, 2422–23 (2020) (recounting the subpoena debate).

<sup>368</sup> 3 CARPENTER, *supra* note 294, at 418. So far as we are aware, no scholar has explored the double jeopardy implications of the Burr case. When and how double jeopardy attached at this time seems to have still been a matter of some debate. See generally Jay A. Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283 (1963).

<sup>369</sup> *Id.* Burr's counsel, Luther Martin, and Dr. John Cummins (sometimes given as Cummings), a Mississippi landowner, stood surety for Burr. Cummins also stood surety for Blennerhassett. Israel Smith, the Republican Senator from Vermont, was Blennerhassett's second surety. *Id.*

<sup>370</sup> Blennerhassett wrote to his wife that he was "nine miles above Natchez," Mississippi, in early February 1808. Letter from Harman Blennerhassett to Margaret Agnew Blennerhassett (Feb. 8, 1808), in WILLIAM H. SAFFORD, *THE BLENNERHASSETT PAPERS* 520, 520 (Cincinnati, Moore, Wilstach, Keys & Co. 1861). On Burr's self-imposed exile in England, see ISENBERG, *supra* note 298, at 370–86.

<sup>371</sup> ISENBERG, *supra* note 298, at 370–71.

<sup>372</sup> See, e.g., FREEMAN'S FRIEND (Portland, Me.), Feb. 13, 1808; NAT'L INTELLIGENCER (D.C.), Feb. 1, 1808 (retracted Feb. 3, 1808); N. AM. & MERCANTILE DAILY ADVERTISER (Balt.), Feb. 2, 1808.

<sup>373</sup> For the most detailed accounts of the Ohio court session, see THE AURORA (Phila.), Feb. 13, 1808. On the shifting tones of newspapers from blaming Chief Justice Marshall to blaming President Jefferson for the failure to convict Burr, see LEWIS, *supra* note 294, at 423–26.

<sup>374</sup> See Records of the District Court for the Southern District of Ohio Relating to the Proposed Trials of Aaron Burr and Harman Blennerhassett, Records of District Courts of the United States, Record Group 21, National Archives, Washington, D.C.



recognizances. He informed her that a local lawyer “can explain to you how two writs of *scire facias* must be returned, in case of my absence from the district, before my recognizance becomes forfeited.”<sup>375</sup> Since the court held only two terms a year, the earliest that execution proceedings could even *commence* would be January 1809, long after the government would have lost interest in the case — and in seeing its many failures in the Burr affair rehearsed again in the newspapers.<sup>376</sup>

To sum it up at last: Through the course of his prosecution for treason and conspiracy, Aaron Burr pledged bail bonds of \$5,000, \$5,000, \$10,000, \$10,000, \$5,000, and \$3,000 on separate occasions, each time with at least two sureties pledging equivalent amounts. The first and the last bails were forfeited when Burr violated court orders to attend the next session of court. Yet through all of this, Burr never paid a single dollar to the court, the government, or his sureties. He was detained for two months after a grand jury indictment for treason, the most serious capital offense chargeable. But at all other times the Chief Justice of the United States and even the government’s own prosecutors understood that Burr had a right to be released pretrial upon a pledged amount that he could reasonably access.

4. *Lessons of the Burr Trial.* — Unique though it was, the Burr case illustrates well how bail worked in practice for suretied citizens.

*First, admission to bail was a function of class, not cash.* It bears repeated emphasis that neither defendants nor their sureties paid anything upfront to the court admitting them to bail in the Founding era. A surety’s sworn declaration of his property holdings did not secure collateral to the court or create any kind of lien that could be easily foreclosed. Access to sureties thus did not turn on a defendant’s liquidity. Rather, the question for a potential surety was one of reputational risk. A surety who pledged for an absconding defendant was unlikely to forfeit property, but the pledge sent a social signal of the surety’s improvidence, his lack of judgment, and his questionable reliability in future transactions.

Put another way, the decision to stand surety turned on what the defendant could be expected to do, not with the surety’s property, but with his good name. That meant that certain impoverished defendants like gospel ministers and physicians never lacked for sufficient sureties.<sup>377</sup> On the other hand, even sailors or ship passengers who were not destitute financially might find themselves detained without sureties because their reputation was not established in a particular locale.<sup>378</sup>

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<sup>375</sup> Letter from Harman Blennerhasset to Margaret Agnew Blennerhasset (Oct. 29, 1807), in SAFFORD, *supra* note 370, at 508, 508.

<sup>376</sup> *Id.* at 508–09.

<sup>377</sup> See SIXTH ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE PRISON DISCIPLINE SOCIETY 22 (Boston, Perkins & Marvin 1831).

<sup>378</sup> See *id.* at 21–22; MASUR, *supra* note 172, at 160–61.

Indeed, the common term for a pretrial detainee was not an *indigent* but rather a *stranger*.<sup>379</sup>

The Burr trial showcased the reputational economy of bail at nearly every turn, but perhaps most dramatically in the following line, delivered by the government lawyer William Wirt in his opening argument to commit Burr pending trial: “Really, sir, I recollect nothing in the history of his deportment, which renders it so very incredible, that Aaron Burr would fly from a prosecution.”<sup>380</sup> What would have most pricked the ears of Wirt’s audience at the time was that Wirt called the defendant *Aaron Burr*. Even Jefferson’s prosecutor gave him the honorific *Mister Burr*.<sup>381</sup> To everyone else, including the defense, the Chief Justice, the reporters, and the Richmond elite, he was *Colonel Burr*.<sup>382</sup> Wirt’s language was a deliberate invitation to imagine Burr stripped of his social standing. Through dozens of repeated references, Wirt persisted in calling Burr by his first name.<sup>383</sup> He understood that the legalities of bail made up only half the argument he needed to win. For the other half, he would have to show that Burr had so betrayed his social class that he did not deserve sureties.<sup>384</sup>

The strategy nearly succeeded. When Burr’s first Richmond sureties came forward, historian James Lewis writes, “[i]t was not immediately apparent [whether] the social act of offering hospitality to Burr would be viewed as [a] political act” or a betrayal of class.<sup>385</sup> One supporter observed that “to wish [Burr] well or not almost formed the line of Demarcation between Gentlemen and those who were not it.”<sup>386</sup> But the reputational costs soon dissipated. Republican newspapers denounced the Richmond sureties, but when the Federalist press came to their defense the reputational economy settled into equilibrium: gentlemen, it turned out, could indeed support Burr without sacrificing their status.<sup>387</sup> The seamliness of standing surety for Burr increasingly became a question of politics more than social status.<sup>388</sup>

*Second, forfeiture burdened the government, not bailees.* Since neither defendants nor their sureties posted real collateral in making their

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<sup>379</sup> See, e.g., *Taft v. Hoppin*, 1 Ant. N.P. Cas. 255, 256 (N.Y. Sup. Ct. 1816); *Brant v. Higgins*, 10 Mo. 728, 730 (Mo. 1847); DANIEL ROGERS, REPORT OF THE SEVERAL TRIALS OF ROBERT M. GOODWIN, FOR MANSLAUGHTER, at iii (New York, Nathaniel Smith 1821).

<sup>380</sup> 1 ROBERTSON, *supra* note 294, at 59.

<sup>381</sup> See, e.g., *id.* at 18, 45, 93.

<sup>382</sup> See, e.g., *id.* at 21, 23–25, 27–28, 54–55, 117, 128.

<sup>383</sup> See, e.g., *id.* at 58, 137, 139–40, 454.

<sup>384</sup> See Wood, *supra* note 301, at 280.

<sup>385</sup> LEWIS, *supra* note 294, at 321.

<sup>386</sup> See *id.* at 320–21 (quoting Letter from Erick Bollman to Joseph Alston (July 27, 1807), (Hist. Soc’y of Pa., Phila.: Gratz Autograph Collection)).

<sup>387</sup> See *id.* at 321–22.

<sup>388</sup> See *id.* at 320–23.

recognizances,<sup>389</sup> there was usually nothing within easy reach for the government to collect upon forfeiture.<sup>390</sup> As the Burr case illustrates, that process could not even *commence* in most jurisdictions until after the return of two ineffectual *scire facias* writs, typically one to two years after a defendant's failure to appear. A *scire facias* writ also allowed for its target to submit excuses to the court.<sup>391</sup> In a stack of returned writs from rural South Carolina, for instance, bailees and sureties seem to have submitted excuses in writing to the sheriff without the bother of a court appearance.<sup>392</sup> One defendant said he never heard his name called in court.<sup>393</sup> Two had negotiated settlements with the complaining witnesses and thought the case had been dismissed.<sup>394</sup> One surety saw the defendant on the road to the courthouse and assumed his bond was exonerated.<sup>395</sup> It appears that all these excuses were acceptable to the court.<sup>396</sup> Even when the government *did* prosecute a debt action and prevail, defendants and their sureties could petition the state legislature or governor to set aside the forfeiture — requests that, it appears, were regularly granted.<sup>397</sup>

Little wonder, then, that evidence of collections executed on forfeited bail bonds is vanishingly rare for this time period. At the federal level, it was not until 1825 that an unambiguous receipt for a forfeited bond

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<sup>389</sup> This stood in contrast to civil bail, some forms of which could be secured by attaching the property or person of the bailee before trial. See MANN, *supra* note 73, at 14–17.

<sup>390</sup> In the Founding era, title and possession of virtually all property remained in the hands of defendants and their sureties up until the government completed the tortuous process of executing a creditor's remedy at law. See *id.* at 18. As late as the 1860s, summary forfeiture proceedings on bail bonds without *scire facias* process and the chance to submit an excuse to the court were still considered novel and of dubious constitutionality. See, e.g., Lang v. People, 14 Mich. 439, 451–54 (1866) (opinion of Campbell, J.).

<sup>391</sup> An inquiry into the defaulter's excuse was an inheritance of exchequer practice. See GEOFFREY GILBERT, A TREATISE ON THE COURT OF EXCHEQUER 166 (London, Henry Lintot 1758); I G.E. HOWARD, A TREATISE OF THE EXCHEQUER AND REVENUE OF IRELAND 117–18 (Dublin, J.A. Husband 1776).

<sup>392</sup> See Scire Facias Executions, Kershaw County Court, 1792–1797 and 1800–1811, Collection 28, Series L.28032 & L.28211, SCDAH [hereinafter Scire Facias Executions].

<sup>393</sup> See Order to Joseph McAdams to Show Cause, Scire Facias Executions, *supra* note 392.

<sup>394</sup> Order to John Moore to Show Cause, Scire Facias Executions, *supra* note 392; Order to James Miller & John Russel to Show Cause, Scire Facias Executions, *supra* note 392.

<sup>395</sup> Order to Ely Cook & David Sanders to Show Cause, Scire Facias Executions, *supra* note 392.

<sup>396</sup> Although there does not appear to have been a systematic filing of these records, some writs have “discharged” scribbled in a different hand on the cover. See, e.g., *id.* (State v. Joseph McAdams, Adam Farnson & Andrew Nutt; State v. Jn. Trentham Jr.; State v. David Sanders); see also United States v. Feely, 25 F. Cas. 1055, 1057 (Marshall, Circuit Justice, C.C.D. Va. 1813) (No. 15,082) (excusing a forfeiture when “the real intention and object of the recognizance are effected, and no injury is done” after a nonappearing defendant returned to the next court session).

<sup>397</sup> See *supra* note 217 and accompanying text. After Simon Verdier, one of the wealthiest plantation owners in South Carolina, suffered a default judgment of \$500 on a forfeited bail, he petitioned the state legislature to set aside the forfeiture. Two years later, the legislature honored his request, judgment suspended all the while. Simon Verdier, Petition and Supporting Papers, Series S165015, Year 1834, Item 36, SCDAH; Acts and Resolutions of the General Assembly of the State of South Carolina 119–20 (1837).

was reported by the Treasury.<sup>398</sup> Even if bail bonds were included in a more ambiguous category of general forfeitures, none of these was transmitted to the Treasury until 1805, and afterwards there could not have been more than one or two collected in any given year.<sup>399</sup> Conclusive evidence is harder to come by at the state level, but meticulous studies of peace bonds in New York and Philadelphia agree that even when forfeitures were many, collections were few.<sup>400</sup>

Accordingly, scholars must be careful in describing the incentives of a bail system over time. When Burr failed to appear in Ohio, Republican papers gleefully reported that Burr “ha[d] forfeited his recognizance.”<sup>401</sup> That did not mean that anyone’s property had been transferred to the state. Rather, it broadcast the fact that Burr’s sureties had shown themselves to be fools. They had given their names to a man of no loyalty. Future transactors had to think hard about whether they wanted their own names tangled up in this reputational economy of social bondedness.

*Finally, defendant safeguards were as strong in practice as they were on the books.* The chief lesson of the Burr trial was that the dissenters’ model of bail worked largely as intended — for those who belonged. The requirement that all noncapital prisoners beailable meant that Burr and his co-conspirators had to be released on recognizances they could reasonably afford on any charges less than treason. Even after Burr was indicted for treason, Chief Justice Marshall thought long and hard about whether detention would be ordered, hearing arguments over several days and accommodating Burr with the lowest levels of custody deemed available.<sup>402</sup>

#### D. Policing Bail Abuses

If early American statutes and constitutions, and the treatises disseminating them, constituted the law of bail “on the books,” and the practice of magistrates (and sometimes U.S. Supreme Court Justices) making bail and commitment decisions in the first instance constituted the law of bail “on the ground,” there was also a layer between them: the legal process for seeking relief when practice on the ground violated

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<sup>398</sup> See AN ACCOUNT OF THE RECEIPTS AND EXPENDITURES OF THE UNITED STATES FOR THE YEAR 1825, at 12 (Washington, E. De Krafft 1826). The years 1799 to 1840 are available at <https://www.govinfo.gov/collection/treasury-department> [<https://perma.cc/KR3R-7XTM>].

<sup>399</sup> See *id.*

<sup>400</sup> See Lermack, *supra* note 177, at 181 (“There must have been many defaults. . . . [and m]any of the defaults thus remained uncollected. . . .”); GOEBEL & NAUGHTON, *supra* note 14, at 523–25 (“Frequently the court minutes in [the colonial] period show a failure to appear, yet no default entered or even any further order; . . . and there are actually very few cases before 1760 where an outright order of forfeiture was made.” *Id.* at 523.).

<sup>401</sup> E.g., *Aaron Burr*, N.Y. SPECTATOR, Jan. 23, 1808; ALEXANDRIA DAILY ADVERTISER, Feb. 10, 1808; see also KLINE’S CARLISLE WKLY. GAZETTE, Jan. 22, 1808; N.Y. GAZETTE & GEN. ADVERTISER, Feb. 10, 1808; UNIVERSAL GAZETTE (Phila.), Feb. 11, 1808.

<sup>402</sup> See *supra* pp. 1877–78.

the law on the books. A person committed before trial could seek review of his detention by a higher court through the writ of habeas corpus.<sup>403</sup> He could also seek damages through a civil suit — for malicious prosecution, trespass on the case, or false imprisonment — against the private complainant in the underlying suit, the magistrate who issued the bail or commitment order, or the sheriff who physically took him into custody.<sup>404</sup> These procedures produced a small body of judicial opinions considering claims of unlawful detention and excessive bail.

As a preliminary matter, it is important to remember that the excessive-bail clauses in the Federal Constitution and in state constitutions applied to civil as well as criminal bail. If the accessible case law is representative, the majority of excessive-bail claims related to bail demanded by a private party in a civil suit (although enforced by the local sheriff and magistrates).<sup>405</sup> The first case involving an excessive bail claim to make it to the Supreme Court was the habeas petition of John Burford, imprisoned for inability to procure sureties for a civil peace bond.<sup>406</sup> The following discussion focuses on criminal cases, but draws on civil cases to the extent that they bear on the meaning of “excessive bail.” Although this jurisprudence is admittedly sparse,<sup>407</sup> it supports a few conclusions.

First, courts took access to bail seriously. Federal circuit courts and the Supreme Court demonstrated their willingness to bail even those

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<sup>403</sup> See, e.g., *Munns v. De Nemours*, 17 F. Cas. 993, 994 (C.C.D. Pa. 1811) (No. 9,926) (noting that Munns’ bail in criminal and civil cases was reduced through habeas proceedings); *Ex parte Burford*, 7 U.S. (3 Cranch) 448, 449–50, 453 (1806) (granting certiorari on a habeas petition, and ultimately discharging Burford from prison).

<sup>404</sup> See, e.g., *Munns*, 17 F. Cas. At 993–94 (malicious prosecution suit against private individuals for prior criminal and civil charges, and bail demands, that resulted in extended detention); *Murray v. McLane*, 17 F. Cas. 1057, 1057 (C.C.D. Del. 1815) (No. 9,964) (malicious prosecution claim against private individuals for their allegedly excessive bail demand in a prior civil suit); *Ray v. Law*, 20 F. Cas. 330, 331 (C.C.D. Pa. 1816) (No. 11,592) (“Demanding excessive bail, although the plaintiff has a well founded cause of action, or holding to bail, when the plaintiff has no cause of action, if done for the purpose of vexation, entitles the party aggrieved, to an action for a malicious prosecution.”). *But see* *Evans v. Foster*, 1 N.H. 374, 375–77 (1819) (finding that a magistrate was not liable for imposing unattainable bail, even though magistrates “are equally liable with a justice of the peace,” *id.* at 377, for imposing excessive bail).

<sup>405</sup> See cases cited *supra* note 404.

<sup>406</sup> *Burford*, 7 U.S. (3 Cranch) at 449–50.

<sup>407</sup> The accessible jurisprudence is disproportionately federal, because those are the decisions that were most reliably recorded and subsequently digitized. We have searched comprehensively for relevant appellate opinions from 1780 to 1820 in the databases of the Harvard Caselaw Access Project, Westlaw, and HeinOnline. It might be possible to attain a more complete view of state-court opinions in habeas cases and tort suits alleging excessive bail by combing the physical files held in state-court archives. We leave that project to future researchers.

charged with treason and piracy when the evidence was thin,<sup>408</sup> or on humanitarian grounds.<sup>409</sup>

Second, the case law reflects the principle that bail should be calibrated to the circumstances of the accused so as not to result in detention. There is no clear doctrine about what quantum of bail was “excessive.”<sup>410</sup> But state appellate courts seem to have frequently reduced bail amounts on habeas review, although they did not write opinions that established precedent. And on three significant occasions, Chief Justice Marshall authored opinions reflecting the principle that bail must be calibrated to the principal’s means. In Burr’s case, Marshall responded to the argument of Burr’s counsel that “[t]he court has always inquired into the amount of the estate of the party accused” by adjusting his bail amount downward.<sup>411</sup> *Ex parte Burford*,<sup>412</sup> as noted previously, concerned the habeas petition of a man imprisoned for inability to satisfy a \$4,000 peace bond.<sup>413</sup> One of his claims was that the terms of the peace bond violated the Federal Excessive Bail Clause.<sup>414</sup> Before his case reached the Supreme Court, the federal circuit court reduced the bond amount to \$1,000 and the term of the bond to one year.<sup>415</sup> Marshall subsequently wrote that the circuit court had “gone so far as to correct two of the errors committed,” presumably agreeing that the original bond amount had been excessive.<sup>416</sup> Finally, riding circuit, Marshall held in *United States v. Feely*<sup>417</sup> that a court could set aside the forfeiture of a recognizance bond if the principal who had missed court appeared at the next court session with a good excuse.<sup>418</sup> He noted that a defendant who missed court once could be

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<sup>408</sup> See, e.g., *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 17–18 (1795) (directing that Hamilton be admitted to bail because the evidence of alleged treason was weak); *United States v. Johns*, 4 U.S. (4 Dall.) 412, 413 (1806) (considering a claim made by the defendant that he should be bailed where the evidence of alleged piracy was thin); cf. *United States v. Stewart*, 2 U.S. (2 Dall.) 343, 345 (1795) (“[T]he circumstances must be very strong, which will, at any time, induce us to admit a person to bail, who stands charged with High-Treason.”).

<sup>409</sup> See, e.g., *United States v. Jones*, 26 F. Cas. 658, 659 (C.C.D. Pa. 1813) (No. 15,495) (bailing defendant charged with piracy where physician opined that, because of a serious medical condition, his continued incarceration would be dangerous and perhaps fatal).

<sup>410</sup> E.g., *Murray v. McLane*, 17 F. Cas. 1057, 1058 (C.C.D. Del. 1815) (No. 9,964) (opining that whether the bail in question was excessive “depended, in a great measure, upon the law of the state of Delaware, and the practice of the courts under those laws,” as there could be significant variation across states); *Evans v. Foster*, 1 N.H. 374, 375–76 (1819) (discussing the fact that, in civil cases, the bail demand was tethered to the amount in dispute, but criminal cases lacked any such anchor).

<sup>411</sup> See *supra* note 359 and accompanying text.

<sup>412</sup> 7 U.S. (3 Cranch) 448 (1806).

<sup>413</sup> *Id.* at 450.

<sup>414</sup> *Id.* at 451–52; *Ex parte Burford*, 4 F. Cas. 723, 723 (C.C.D.C. 1805) (No. 2,148), *rev’d*, 7 U.S. (3 Cranch) 448.

<sup>415</sup> *Burford*, 7 U.S. (3 Cranch) at 451.

<sup>416</sup> *Id.* at 453. On the other hand, Chief Justice Marshall also cited a passage of Blackstone approving commitment for lack of sureties if the evidence supporting the peace bond is sufficient. *Id.* at 452–53.

<sup>417</sup> 25 F. Cas. 1055 (Marshall, Circuit Justice, C.C.D. Va. 1813) (No. 15,082).

<sup>418</sup> *Id.* at 1056–57.

required to give an additional recognizance for his future appearance, “but not in such a sum as to amount to refusal of bail, or to be really oppressive.”<sup>419</sup>

There are a few judicial opinions to the contrary. In 1799, the Supreme Court of Pennsylvania upheld an unaffordable bail requirement for a peace bond imposed *after acquittal*.<sup>420</sup> In 1819, the New Hampshire Supreme Court deemed a bail requirement of \$2,000 in a perjury case not to be excessive, although the defendant had been unable to procure sureties and had consequently been jailed.<sup>421</sup> These courts took a distinctly unfavorable view of the petitioners;<sup>422</sup> their willingness to affirm unaffordable bail amounts supports the notion of a two-tiered system.

By contrast, it was regarded as an outrage when a respectable person was detained for inability to procure sureties to meet an exorbitant pledge demand. The Founding-era archival materials disclose several notable incidents of this kind. In most of them, the accused immediately resorted to civil litigation against sheriffs or magistrates for satisfaction, a remarkable display of public awareness of when the law in practice had transgressed the law enshrined in constitutional provisions.

In February 1789, whether from celebrating the new Constitution a little too enthusiastically or for some other reason, the Philadelphia merchant James Mitchell found himself before Justice of the Peace Joseph Wharton facing an accusation of rioting.<sup>423</sup> Mitchell was indignant that the justice listened only to the accusers at the initial hearing while ignoring Mitchell’s protestations of innocence.<sup>424</sup> At some point Wharton had to physically restrain Mitchell with a “*violent stroke* on the breast.”<sup>425</sup> Wharton ordered Mitchell detained, even though Mitchell “told him repeatedly to recollect that [he] had offered him security.”<sup>426</sup> In addition to the denial of bail, what most upset Mitchell was that Wharton had ordered him detained “at a public hour of the day,” necessitating an escort to the jail “through some of the most public streets.”<sup>427</sup> Mitchell straightaway published his complaint against Wharton in a local newspaper and initiated a lawsuit against the justice.<sup>428</sup> The suit appears to have come to nothing as Wharton died shortly before the

<sup>419</sup> *Id.* at 1057.

<sup>420</sup> *Respublica v. Donagan*, 2 Yeates 437, 438 (Pa. 1799).

<sup>421</sup> *Evans v. Foster*, 1 N.H. 374, 374–77 (1819); *cf.* *Palmer v. Allen*, 11 U.S. (7 Cranch) 550, 563–64 (1813) (endorsing detention “until bail was given” in a civil debt case, *id.* at 564, but the petitioner’s complaint did not relate to the fact or contest the amount of the bail demand).

<sup>422</sup> *Donagan*, 2 Yeates at 438 (“Unsafe would the community be, if such characters could prowl at large through the country, without a sufficient tie on them.”).

<sup>423</sup> James Mitchell, Opinion, *To the Public*, FED. GAZETTE (Phila.), Feb. 26, 1789.

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

next court term opened,<sup>429</sup> but it seems that Mitchell cleared his name anyway. He himself became a justice of the peace in nearby Washington County the next year.<sup>430</sup>

Mitchell's case illustrates several of the key themes of our study. First, the early law of bail in practice could diverge quite sharply from the law on the books, even when the ink had hardly dried on those books. Pennsylvania's revolutionary constitution of 1776 reaffirmed William Penn's dissenter clause that "all prisoners" not charged with capital crimes were bailable upon offering sufficient sureties.<sup>431</sup> That didn't matter much to a magistrate intent on jailing someone. Second, though, suretied citizens like Mitchell had recourse. They enjoyed real entitlements to pretrial liberty that, when deprived, could be vindicated in the courts of law or at least the court of public opinion.

Nine years later, Philadelphia blacksmith Patrick Lyon was committed to the Walnut Street jail when he fell under suspicion of involvement in the nation's first bank heist, the spectacular robbery of the Bank of Pennsylvania on August 31, 1798.<sup>432</sup> Lyon had crafted the new locks recently installed on the Bank.<sup>433</sup> When he heard that he was suspected, he met with Samuel M. Fox, the Bank president; John Clement Stocker, a Bank director; Jonathan Smith, the Bank cashier; and Robert Wharton, the mayor (and Joseph Wharton's son), at Stocker's house.<sup>434</sup> They were not persuaded of his innocence. Stocker, who was also an alderman, ordered Lyon to produce sureties willing to pledge \$150,000.<sup>435</sup> This was a fantastical amount. When Lyon was unable to procure the requisite sureties, Stocker had him jailed.<sup>436</sup>

Lyon spent three months imprisoned,<sup>437</sup> but in the end he made out all right. He secured his freedom through a habeas petition that resulted in the reduction of the bail amount to a realistic sum.<sup>438</sup> The true perpetrator of the robbery was identified when he began trying to deposit

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<sup>429</sup> See ANNE H. WHARTON, GENEALOGY OF THE WHARTON FAMILY OF PHILADELPHIA, 1664 TO 1880, at 17 (Philadelphia, Collins 1880).

<sup>430</sup> ALFRED CREIGH, HISTORY OF WASHINGTON COUNTY 85–86 (Harrisburg, B. Singerly 1871).

<sup>431</sup> PA. CONST. of 1776, § 28.

<sup>432</sup> T. LLOYD, ROBBERY OF THE BANK OF PENNSYLVANIA IN 1798: THE TRIAL IN THE SUPREME COURT OF THE STATE OF PENNSYLVANIA 44 (Philadelphia, 1808); Ron Avery, *America's First Bank Robbery*, CARPENTERS' HALL, <https://www.carpentershall.org/americas-first-bank-robbery> [https://perma.cc/6GSS-B5ZP]. For a more complete account of Lyon's story, see *A Philadelphia Story: The Saga of Patrick Lyon*, available at BAIL AT THE FOUNDING, <https://bailatthefounding.net/a-philadelphia-story-the-saga-of-patrick-lyon> [https://perma.cc/4DJN-NXQ2].

<sup>433</sup> LLOYD, *supra* note 432, at 12; LAURA RIGAL, THE AMERICAN MANUFACTORY: ART, LABOR, AND THE WORLD OF THINGS IN THE EARLY REPUBLIC 179 (1998).

<sup>434</sup> LLOYD, *supra* note 432, at 9, 44.

<sup>435</sup> *Id.* at 9.

<sup>436</sup> *Id.* at 9, 44.

<sup>437</sup> *Id.* at 9.

<sup>438</sup> *Id.* at 10.



the stolen bank notes back at the very same bank.<sup>439</sup> Lyon wrote an account of his travails<sup>440</sup> that made him a popular hero, sued the authorities who had committed him,<sup>441</sup> obtained a generous settlement,<sup>442</sup> and pursued a successful career as an inventor and engineer.<sup>443</sup> His story too illustrates both the divergence between theory and practice and the fact that, for a member of the community with some social standing, detention on an unaffordable bail demand was recognized as an injustice in courts of both law and public opinion.

The Burr saga also involved an instance of intentional detention through an unrealistic surety demand — this time of a witness. General Wilkinson (the conspirator-turned-state’s-witness) had a man by the name of James Knox arrested in New Orleans, apparently to pressure him to testify against Burr, then confined on an unpayable bail and transported to Richmond.<sup>444</sup> The New Orleans court did not actually have jurisdiction to bail Knox for a Richmond proceeding,<sup>445</sup> and the surety demand was obviously beyond the means of a “poverty-stricken” traveler unknown to the local community.<sup>446</sup> To Benjamin Botts, one of Burr’s counsel, the Knox episode revealed the “vague and whimsical phantasy of equality” in the criminal justice system.<sup>447</sup> But Chief Justice Marshall made sure to inform Knox that he was not without legal recourse. He suggested that even if the officers who arrested and detained him were executing facially valid judicial orders in good faith, “this would be no defence for them in an action to obtain compensation for the injury.”<sup>448</sup>

<sup>439</sup> *Id.*; Avery, *supra* note 432.

<sup>440</sup> See generally PATRICK LYON, THE NARRATIVE OF PATRICK LYON (Philadelphia, Francis & Robert Bailey 1799).

<sup>441</sup> See generally LLOYD, *supra* note 432 (report of the proceedings, including a trial transcript).

<sup>442</sup> *Id.* at 184.

<sup>443</sup> See 3 SCHARF & WESTCOTT, *supra* note 189, at 1907; Avery, *supra* note 432.

<sup>444</sup> The episode is laid out most fully in the speech of Edmund Randolph at 1 ROBERTSON, *supra* note 294, at 277–83. The arrest and bail were countenanced by Judge Domenic Augustin Hall, a federal judge in New Orleans. *Id.* at 285.

<sup>445</sup> *Id.* at 285 (discussing “the duty of ‘the judge of the district, *where the delinquent is imprisoned*’ . . . judge Hall well knew, that the accused was not imprisoned in his district . . .”); see also, e.g., PETERSDORFF, *supra* note 76, at 486; JOHN BINNS, BINNS’S JUSTICE: DIGEST OF THE LAWS AND JUDICIAL DECISIONS OF PENNSYLVANIA, TOUCHING THE AUTHORITY AND DUTIES OF JUSTICES OF THE PEACE 314 (Pittsburgh, C. H. Kay & Co. 1840).

<sup>446</sup> 1 ROBERTSON, *supra* note 294, at 302; see also *id.* at 280 (“Was this man capable of giving bail in so excessive a sum?”); *id.* at 316 (government concession). Burr’s counsel repeatedly complained that “if conduct like this in a judge is to be tolerated, there is an end of all law and justice.” *Id.* at 280.

<sup>447</sup> *Id.* at 302. Botts lamented that “[t]he abuses of Knox are of no moment. The sun rises and sets as usual. General Wilkinson takes his coffee in the morning, and reposes himself on his sofa in the evening. We are happy and content at our homes,” *id.* at 302, while Knox is “thrown into a stinking room with the common felons,” *id.* at 213.

<sup>448</sup> *Id.* at 356. On the common practice of assessing damages against officers and leaving them to seek indemnification from the legislature, see Jane Manners, “A Remuneration for Damages

James Knox disappears from the record after the Burr trial. Whether he ever returned to New Orleans to seek recourse from his jailors, it was important to Marshall to answer Botts's charge that the U.S. bail system was unjust. The right to bail was, like all common law rights were supposed to be, a right whose transgression could be swiftly and effectively vindicated.<sup>449</sup> Respectable citizens, including poorer ones like Knox, were not to be held in close confinement on a bail beyond their sureties' means. When they were, they could — as Patrick Lyon and countless others did — sue their judges, jailors, and accusers for money damages, with none of our modern doctrines of qualified or official immunity standing in their way.

### III. CONTEMPORARY IMPLICATIONS

The historical record of bail law and practice at the Founding is complex, but it has clear implications for contemporary debates. This Part identifies three common historical claims that, in light of the record, are clearly false. Then it considers the implications of the two-tiered system of bail that operated in the Early Republic.

#### A. *Claims Foreclosed by History*

The clearest implication of the Founding-era law and practice of bail is that there is no ancient tradition of cash bail. The record precludes the notion, regularly advanced in support of cash-bail systems, that America has always relied on a money bail system requiring upfront deposits to keep its judicial machinery running.

The American Bail Coalition (ABC) — an association of insurers who underwrite bail bondsmen — has been most active in purveying the narrative of a timeless cash-bail tradition. In an amicus brief filed in the landmark case *Walker v. City of Calhoun*<sup>450</sup> in the Eleventh Circuit, for instance, celebrated advocate and former U.S. Solicitor General Paul Clement wrote, on behalf of ABC, that “the text and history of our founding charter conclusively confirm that monetary bail is constitutional,”<sup>451</sup> because, “[s]ince our Nation’s birth, systems of bail like the City of Calhoun’s [cash bail schedule] have protected both the liberty interests of defendants and the security interests of

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Incurring”: Officer Liability and Legislative Indemnification in the Early Republic 4 (Feb. 2023) (unpublished manuscript) (on file with the Harvard Law School Library); see also James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1925–29 (2010).

<sup>449</sup> On the pre-Blackstonian common law approach to redressing wrongs and vindicating rights, see generally MICHAEL LOBBAN, *THE COMMON LAW AND ENGLISH JURISPRUDENCE, 1760–1850* (1991).

<sup>450</sup> 901 F.3d 1245 (11th Cir. 2018).

<sup>451</sup> Brief for *Amici Curiae* American Bail Coalition, Georgia Association of Professional Bondsmen, and Georgia Sheriffs’ Association in Support of Defendant-Appellant and Reversal of the Preliminary Injunction at 3, *Walker*, 901 F.3d 1245 (No. 16-10521).

communities.”<sup>452</sup> The plaintiffs, ABC argued, were trying to dismantle “the traditional American system of secured monetary bail.”<sup>453</sup> Clement’s most recent brief for ABC asserts: “Since before the Founding, American communities have relied on bail systems to give criminal defendants an opportunity to secure their liberty before trial, while guaranteeing their appearance for prosecution through the ‘deposit of a sum of money subject to forfeiture.’”<sup>454</sup> This statement is correct until the words “deposit of a sum of money,” lifted out of context from *Stack v. Boyle*.<sup>455</sup>

The bondsmen’s advocacy has found traction in the courts. In 2022, the Eleventh Circuit reversed the grant of a preliminary injunction in a constitutional challenge to the cash-bail system in use in Cullman County, Alabama.<sup>456</sup> Citing ABC’s brief, the court invoked *Stack*’s definition of bail as a “deposit [of] a sum of money”<sup>457</sup> and immediately added: “Since before the days of the Magna Carta, society has used the posting of surety as a mechanism for the accused to secure their pretrial release.”<sup>458</sup> This sequence does not explicitly assert that society has used the posting of *cash* as a bail mechanism since before Magna Carta, but it certainly suggests as much.

Let it be clear: there is no American tradition of cash bail that dates to the Founding era. The Founding-era bail system of reputational capital was fundamentally different than cash-bail systems in place today. Indeed, in all the archives — public and private, state and federal — the most glaring absence in the early “money bail system” is the *money*. We have yet to find a single instance of a pretrial defendant detained for failure to pay a cash bail deposit, nor have we found any offer or acceptance of bail collateral with a justice of the peace or a court of record. What bail certified was that someone belonged to a local community in a strong enough sense that he would remain to abide its judgments.<sup>459</sup> Within these borders of belonging, direct money incentives had comparatively little role to play, as both the users and the victims of the

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<sup>452</sup> *Id.* at 5.

<sup>453</sup> *Id.* at 17.

<sup>454</sup> Brief for *Amici Curiae* American Bail Coalition and Georgia Association of Professional Bondsmen in Support of Defendants-Appellants and Reversal of the Preliminary Injunction at 6, *Hester v. Gentry*, 143 S. Ct. 2610 (2023) (No. 18-13894) [hereinafter Brief for American Bail Coalition in *Hester*] (quoting *Stack v. Boyle*, 342 U.S. 1, 5 (1951)).

<sup>455</sup> 342 U.S. 1, 5. *Stack* defined bail in these terms in 1951, according to mid-twentieth century practice. *Id.*

<sup>456</sup> *Schultz v. Alabama*, 42 F.4th 1298, 1298, 1306, 1335 (11th Cir. 2022).

<sup>457</sup> *Id.* at 1330 (quoting *Stack*, 342 U.S. at 5).

<sup>458</sup> *Id.* (citing Brief for American Bail Coalition in *Hester*, *supra* note 454, at 6–8).

<sup>459</sup> *Cf. WELKE*, *supra* note 163, at 4–6.

American bail system well knew. Until well after the Founding era, all bail was “unsecured” in today’s meaning of that term.<sup>460</sup>

The historical record also forecloses two claims frequently made by contemporary bail-reform advocates, however. The first is the notion that the historical right to bail operated as an absolute right to release. That is not so. The right to bail was a right to offer sureties, and not everyone had access to a willing surety. But in dissenter-model jurisdictions the right extended quite far indeed. We estimate that about eighty percent of the population had routine access to a surety, and virtually any surety was a sufficient surety in the eyes of a court.

The second reform-side claim the history precludes is that concern for public safety in bail setting is a new development. This claim has a basis in the jurisprudence; appellate court pronouncements about criminal bail described its sole purpose as securing court appearance.<sup>461</sup> But it is also abundantly clear both on the books and in practice that recognizances could be taken for good behavior, alone or in combination with appearance bonds, and that this practice was extremely common.<sup>462</sup> Peace bonds were a ubiquitous preventive device, and neither the legal nor the practical line between peace bonds and appearance bonds was very clear.<sup>463</sup> Overall, preventive detention and restraint clearly played a central role in pretrial proceedings in the Founding period. To the extent that recent scholarship has cast system-level concern with dangerousness as a modern development,<sup>464</sup> future scholarship should take the Founding-era realities of practice into account.

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<sup>460</sup> See *supra* sections I.B, pp. 1829–32, II.C.1, pp. 1870–72, and II.C.4, pp. 1880–83. Thus the bond pledge by which disgraced crypto wunderkind Sam Bankman-Fried was initially permitted to remain at home pending trial — which elicited outrage in some quarters for its “lenience” — was exactly the sort of pledge that secured defendants’ appearance in the Founding era. See, e.g., Benjamin Weiser et al., *Sam Bankman-Fried Released on \$250 Million Bond with Restrictions*, N.Y. TIMES (Dec. 22, 2022), <https://www.nytimes.com/2022/12/22/business/sam-bankman-fried-ftx-bail.html> [<https://perma.cc/58BA-2V6H>].

<sup>461</sup> While riding circuit, for instance, Chief Justice Marshall explained that “[t]he object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty.” *United States v. Feely*, 25 F. Cas. 1055, 1057 (Marshall, Circuit Justice, C.C.D. Va. 1813) (No. 15,082). The legal question at issue was whether the court should remit Feely’s forfeited recognizance bond when he had appeared after having missed court with a good excuse. *Id.* at 1055. Chief Justice Marshall held that remission was warranted because, if Feely were innocent, it would be “unreasonable and unjust” to make him pay the debt on a bond that was “intended only to secure a trial”; and if he were convicted and punished, “it would be unreasonable to superadd the penalty of an obligation entered into only to secure a trial.” *Id.* at 1057; see also *Ex parte Milburn*, 34 U.S. (9 Pet.) 704, 710 (1835) (opinion of Story, J.) (“A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused to answer the indictment, and to submit to a trial, and the judgment of the court thereon.”).

<sup>462</sup> See *supra* pp. 1853.

<sup>463</sup> See *id.*

<sup>464</sup> E.g., Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 452, 470 (1992); Sean Allan

### B. *Constitutional Meaning in a Two-Tiered System*

Beyond these historical clarifications, the implications of the Founding-era picture for contemporary constitutional interpretation are less certain, because the picture that emerges is of a two-tiered system — and one that operated in a context very different from ours. This complex historical reality does not, on its own, provide a clear answer to any open constitutional question.

The broadest open question of constitutional law is whether a right to liberty before trial is “deeply rooted in this Nation’s history and tradition” for purposes of substantive due process.<sup>465</sup> There is certainly a plausible argument in the affirmative.<sup>466</sup> The dissenter-clause framework for bail, which became the dominant framework nationwide, demonstrates a distinctly American tradition of strict protections for pretrial liberty. In decreeing a right to bail for all but those facing capital charges,<sup>467</sup> William Penn meant to restrict both pretrial detention and the judicial discretion to order it very narrowly. It was an intentionally dramatic departure from the English model, one that Congress and almost every new state to enter the Union after 1789 chose to follow.<sup>468</sup> On this model, because a right to bail was supposed to enable release, all those accused of noncapital crime were meant to remain at liberty pending trial. And indeed, for those who had sureties to vouch for them — even sureties of dubious reputation or modest means themselves — the dissenter model appears to have worked as intended.

On the other hand, for those who lacked sureties, a criminal charge meant jail. If Ebenezer Ferguson’s Record Book is representative, fully half of those accused of a crime may have been jailed “for want of bail” at least temporarily.<sup>469</sup> A significant number remained in jail for weeks or months, in squalid and crowded rooms, awaiting the next court session.<sup>470</sup> For the most marginalized, a pending criminal charge was not even a necessary condition for incarceration. One could also be imprisoned as a witness who lacked sureties; as a vagrant; for failure to pay debts or court costs; or for dangerousness if one could not produce

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Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910, 920 (2021). One of us has had to adjust our own views on this point. See Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 331 (2015) (asserting that various preventive practices “reflect a recent transformation in the culture of American criminal justice”).

<sup>465</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

<sup>466</sup> Application for Leave to File Brief *Amici Curiae* and Proposed Brief of *Amici Curiae* National Law Professors of Criminal, Procedural, and Constitutional Law in Support of Respondent at 56, *In re Humphrey*, 482 P.3d 1008 (Cal. 2021) (No. S247278). One argument that we do not pursue here, but have elsewhere, is that *physical liberty* more generally is the fundamental right infringed by pretrial detention. See *id.* at 15, 58.

<sup>467</sup> See *supra* section I.D.2, pp. 1837–42.

<sup>468</sup> See *supra* section I.D.3, pp. 1842–45.

<sup>469</sup> See *supra* section II.B.2, pp. 1854–67.

<sup>470</sup> See *supra* section I.B, pp. 1829–32.

sureties for a peace bond.<sup>471</sup> For this group, liberty was always precarious, and a criminal charge was but one path to imprisonment. Whether a right to pretrial liberty is deeply rooted in the nation's history and tradition depends, then, on what constitutes our history and tradition: the ideals and commitments deliberately enshrined in law, or the often indeliberate, reflexive practices on the ground.

A right to pretrial liberty is more explicitly codified in the state constitutions that include the dissenter bail clause, with its right to release by "sufficient sureties."<sup>472</sup> A key question in those jurisdictions is what this mysterious phrase originally meant. To some extent the answer is clear. Sureties were human beings — guarantors — not cash deposits. The "security" sometimes mentioned in Founding-era sources is the security provided by the pledges of the accused and the sureties, not collateral transferred up front.<sup>473</sup>

The thornier question is what made sureties "sufficient." In theory, magistrates were supposed to ensure that sureties had the resources to satisfy a forfeited bond if necessary, while also ensuring that this requirement did not defeat the accused person's right to release. In practice, "sufficiency" seems to have been a matter of credibility and character. As a West Virginia judge expressed the general idea later, "[b]ail is a matter of confidence and personal relation."<sup>474</sup> A sufficient surety was a respectable person of "good fame" whose pledge (that the defendant would appear for court and behave in the meantime) could be trusted.

It is unclear what role the requirement of "sufficiency" played in the commitment of Founding-era Philadelphians pending trial. As indicated above, some people who had a right to bail were nonetheless committed to jail. Most likely, this was because no one would vouch for them. But the evidence does not rule out the possibility that it was sometimes because those willing to vouch for them were not "sufficient" in the magistrates' eyes. Another possibility is that the magistrates ignored the law in some cases and unilaterally committed people to jail. The most we can say is that the right to bail "by sufficient sureties" was intended to guarantee release so long as there was a member of the

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<sup>471</sup> See *supra* notes 235–246 and accompanying text.

<sup>472</sup> See *supra* p. 1842.

<sup>473</sup> See *supra* sections I.B, pp. 1829–32, and II.C, pp. 1869–83.

<sup>474</sup> *Carr v. Davis*, 63 S.E. 326, 331 (W. Va. 1908) (Robinson, J., dissenting). The court in *Carr v. Davis* held that West Virginia law did not prohibit defendants from indemnifying their sureties (a precursor to commercial bail). *Id.* at 326 (majority opinion). Justice Robinson, dissenting, wrote:

The poorest man, if honest, can find bail. The richest man, for whom those knowing him would not vouch without indemnity, should not be allowed to furnish bail by virtually purchasing it. . . . Bail is a matter of confidence and personal relation. It should not be made a matter of contract or commercialism. . . . Why provide for a bail piece, intended to promote justice, and then destroy its effect and utility? Why open the door to barter freedom from the law for money?

*Id.* at 331 (Robinson, J., dissenting).

community with some standing who would vouch for the accused person's compliance.

And what of the prohibition on "excessive bail" in both federal and state constitutions? The justice-of-the-peace manuals were clear that bail demands should be calibrated to a defendant's means and suggested that, in right-to-bail cases, an unattainable demand was an excessive one.<sup>475</sup> Chief Justice Marshall's judicial opinions and his conduct during the Burr trial, as well as the indignation and civil litigation that followed the detention of reputable figures like James Mitchell and Patrick Lyon, demonstrate that this understanding of the law also governed practice for suretied citizens. There are indications that pretrial detainees used habeas procedure to challenge hefty bail requirements and that higher courts often lowered them.<sup>476</sup> On the other hand, there was no statutory law or definitive judicial precedent specifying precisely when bail was "excessive."<sup>477</sup> Excessive-bail claims were strikingly uncommon, almost certainly because few detentions turned on the *amount* of the pledge required but rather whether there were *any* sureties at all.<sup>478</sup>

In sum, the original meaning of the terms "sufficient sureties" and "excessive bail" were amorphous along certain dimensions. Both notions were meant to function as part of a framework that guaranteed pretrial release for noncapital defendants with adequate status in the community. But neither was meant to prevent the summary incarceration of the destitute, the incapacitated, the disorderly, or the stranger. And in practice, the elastic concepts of "excessive" and "sufficient" facilitated the use of pretrial detention as one method of short-term incarceration among others.

What does all this mean for interpretation of right-to-bail and excessive-bail clauses today? The story of the dissenter-clause framework supports arguments that federal and state constitutional provisions should be understood to impose strict limits on pretrial detention. But the story of those jailed at Walnut Street undercuts any notion that pretrial detention was anathema to the Founding generation in the way it may have been to Penn's. The additional hurdle to extrapolation is that, in many ways, the 1790s were a foreign world that defies analogy with our own. Bonds — of all kinds — were ubiquitous, while cash and its equivalents were not. Officers were amenable to suits for damages even for de minimis detention orders that transgressed the limited bounds of

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<sup>475</sup> See *supra* p. 1833.

<sup>476</sup> See, e.g., *supra* note 403. We were unable to make a thorough study of habeas records within the confines of this project.

<sup>477</sup> See *supra* section II.D, pp. 1883–89.

<sup>478</sup> There are only two mentions of an excessive-bail claim in an expansive compilation of newspaper accounts of criminal proceedings in the colonies and then the states before 1801. See 1 NEWSPAPER REPORTS OF DECISIONS IN COLONIAL, STATE, AND LOWER FEDERAL COURTS BEFORE 1801, *supra* note 245, at 926; 2 *id.* at 1525.

their authority. Today, official and qualified immunities effectively cut off such suits.

In the end, a nuanced picture of bail at the Founding belies the fantasy that we can look to the past for clear answers to contemporary questions about when the state is justified in depriving people of liberty. There is too much complexity, along too many dimensions, to extract cleanly determinate meanings from past texts and practices. The aim of this Article has not been to reduce the complexities into rules for litigation, but rather to present a responsible history that makes the practices of that time vivid.

### CONCLUSION

As it does today, bail pending a criminal trial in the Founding era involved a vast regulatory system that managed competing norms in a complex balance of written and unwritten, national and local, ancient and modern law. The inherited English common law emphasized the discretion of local magistrates to deny release before trial with or without conditions for bail. About half the states retained this system at the time of the Founding, but the balance would rapidly shift toward a model of bail innovated by dissenting Puritan and Quaker colonists. This model eliminated magisterial discretion in all noncapital cases and required release on what today would be known as unsecured bail: an uncollateralized pledge to forfeit property if a defendant failed to appear for trial.

In practice, the unsecured, largely unmonetized surety system worked to release suretied criminal defendants in the Founding era but broke down for defendants living at the margins of a reputational economy. The very poor found themselves subject to detention before or without trial in thousands of cases across the period. For them, the lines between pretrial custody and postconviction sentence were blurry at best.

Translating these findings into a “history and tradition” of bail is not straightforward. Still, this study can at least negate a couple of conclusions that have been gaining traction in recent litigation and debates over bail reform. Cash deposits are entirely absent from the archive of bail at the Founding, so even the label “money bail system” tends to mischaracterize the history and tradition of American bail. On the other hand, the right to release was not absolute, and concern for public safety animated bail conditions and detention orders much as it does today.

The clearest tradition that the Founding-era law and practice of bail reveals is a tradition of unrealized legal ideals. Since 1787, our law has proclaimed a commitment to pretrial liberty and careful limits on detention, and has failed to live up to those commitments. Since 1787, too, people have labored to hold the law to its word. A history of bail at the Founding illuminates a world in which those struggles played out on a



field of legal practices and cultural meanings quite different from our own. How to honor core constitutional commitments in our local courts and jails today cannot be directly resolved by history, but the study of the past can at least relieve us of the sense that the practices we have are what they have always been.

## APPENDIX I: GLOSSARY

For the reader's benefit, we include a short glossary of key terms roughly in order of their appearance in a criminal proceeding. Key legal terms were frequently used interchangeably with more or less technical rigor in the early national period. So, for instance, *bail* might refer to the release of a defendant (as in a bailment, that is, a transfer of custody); while other times it referred to the condition of release, usually an amount of property to be forfeited upon failure to appear (as in bail of £40); while still other times it might refer to the third party pledging the property (as when one business partner assured another "I will be your [b]ail to any amount").<sup>479</sup> We have numbered the definitions below to reflect this usage. The first entry is the most technically correct statement of the law; subsequent definitions reflect common usage as we have seen it in the sources.

*Bail*: (1) The transfer of custody from the state to private or personal supervision before trial. Because imprisonment for debt was extensively used in the Early Republic, bail was as much a civil as it was a criminal device.<sup>480</sup> (2) The release of a defendant from detention in a jail. (3) The person securing the release (see also *surety*). (4) The amount of property pledged to secure release, in dollars or pounds sterling.

*Surety*: (1) A legally binding assurance, usually that a defendant or third party will forfeit a specified amount of property if the named defendant fails to perform a condition (like appearance at trial or keeping the peace for a year and a day). Depending on local statutes and the level of the charge, a defendant might offer surety himself or rely, in addition or exclusively, on the sureties of others, often two other third parties.<sup>481</sup> (2) The third party making assurance for the defendant's performance of the condition.<sup>482</sup> (3) The amount of property pledged, otherwise known as *security*, in dollars or pounds sterling.

*Recognizance*: (1) The instrument obligating its signatories to perform a stated legal duty or condition. From the defendant's perspective, the recognizance obligated appearance at trial on a date certain, and often to keep the peace and remain of good behavior in the meanwhile.

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<sup>479</sup> Wood, *supra* note 301, at 283.

<sup>480</sup> See MANN, *supra* note 73, at 24–25. Civil bail involved a highly intricate classification between "common bail," through which the arrestee could enter fictitious sureties, and "special bail," by which real sureties had to guarantee the appearance (and ultimate payment of the debt). See Levy, *supra* note 174, at 68.

<sup>481</sup> See, e.g., WILLIAM GRAYDON, THE JUSTICES AND CONSTABLES ASSISTANT 10 (Harrisburg, John Wyeth 1805) ("When the person charged, is brought forward and examined, if the offence is bailable, he ought to be required to give sufficient surety for his appearance at the succeeding court.").

<sup>482</sup> See, e.g., *id.* at 12 (form committing a defendant to jail who "hath refused, and still doth refuse, to find sufficient sureties for her appearance at the next court of quarter sessions of the peace").

From the surety's perspective, the recognizance obligated the forfeiture of a specified amount of property if the defendant did not appear at the required court session.<sup>483</sup> (2) The third party signing the recognizance (see also *surety*).

*Bond*: (1) A conditional promise to pay money or forfeit property upon the failure of the stated condition.

*Bail Bond*: (1) An informal concatenation of bail, bonds, and recognizances. A bond is the promise to pay; the recognizance is the legal record of the promise and the conditions of forfeiture. When a magistrate considered the amount of the bond sufficient to induce the proper performance of the defendant, the defendant was "admitted to bail," that is, released from state custody.

*Peace Bond*: (1) A promise to keep the peace, often with reference to a named victim or harasser, for a specified term, usually a year. Peace bonds might or might not also include a condition to appear before a court and/or to answer a charge, making such bonds indistinguishable from bail bonds. But peace bonds could also be demanded and executed without trial, in lieu of trial, or after trial (no matter whether conviction or acquittal was ordered).

*Scire Facias*: (1) A general show-cause writ to bring parties before a court to excuse, justify, or condemn their failure to perform the obligation of a recognizance.

*Mittimus*: (1) A formal order of incarceration, usually directed to a sheriff or warden to detain a defendant pending trial on a date certain, or until further order of the court.

*Forfeiture*: (1) A formal recognition by a court that a defendant had failed to perform a condition of his or her recognizance; a preliminary step to condemn and seize the property of the defendant (if signing the recognizance himself or herself) and of the surety/sureties. A forfeiture usually could not be perfected until the defendant or sureties had twice failed to appear to show cause (via *scire facias* process) why a forfeiture should not be ordered. (2) An informal recognition by observers that a defendant had failed to perform a condition of his or her recognizance.

*Estreatment*: (1) A proceeding, derived from English exchequer practice, of "removing a record" (the literal meaning of the term) and forwarding it to another official for enforcement.<sup>484</sup> Magistrates typically estreated forfeited bonds by sending the recognizance and judgment of forfeiture to an attorney general or district attorney for execution proceedings.

*Execution*: (1) The payment of the forfeited pledge or the seizure of a surety's property to satisfy the same. While practices varied,

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<sup>483</sup> See, e.g., *id.* at 46–47.

<sup>484</sup> See, e.g., DAVIS, *supra* note 106, at 150.

government prosecutors could typically resort to ordinary creditor actions to collect against an estreated recognizance.

APPENDIX II: SAMPLE PAGE FROM THE PFT DOCKET

Prisoners Names	When Arrested?	Their Crimes	By whom Committed	When Discharged?	By whom on their Discharge?
William Cunningham	1799 Mar. 22 <sup>d</sup>	Charged on the oath of Joseph Price with stealing sundry articles from him also with stealing a Corn Butt from Adam Mackley "due course of law"	Wm Robinson Capt.	1799 May 7 <sup>th</sup>	Remanded to Convicts Docket 154.
John Hardy	1799 Mar. 25 <sup>th</sup>	Charged with deserting from the Ship Eagle on his own coffee "due course of law"	Jos: Bird Capt.	1799 Apr. 11.	6 <sup>th</sup> Convicts
James Dougherty	1799 Mar. 25 <sup>th</sup>	Charged with being drunk & with doing himself an injury "due course of law"	Elon. Ferguson Capt.	1799 Mar. 21.	sent to the Alms House
Nathan Cummings	1799 Mar. 21 <sup>st</sup>	Charged with assaulting & beating the person of David Mackley "due course of law"	Joseph Bird Capt.	1799 May 7 <sup>th</sup>	sent to the House
Patrick McEghon	1799 Mar. 29 <sup>th</sup>	Charged on oath with actually shooting, beating, & threatening to take the life of Mary his wife "due course of law"	Joseph Bird Capt.	1799 May 7 <sup>th</sup>	discharged under a file #10
Laurence Brady & Margaret Brady	1799 Mar. 29 <sup>th</sup>	Charged with having in their possession a papered letter which says that they were in London last to answer as the next day 1799	Robert Wharton Mayr	1799 Apr. 11 <sup>th</sup>	sent to the House Marg Brady to Convicts Docket.

2 PFT Docket 1790-1802, at 106, City of Philadelphia, Department of Records, City Archives, Record Group 38, Inspectors of the Jail and Penitentiary House/County Prison.

APPENDIX III: SAMPLE PAGE FROM THE VAGRANCY DOCKET

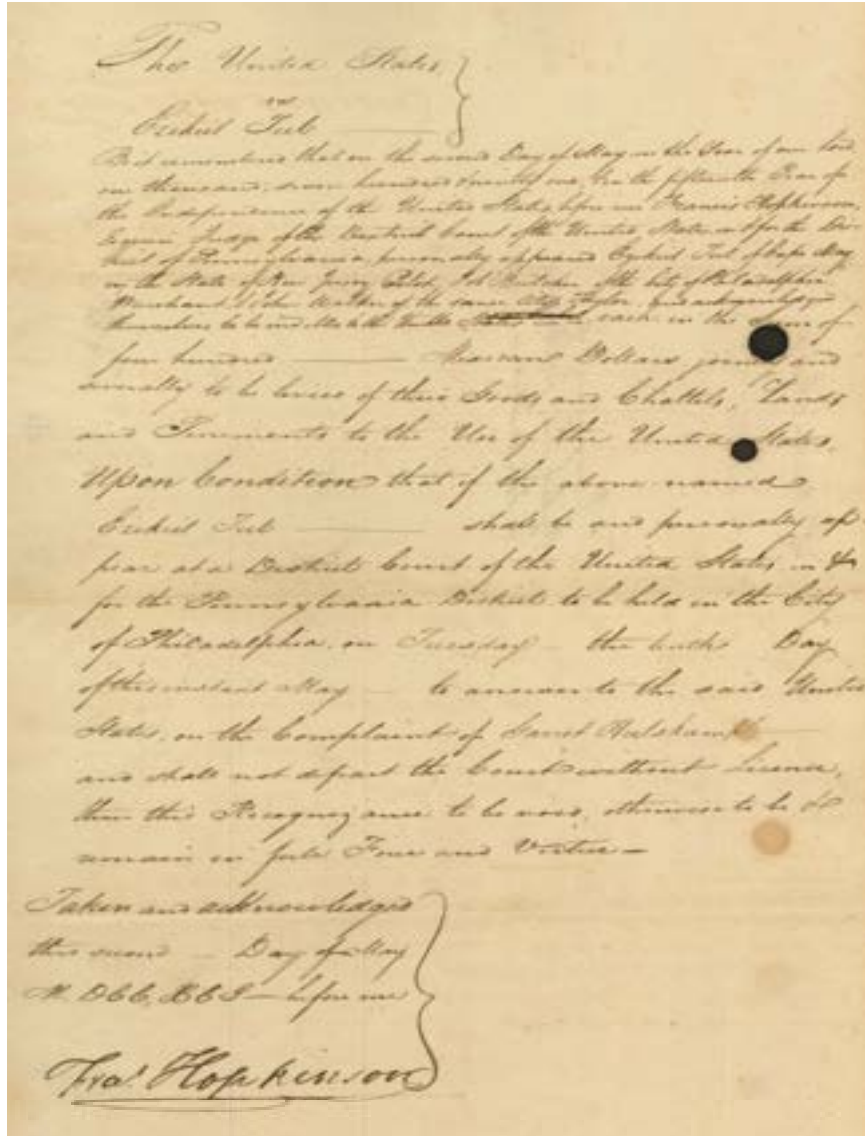
434

Vagrants Names	When Comd?	Their Crimes	By whom Committed	On what day?	By what order Dischd?
Alindor a neg	1797 Dec. 29	Charged with absconding from the service of his Master when notice of refusal to return to his service; till he shall with consent of his master return to his duty; otherwise lawfully discharged	Mr. Milligan Esq.	12 Aug 1798	Believed to be in the State of Pa.
Jean a neg	1797 Dec. 29	Charged with being a drunkard & also with behaving disorderly in striking a turkey in the market; to be kept at hard labour for 30 days unless otherwise lawfully discharged	Henry Baker Esq.	1798 Aug 30	Henry Baker Esq.
Desire a neg for 1 month	1797 Dec. 29	Charged with absconding from the service of his Master, Madam Bess. see last; on till returned by his said Master	John Jennings Esq.	1798 Aug 17	Believed to be in the State of Pa. by Mr. B. Baker
Urania a neg	1797 Dec. 30	Charged with absconding from the service of her Master with intention and now refuses to return to the service of her said Master until she consent to return home to her said Master or be otherwise lawfully Discharged	Mr. Milligan Esq.	1798 Aug 17	Believed to be in the State of Pa. by Mr. B. Baker
Catharine Hague	1797 Dec. 30	Charged with being an idle drunkard Vagrant on the high at hard labour for 30 days	Mr. Board Esq.	1798 Aug 17	Believed to be in the State of Pa.

Vagrancy Docket, 1790-1815, at 434, City of Philadelphia, Department of Records, City Archives, Record Group 38, Inspectors of the Jail and Penitentiary House/County Prison.

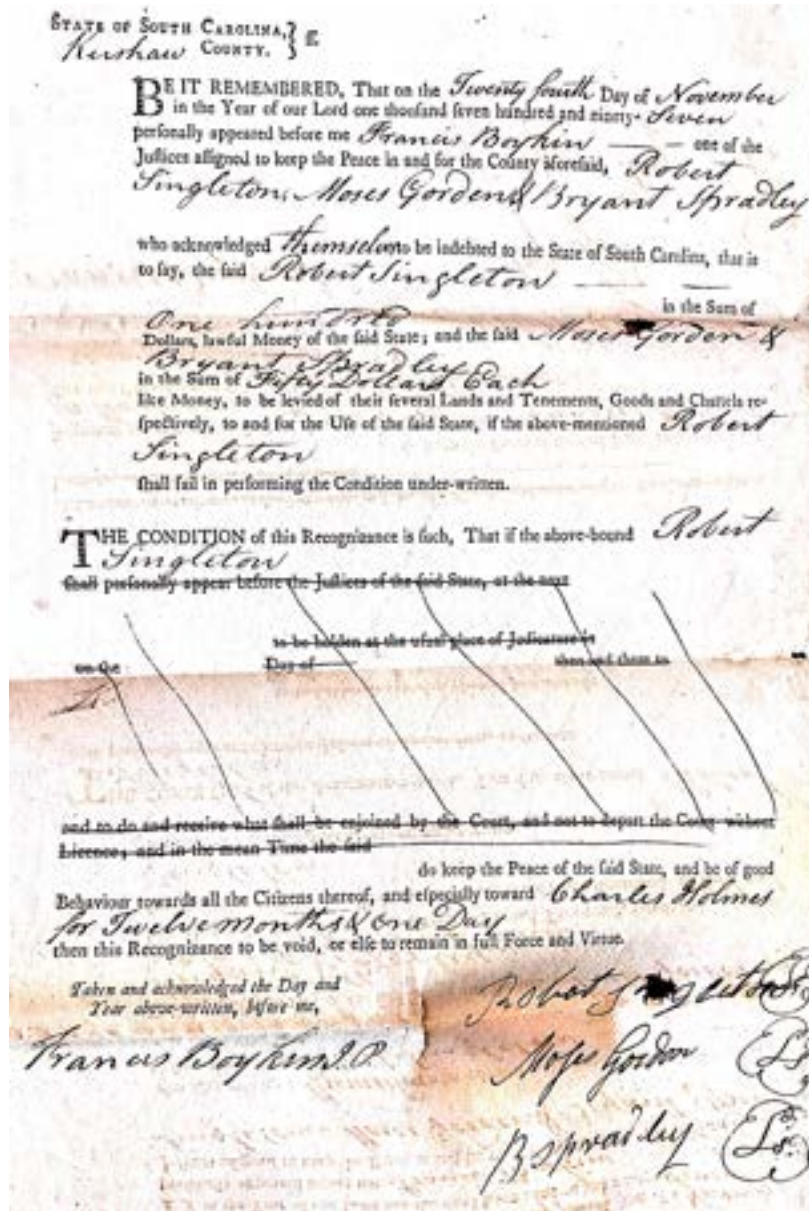
APPENDIX IV: SAMPLE RECOGNIZANCE FORMS

United States v. Ezekiel Teel (E.D. Pa. 1791)



Recognizance Bond in *United States v. Ezekiel Teel*, Box 1; Record Group 21; National Archives at Philadelphia. In relevant part, two men identified as a merchant and a tailor pledge “four hundred Mexican dollars, jointly and severally to be levied of their Goods and Chattels, Lands and Tenements” if Ezekiel Teel should fail to appear before the district court for trial.

Form Peace Bond, Kershaw County, South Carolina, 1797



Kershaw County Peace Bonds, 1792–1799, County and Intermediate Court, Record 28, Series L28026, South Carolina Department of Archives and History, Columbia, South Carolina.



## Final Bail Bond of Aaron Burr, Richmond, Virginia, 1807

United states of America - Virginia district to wit,  
 He is remembered that on the twentieth day of  
 October in the year one thousand eight hundred seven &  
 in the thirty second year of the Independence of the United  
 states Aaron Burr and Letitia Martin John Cummings  
 personally appeared before me John Marshall chief  
 Justice of the United states and acknowledged themselves  
 to be legally indebted to the United states as follows -  
 the said Aaron Burr in the sum of Three thousand  
 dollars and the said Letitia Martin & John Cummings  
 in the sum of One thousand five hundred dollars in  
 each of their respective goods chattels lands and  
 tenements to be levied to the use of the said United  
 states rendered - But upon his consideration that if the  
 said Aaron Burr shall make his personal appearance  
 before the court of the United states for the next session  
 and district of Ohio at Chillicothe on the first day of the  
 next states term or before thereof then & there to be  
 held for a misdemeanor against the United states in  
 beginning or being on foot or preparing or providing  
 the means of amilitary expedition or enterprise against  
 Mexico or against the King of Spain with whom the United states were then at peace  
 shall not depart thence without the leave of the said  
 court or until discharged by due course of law then  
 the foregoing recognizance to be void else to remain  
 in full force & effect

acknowledged before me  
 John Marshall Ch. Just. of the U.S.

Aaron Burr's final bail bond, committing him to submit himself to the next session of the federal court sitting in Chillicothe, Ohio, written in the hand of Chief Justice Marshall. Everett D. Graff Collection of Western Americana, Item 2690, Newberry Library, Chicago, Illinois.