Bail and Custody
The History of Bail in the United States and the Future of Reform in America and the Balkans

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I. INTRODUCTION

Bail is a certain sum of money or collateral a defendant pays to the court in order to be able to be released from custody while he awaits trial. The bail acts as a guarantee that the defendant will appear for his trial. Should a defendant not return for trial, he forfeits his bail and may face an additional charge.[1]

In the United States, there are federal laws concerning bail that grew out of the English tradition. From these roots, the federal bail laws in the United States were designed to ensure the accused would appear for his trial. As time went on, however, disparate effects of money bail between wealthy and indigent defendants were observed. Bail reform in the 1960s was enacted to make it as easy as possible to release a defendant pending trial, but these reforms were met with rising crime rates in the years following. Another round of bail reforms in the 1980s were enacted that served to make public safety, along with flight risk, a consideration before releasing a defendant before his trial. This latter bail act also used bail as a means of deterring crime, which was not the original purpose of pretrial bail.

Like the federal system, each individual state has its own laws pertaining to bail. While cash bail is the most common form of bail and acts as a middle ground between release with only a promise to appear for trial and being detained until trial, there is vocal concern in the United States that cash bail may be unfair to certain groups.[2] The use of cash bail continues to spark debate as to whether it is the best way to walk the line of ensuring public safety while not punishing the indigent simply for being poor.

In the Balkan nations of the Federation of Bosnia and Herzegovina, the Brcko District, and the Republika Srpska, laws governing bail are highly unified if not identical.

1 https://www.justia.com/criminal/bail-bonds/types-of-bail/
2 https://www.nytimes.com/2019/01/11/nyregion/how-does-bail-work-and-why-do-people-want-to-get-rid-of-it.html

These laws have many things in common with bail laws in the United States as far as general principles, but simultaneously vary a great deal, from how bail is determined to the conditions placed on a defendant released on bail to the general aim of bail and custody. While bail laws are in place in the Balkan region, bail is not widely used and is certainly not as commonplace as it is in the United States. While the United States and the Balkan nations may differ in their bail practices, this is fitting because the two regions have vastly different needs within their criminal justice system, as well as different histories and cultures. One cannot necessarily look to the other for answers to bail issues within their region. However, the original intentions and parameters of bail can be revisited by both regions to maximize its benefit.

This paper will first examine the history of bail leading up to the inclusion of protection against unreasonable fines in the United States Bill of Rights. Following this perusal of history, the paper will then compare and contrast the Bail Reform Act of 1966 and the Bail Reform Act of 1984, the latter of which is the current bail law of the United States. Discussion on the benefits and issues of the cash bail system at the state level will then follow. From there, a layout of the bail laws in the Balkan nations will follow. A conclusion about the bail laws in both regions will follow, and the paper will finish with a proposal to return to initial principles regarding bail to help guide judges when determining release and bail amounts in an effort to get the most benefit out of a bail system for both the accused and the general public.

II. UNITED STATES BAIL AND CUSTODY

The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[3] Growing from

3 U.S. Const. amend. VIII

this 1789 amendment, the Bail Reform Act of 1984, following the Bail Reform Act of 1966, established certain procedures for bail in the United States. *United States v. Salerno* considered the constitutionality of the Bail Reform Act of 1984. Release or detention, including the use of bail, for a defendant pending trail is codified in 18 U.S. Code § 3142. States also have state codes concerning how bail is to work within that individual state. These sources of law shape the way bail is handled in the United States.

A. THE EIGHTH AMENDMENT AND ITS HISTORY

Like many of the modern law's core ideas, the Eighth Amendment's origins can be traced all the way back to the British Magna Carta. The British Magna Carta, intended to limit the power of the state or crown and guarantee the rights of the governed, established the principle that fines placed on people for offenses should be in proportion to the offense.[4]

The English Bill of Rights followed the British Magna Carta nearly five-hundred years later and expounded on the principle of proportional fines. The 1689 legislation stated "that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." [5]

The American framers looked to these roots when considering how they could best craft governing principles for the new nation of the United States. The founders considered the writings of the British lawyer and great legal mind Sir William Blackstone. His writings were considered the preeminent authority of common law in the United States during the period of the American Revolution.[6] In his treatise on the law of England, *Commentaries on the Law of England*, Sir Blackstone wrote about how bail

4 https://www.revolutionary-war-and-beyond.com/8th-amendment.html
5 Id
6 Id

should work and provided some insight as to why and how bail should be considered when administering justice.

The first impartment of wisdom from Sir Blackstone when considering bail is that "in this dubious interval between the commitment and trial, a prison ought to be used with the utmost humanity."[7] This sentiment relates to the idea that the accused man is innocent until proven guilty and should be treated as such while in custody.

This legal principle then is linked to how bail should be granted and why. Sir Blackstone wrote that a defendant is being held "only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes."[8] This is to say that bail should be granted to defendants accused of lesser crimes and where the defendant is being held only to ensure he will attend his trial, as opposed to a defendant who is being held because he is a danger to society, because he is likely to commit another crime while out on bail, or because he is likely to flee. The legal scholar noted, however, "in felonies, and other offences of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life?"[9] This relates to the notion that bail should be set at an amount that is proportional to the crime of which the person in custody is accused.

Furthermore, Sir Blackstone put forth "that no man shall have a larger [fine] imposed upon him, than his circumstances or personal estate will bear."[10] In addition to the idea that the amount of bail should be proportional to the crime of which the defendant is accused of committing, Sir Blackstone submitted in this passage that bail should also be proportional to the monetary means available to the accused. To set a bail

7 The Founders' Constitution Volume 5, Amendment VIII, Document 4, The University of Chicago Press. Blackstone, William. Commentaries on the Laws of England: A Facsimile of the First Edition of 1765--1769. Chicago: University of Chicago Press, 1979.
8 Id
9 Id
10 Id

amount that is exorbitant, Sir Blackstone wrote, would be equal to being forced to remain in custody and the accused not being granted bail at all.[11] Sir Blackstone stipulated "though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine."[12] Sir Blackstone's passage here means that there is no bright-line rule that states precisely what bail should be set at for a certain crime, nor should such a rule exist. Rather, the totality of the facts of the case should be considered when determining bail. In addition to the facts of a particular case being determinative of what amount a defendant's bail should be set at, the defendant's circumstances should also be used when considering the amount, as Sir Blackstone explained, "[P]ecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's."[13] Again, Sir Blackstone rejected the notion of a bright-line rule that would be used to determine a fixed amount at which bail is to be set. This is because, as Sir Blackstone noted, a five-thousand dollar bail would likely mean far less to a multi-millionaire than that same bail would mean to an indigent individual. Implementing a fixed amount could result in the wealthy always being able to pay their bail while the poor would always be forced to stay in custody and confined to jail while awaiting trial, despite the supposition that the accused are still innocent, as they have not been convicted and thus proven guilty of the crime of which they are accused.

Expanding upon the notion that excessive bail is the *de facto* equivalent of not being granted bail at all, Sir Blackstone tied this to judges determining bail. Speaking on the subject, Sir Blackstone said that "to refuse or delay any person bailable, is an offence

11 Id
12 Id
13 Id

against liberty of the subject, in any magistrate, by the common law; as well as by the statute."[14] This means that when a defendant should be afforded bail, that defendant should not be denied same, nor should the setting of the bail be put off. A judge doing either of those things is undermining the rights of the accused individual. Sir Blackstone further explained, "And lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute … that excessive bail ought not be required."[15] Here, Sir Blackstone pointed out that the statute of the time, which is very similar to what would become the Eighth Amendment in the United States, works as a safeguard and check against judges that would set an excessive bail for a defendant and thereby undermine the aim of laws governing the granting of bail by expressly disallowing such action by judges.

"[H]owever unlimited the power of the court may seem," Sir Blackstone wrote, "it is far from being wholly arbitrary; but its discretion is regulated by law. For the bill of rights has particularly declared, that excessive fines ought not be imposed, nor cruel and usual punishment inflicted."[16] The framers of the United States Constitution took this passage from Sir Blackstone very much into consideration when crafting their own government, as the separation of powers, checks and balances, and, particularly, the language of the Eighth Amendment are all present in Sir Blackstone's writing.

In 1789 the Congress of the United States passed the Bill of Rights, which included the Eighth Amendment. The Eighth Amendment was closely tied to the Sixth Amendment, which guaranteed that when a person is arrested, he must be told why he is being arrested, which in turn would let the arrestee know if his offense was a bailable offense so that he could then demand bail. These amendments, however, protect against

14 Id
15 Id
16 Id

excessive bail and let the accused know if he is entitled to bail, but they do not grant a right to bail. To more fully form the way bail would work in the United States, Congress passed the Judiciary Act at the same time it passed the Bill of Rights. The Judiciary Act explained what sort of offenses were bailable and limited judicial discretion for determining bail. "Congress adopted the [Eighth] Amendment to prevent judges from setting excessive bail in cases prescribed as bailable by Congress. … then enacted a bill prescribing which offenses would be bailable. The Eighth Amendment, therefore, is not self-executing. It requires legislation creating legal entitlements to bail to give it effect."[17]

B. THE BAIL REFORM ACTS OF 1966 AND 1984

After the First Congress passed the Bill of Rights and the Judiciary Act, legislation regarding bail did not change until a distinction was made between pretrial bail and bail while waiting for an appeal or certiorari. This was done in 1946 when the Federal Rules of Criminal Procedure solidified the distinction between pretrial bail and post-conviction bail by stating that the grant of post-conviction bail was left solely to the judge's discretion, no matter the offense.[18]

In was not until 1966 that Congress again addressed bail law when it passed the Bail Reform Act of 1966. The aim of the Bail Reform Act of 1966 was to allow defendants to be released from custody as easily as possible, requiring as little as possible from a defendant to secure his release. This was done in response to criticism that the bail system used in the United States unfairly favored the more affluent while being prejudiced against the indigent. This then, critics argued, meant that the impoverished defendants had to remain in jail while awaiting trial, effectively meaning that poor defendants had no chance of release, while the wealthier defendants were set free.[19]

17 https://www.pbus.com/page/14
18 Id
19 https://study.com/academy/lesson/bail-reform-act-of-1984

Seeking to create a bail system that was fairer and held no regard for a defendant's economic status, the 1966 act provided that defendants charged with non-capital offenses should be released from custody while awaiting trial on his own recognizance, meaning the defendant would only need to sign a written affirmation that he promised to appear before the court for his trial and no further surety was required. If the judge was to determine that a personal guarantee to appear for trial would not be sufficient to ensure the defendant would in fact return for his trial, the 1966 act required the judge to then look to a list of other measures that could be used to ensure a defendant would appear in court. Among these measures were restricting travel and imposing a bail bond. The judge was to implement the measure that was the least restrictive on the defendant while ensuring that the defendant would come to his trial. Defendants facing capital offenses or awaiting appeal were to be released unless the judge believed that none of the prescribed measures would prevent the accused from fleeing or if the accused would be a danger to other people.[20]

The Bail Reform Act of 1966's relaxed and unrestrictive guidelines, aimed at releasing defendants as often and as freely as permissible, drew criticism in the years following the act's adoption. It was found that alarmingly often, defendants facing charges of violent crimes would be released on their own recognizance and, once released, these defendants would commit additional crimes while awaiting trial for the original offense. When taken into custody for the recent offense, these defendants would be released on bail because the amount of bail that judges would set in an attempt to comply with the act would be low enough for most defendants to secure release despite facing multiple trials. In 1969 the Judicial Council committee looked to the operation of

20 https://www.pbus.com/page/14

the Bail Reform Act for guidance on how to shape bail laws in the District of Columbia, and finding that defendants accused of non-capital offenses that were still potentially dangerous were being released per the 1966 Act, the Judicial Council committee proposed that a defendant's likelihood to be dangerous if released should be considered by the judge when determining release and bail even for defendants that were facing non-capital charges.[21]

Seeing that the Bail Reform Act of 1966 fell short of administering justice and was arguably allowing violent criminals to be free from custody more readily, Congress again looked to reform the United States bail system in 1984. Rising crime rates across the nation also spurred Congress to take action to try to limit criminal activity, particularly activity of a violent nature. Essentially, the Bail Reform Act of 1984 sought to place more restrictions on released defendants when deemed necessary to avoid criminal activity or flight while adding public safety as a reason for detention where the 1966 act's goal was to promote defendants being released.

The Bail Reform Act of 1984 repealed the Bail Reform Act of 1966 and established new procedures for bail that are currently in place in the United States. Foremost, in a major divergence from the now-defunct 1966 Act, the 1984 Act allows a judge to take the safety of any person or the community into consideration when making a pretrial release determination. The act also contains a mandatory condition for release that provides that the defendant not commit a federal, state, or local crime while he is out on release. Like the 1966 act, however, the base preference for release remains release upon a defendant's own recognizance. [22]

21 Id
22 https://www.congress.gov/bill/98th-congress/house-bill/5865

While pretrial release with an unsecured appearance bond is allowed under the act, the discretionary release conditions a judge can impose on a defendant are expanded. These include: Maintaining employment or being in an educational program; avoiding contact with alleged victims or potential witnesses; reporting to a law enforcement or pretrial services agency; complying with a set curfew; refraining from possessing a firearm or using alcohol or narcotic drugs; undergoing medical treatment; forfeiting designated property if the defendant should fail to appear for trail; returning to custody at specified hours.[23]

The Bail Reform Act also authorizes a judge to order a defendant who is on pretrial release for a felony under federal, state, or local law or on probation or parole or release pending sentencing or appeal for any offense to be held in detention for up to ten days if no conditions on his bail that the judge could impose would assure the defendant's appearance at his trial or the safety of the community or any other person. The judge is also authorized by the act the order the pretrial detention of defendant upon finding that no condition on bail would reasonably assure the defendant's appearance at his trial and the safety of the community or any other person. A provision for the detention of an alien that is not in the United States legally also exists within the act.[24]

A detention hearing is required under the act in any case that involves: a crime of violence; any offense punishable by life imprisonment or death; a narcotics offense punishable by a least ten years imprisonment; or any offense committed after the person has been convicted of two or more offenses for which a hearing is mandated. The act permits the court or the government to move for a detention hearing in any case that involves a serious risk of flight or obstruction of justice.[25]

23 Id
24 Id
25 Id

The act lays out additional factors that are to be considered by a judge when he is making a release determination. These include the defendant's past conduct, history of drug or alcohol abuse, and criminal history, as well as the nature and seriousness of the defendant's danger to the community or any person.[26]

The detention of a defendant who has appealed his conviction is required under the act unless the judge finds, by clear and convincing evidence, that: Such a person is not likely to flee or pose a danger to another person or to property; and the appeal raises a substantial question of law or fact. Similarly, the act requires the detention of a defendant awaiting sentencing unless the judge finds, by clear and convincing evidence, that the defendant is not likely to flee or pose a danger to the community or any person.[27]

A United States attorney is authorized to appeal a release order under the act. If a defendant fails to appear before the court or fails to surrender himself for service of his sentence as required, the act provides additional penalties that can be administered upon the defendant. Furthermore, the act establishes mandatory penalties to be placed on a defendant that commits an offense while on pretrial release. Likewise, the act makes a defendant who has been conditionally released and then violates a condition of his release subject to the revocations of his release, as well as prosecution for contempt of court. [28]

Release of defendants under the Bail Reform Act of 1984 is codified in 18 U.S.C. § 3142. This section shows the various levels of release a judge can grant a person charged with an offense. These levels begin with the accused being released on his own recognizance. If this will not ensure the accused will appear for trial or not present a danger to others, the judge can then impose conditions on the defendant's release, order him temporarily detained, or order complete detention.[29]

26 Id
27 Id
28 Id
29 18 U.S.C.S. § 3142

C. *UNITED STATES V. SALERNO*

United States v. Salerno is a defining case concerning bail in the United States. The 1987 case reviewed the constitutionality of the Bail Reform Act of 1984. Pertinent to the trial at hand, the Bail Reform Act of 1984's provision that allowed a federal court to detain a defendant if the government could show by clear and convincing evidence that the safety of others or any other person would be in jeopardy if the defendant was released was called into question, a standard above preponderance of the evidence but lower than the beyond a reasonable doubt standard.[30]

In this case, Salerno and another defendant were arrested and indicted on twenty-nine counts of racketeering activity. These counts included extortion and conspiracy to commit murder, as well as fraud and gambling. In the trial, the government offered evidence that the defendants were part of an organized crime family, that the defendants had participated in conspiracies that would aid their illegal activities via violent means, and that one of the defendants had participated in two murder conspiracies.[31]

The Bail Reform Act of 1984 required an adversary hearing to determine detention, where Salerno had the right to have an attorney present, the right to testify, the right to present his own witnesses, the right to submit evidence, and the right to cross-examine government witnesses. The decision to detain a defendant is ultimately up to the judge, but the Bail Reform Act includes factors for the judge to consider.[32]

In Salerno's case, the District Court granted the government's motion for Salerno to be held for pretrial detention pursuant to the Bail Reform Act of 1984 on the grounds that Salerno was deemed to be dangerous, as he had ordered "hits" while in jail and maintained criminal connections which required him to be supervised. The court also

30 United States v. Salerno, 481 U.S. 739, 741, 107 S. Ct. 2095, 2098, 95 L.Ed.2d 697, 705 (1987)
31 Id
32 Id

found that the evidence of danger presented against the two defendants was overwhelming. The court thus determined that the government met its burden of clear and convincing evidence and that no conditions outlined in the Bail Reform Act of 1984 would ensure the safety of the community.[33]

The United States Court of Appeals for the Second Circuit found that the District Court's pretrial detention order should be vacated. The court of appeals held so because, it asserted, that while the pretrial detention of Salerno and the other defendant on the ground that they were dangerous satisfied the Bail Reform Act of 1984, the act's authorization of pretrial detentions on the ground of dangerousness to the community violated federal substantive due process. Federal substantive due process, the court of appeals held, prohibited a total deprivation of liberty as a means of preventing future crimes.[34] Some viewed pretrial detainment as punishment because of the nature of the crime, past criminal history, or indigency, where the Act officially used pretrial detention to protect the public.

On certiorari, the United States Supreme Court reversed the decision of the court of appeals and held that that provisions in the Bail Reform Act of 1984 that allowed for pretrial detention without bail on ground of dangerousness did not violate the Eighth Amendment's bail clause or due process and that a defendant may be detained prior to trial if the government's interest in public safety is a legitimate and compelling one and if safeguards exist in the form of procedural protections to protect the defendant's liberty. Such safeguards were in place during Salerno's adversary hearing. The six-to-three decision of the court held that the provisions of the act that allow for pretrial detention without bail of certain arrestees on the ground of dangerousness to any other person and

33 United States v. Salerno, 631 F. Supp. 1364 (S.D.N.Y. 1986)
34 United States v. Salerno, 794 F.2d 64 (2d Cir. 1986)

to the community don't violate the Eighth Amendment because the bail clause does not mention bail being available at all times, and even if the clause imposes substantive limits on Congress's power to define which classes of criminal defendants can be admitted to bail, the clause doesn't go so far as to prohibit the government from pursuing compelling interests aside from the risk of the defendant fleeing. The Eighth Amendment prohibits excessive bail; it does not prohibit detention where Congress deems such detention to be appropriate. The risk of a defendant fleeing, the majority asserts, is not the only concern the government is limited to considering. Ensuring the safety of the public is a compelling interest of the government. Furthermore, the Bail Reform Act of 1984 demands pretrial detention on the basis of a legitimate and compelling interest to prevent crime by defendants who are shown to be dangerous to any other person or the community. Because of this, the Supreme Court held, the government's use the Bail Reform Act of 1984 in the present case was not excessive.[35]

D. TENNESSEE BAIL AND BAIL BONDSMEN

The Bail Reform Act of 1984, codified at 18 U.S.C.S. § 3141, surviving a review by the Supreme Court of the United States, is the bail law of the United States. However, each state can have its own variation of bail law, including some states that do not offer cash bail at all.

The state of Tennessee offers bail for defendants. When setting bail, a Tennessee court will consider: the seriousness and nature of the crimes alleged, in addition to the probability of conviction and sentencing; the reputation character, and mental state of the defendant; the safety risk the defendant poses to other members of the community; the defendant's past criminal record, flight risk, and history of appearing or facility to appear

35 United States v. Salerno, 481 U.S. 739, 741, 107 S. Ct. 2095, 2098, 95 L.Ed.2d 697, 705 (1987)

for court; the defendant's family relationships, residency, ties within the community, and other relationships; the defendant's current financial status, employment status, and history of employment; trusted members of the community who are willing to testify as to the defendant's dependability; and additional information about the defendant's character, possible forfeiture of bail/bond requirements, or flight risk.[36]

Every defendant is entitled to bail in Tennessee under the legal principle that a defendant is innocent until proven guilty, except for defendants that are a high flight risk, fugitives, repeat offenders, or facing the death penalty. Once bail has been set, the defendant has the right to ask the judge to reduce the amount of the bail. Likewise, the government has the right to petition for an increase in the bail amount. Once a defendant is granted bail, the state of Tennessee requires that the defendant maintain employment, check in with the appropriate authorities, submit to drug testing, follow any curfew requirements, and adhere to any travel restrictions placed upon him.[37]

There are, however, issues with these bail practices in Tennessee. Judges will often look at the crime of which the defendant is accused and set bail accordingly. This, then, does not sufficiently consider other factors that should be considered when setting bail. Because of such practices, a defendant with no criminal history, that is a low-flight risk, and likely poses no danger to the community will still have to post bail, and that bail could be the same amount as a defendant that is a repeat offender. Using bail in this manner can be seen as having a deterrent effect on high-bail crimes. However, this goal is not one originally prescribed in the Eighth Amendment or the documents that brought about its creation.

36 https://www.deliusmckenzie.com/2020/06/how-does-bail-work-in-tennessee
37 Id

Because of the above common practices, bail bond agencies exist in the state of Tennessee. These agencies, licensed and regulated by the Tennessee Department of Insurance, exist to help defendants without readily available assets be able to make bail and be released from detention. The bail bond agency, or bondsmen, as bail bond agencies are often called, charges defendants, usually, ten-percent of the total bail. The bail bond agency then posts bail for the defendant with the court. The reason bail bond agencies do this is because the ten-percent the defendant pays them is non-refundable, even if the defendant appears for his trial. This payment is in exchange for the risk involved on the part of the bail bond agency, since if the defendant fails to appear for his trial, the bail bond agency must pay the entire bail amount to the court. This ten-percent non-refundable fee is different from a defendant paying his entire bail directly to the court himself. In that instance, his bail would be refunded upon his appearance in court for his trial.[38]

E. UNITED STATES BAIL AND CUSTODY REFORM

As discussed previously, bail has been a topic garnering close attention in the United States since the nation's inception, meriting the passage of an act governing bail concurrent to the Bill of Rights that included an amendment concerning bail. The two bail reform acts of 1966 and 1984 encapsulate the struggle of meshing together divergent goals of ensuring liberty while promoting justice. Today, the fairness of the cash bail system takes center stage in the debate on the most just way to administer bail.

Critics of the cash bail system assert that it keeps indigent defendants in prison while the wealthy are able to gain pretrial freedom. These critics assert further that the indigent defendants that are left in prison are disproportionately people of color. Bail

38 https://howbailbondswork.com/how-bail-bonds-work-in-tennessee

bond agencies are also on the receiving end of criticism, facing assertions that these agencies take advantage or poor clients by charging exorbitant fees.[39] Critical assertions also land on judges, whom cash bail critics accuse of setting bail amounts without taking the defendant's financial situation and what he can afford into account. Those in favor of abolishing cash bail also say that cash bail does not improve public safety because even those charged with violent crimes can secure their release if they have the financial means to pay their bail, whereas nonviolent criminals can be left in detention when they are unable to afford bail. Furthermore, critics of cash bail maintain that this system produces worse outcomes for the accused because juries are more likely to find a defendant being brought into court in cuffs and prison attire guilty and because those that have been in custody before their trial are more likely to plead guilty to lessen their jail sentence.[40]

The release of some prisoners in jail during the COVID-19 pandemic has brought up some of the issues the Bail Reform Act of 1966 unearthed. In Detroit, for example, one released convict proceeded to rape three women at knife-point upon his release, illustrating the public safety concern with releasing violent offenders too readily, and the Detroit police chief asserts that the release of violent criminals likely contributed to a spike in homicides and nonfatal shootings in Detroit with similar effects being felt across the country.[41]

Proper administration of justice and defense of personal liberty is a tightrope bail must walk. The failings of the Bail Reform Act of 1966 and shadows of the same present in the release of criminals in the COVID-era suggest that the Bail Reform Act of 1984

39 https://www.nytimes.com/2019/01/11/nyregion/how-does-bail-work-and-why-do-people-want-to-get-rid-of-it.html
40 https://www.forbes.com/sites/maggiegermano/2020/06/26/how-cash-bail-disenfranchises-people-of-color-and-makes-our-criminal-justice-system-inherently-unjust/?sh=3c4928893b54
41 https://www.detroitnews.com/story/news/local/wayne-county/2020/11/27/wayne-county-jail-covid-19-releases-include-violent-criminals/6186170002/

struck the best possible balance to date. The act allows for a hearing to determine bail in order to protect and individual's rights and requires that bail be set according the facts of the case and the defendant's individual circumstances. This is done without sacrificing the meting out of justice or endangering the public. Cash bail, then, provides an individualized opportunity for a defendant to secure his release, further bolstered by the availability of bail bond agencies, while ensuring violent criminals or defendants that are likely to attempt to evade justice are not permitted reentry into society until trial for the welfare of the public at large. Other forms of bail are also available, including personal recognizance and property bonds. The Bail Reform Act of 1984 has proven to be an approach to bail that considers the defendant, the state, and the public and has been the approach best able to meet the interests of all parties while maintaining a primary preference for the accused's release on his own recognizance.

THE FEDERATION OF BOSNIA AND HERZEGOVINA, THE BRCKO DISTRICT, AND THE REPUBLIKA SRPSKA BAIL AND CUSTODY

While this area of the world remains heavily segmented, the Federation of Bosnia and Herzegovina, the Brcko District, and the Republika Srpska's codes on bail are almost all verbatim copies of one another. This level of harmonization is encouraging and an excellent opportunity for further harmonization.

The codes each begin by describing the measures that may be taken against the accused "in order to secure his presence and successful conduct of the criminal proceedings."[42] These measures are summons, apprehension, prohibiting measures, bail, and custody. The codes then also instruct the competent body apply the less severe measure if such a measure can achieve the desired results, and the codes further instruct

42 CHAPTER X MEASURES TO GUARANTEE THE PRESENCE OF A SUSPECT OR ACCUSED AND SUCCESSFUL CONDUCT OF CRIMINAL PROCEEDINGS
Section 1 - GENERAL PROVISIONS Article 123 Types of Measures, Bosnia and Herzegovina

that when a more severe measure must be implemented, its implementation shall cease and be replaced with a less severe measure when the circumstance meriting the more severe measure ceases to exist. This section of the codes also stipulates that the provisions found in this code chapter will apply to a suspect as well, which is a difference from law found in the United States in that no such distinction or language is found.[43]

When discussing the conditions for posting bail, the codes are again all-but identical. The codes state that when the accused is in custody or will be placed in custody because he is a flight risk, he may be allowed to avoid detention or be released if "he personally gives a recognizance or someone else on his behalf furnishes a surety that he will not flee before the end of the criminal proceedings and the accused himself pledges that he will not conceal himself and will not leave his residence without permission."[44] Personal recognizance is permitted in the United States as well, as is a third party providing a surety on the behalf of the defendant.

The codes then address the contents of bail. According to the codes, bail is always a sum of money, and that sum is decided upon after considering the seriousness of the criminal offense, person and family circumstances of the accused, and the property situation of the person paying the bail. When paying bail, the codes say that the payment shall be done by depositing money, securities, valuables, or other personal property that has a high value. This value must be easily marketable and maintained. Mortgaging real estate is also a valid form of posting bail. The code also sets forth that a pledge from one or more people that they will pay the bail if the accused flees is also an acceptable way to post bail. A person paying bail, the code states, shall submit evidence of his financial standing, as well as the origin and ownership of the property or possession posted as bail.

43 Id
44 CHAPTER XIV MEASURES TO GUARANTEE PRESENCE OF SUSPECT OR ACCUSED AND SUCCESSFUL CONDUCT OF CRIMINAL PROCEEDINGS 5. Bail
Article 192 Bail Requirements, Republika Srpska

If the accused flees, the code provides that a decision will be issued that orders the amount posted as bail will be paid to the government in the case.[45] Like the codes represented here, bail law in the United States also considers the severity of the offense and a defendant's personal financial situation. The United States, however, also considers if the defendant is a repeat offender and if the bail is being set for a defendant that was already out on bail or on parole. The United States also doesn't have such a discussion on the marketability of property used for bail, and property is generally understood to be real estate. Like these codes, United States bail law also stipulates the forfeiture of bail if the defendant does not appear for his trial.

The next article of the codes focuses on the cancellation of bail. The codes first state that the accused will be placed in custody should he fail to appear when summoned. Furthermore, if he is preparing to flee or if there exist other legal grounds to order his custody, the accused will be placed in custody. These actions will cancel bail, which will result in the bail, however it was tendered, being returned to the person that posted it. This will happen, too, when criminal proceedings terminate with a legally binding decision to dismiss the proceedings or the entering of a judgment. If the judgment imposes a sentence on the convicted person, the bail is cancelled only when the convicted person begins to serve the sentence.[46] This is very similar to the United States. Bail is canceled under similar circumstances in the United States, but the United States also provides that bail can be cancelled in the event the defendant is re-arrested while out on bail or probation, but this could be covered in these codes under the provision allowing for other legal grounds to merit custody.

45 CHAPTER X MEASURES TO GUARANTEE THE PRESENCE OF THE SUSPECT OR THE ACCUSED AND SUCCESSFUL CONDUCT OF CRIMINAL PROCEEDINGS Section 1 - GENERAL PROVISIONS Article 128 Contents of Bail, Brcko District
46 CHAPTER X MEASURES TO GUARANTEE THE PRESENCE OF THE SUSPECT OR THE ACCUSED AND SUCCESSFUL CONDUCT OF CRIMINAL PROCEEDINGS Section 1 - GENERAL PROVISIONS Article 129 Cancellation of Bail, Brcko District

The final section on bail in these codes concerns the decision of bail. The codes state that a decision on bail, and any subsequent revocation of that bail, will be issued by the preliminary proceedings judge, and after an indictment, by that same judge or the presiding judge. Both decisions of setting a bail and revoking a bail will be made after the prosecutor's hearing.[47] This is different from the United States because there is no "prosecutor's hearing" but rather an adversary hearing to determine whether the defendant should be granted bail. It is done this way to protect the defendant's rights.

III. IMPROVEMENTS TO BAIL AND PRE-TRAIL DETENTION IN THE U.S. AND BiH.

In general, the United States and the BiH share some similar ideas on the topic of bail. All sets of laws agree that when permissible, an individual should not be deprived of liberty because the accused is innocent until proven guilty. There seems to be some divergence, however, on where the line of permissibility lays. The United States has a greater focus on what type of behavior is required of a defendant out of custody on pretrial bail. The United States bail laws also seem to be more concerned with violent offenders and protecting the public at large from such. The BiH codes mention a third party posting bail for the accused, but this is not presented like the business arrangements made in the United States with bail bond agencies, though other third parties are permitted to post bail for the accused in the United States. There are also procedural differences in the way bond is set and administered. As is customary in the common law tradition, the United States favors an adversarial approach to determining if a defendant should have bond, while, as is customary in the civil law tradition, the BiH codes provide that the prosecutor works with a judge to determine what should be done. Both sets of

47 CHAPTER X MEASURES TO GUARANTEE THE PRESENCE OF A SUSPECT OR ACCUSED AND SUCCESSFUL CONDUCT OF CRIMINAL PROCEEDINGS
Section 5 – BAIL Article 144 Decision on Bail, Bosnia and Herzegovina

laws are wary of potential flight risks, and both sets of laws cancel bail under certain conditions, have it ended when a defendant begins serving a sentence, and deem it forfeit if the defendant doesn't attend his trial.

The United States and BiH are very different areas of the world with very different histories and cultures. The codes of BiH are already harmonized with one another, even moreso than bail laws in each state in the United States. There should be great confidence in the assertion that BiH's approach to bail would not work in the United States, as bail is often not even used in BiH. This would not mesh well with the founding principles of the United States that prioritize freedom and protect the accused. The United States approach as defined by the more practical approach of the Bail Reform Act of 1984 could work quite well in BiH because it is a balanced approach that recognizes individual liberty but understands the need to discourage crime and promote the public welfare. The criticism of the cash bond system in the United States that seek to eliminate cash bail entirely, while raising valid points, often ignores or tries to wish away the consequences of releasing potentially violent offenders into the public and the valid path to pretrial freedom that bail bond agencies provide.

BiH codes seem to present themselves as more idealistic because these codes do not seem to deal with as many negative possibilities of releasing a defendant on bail nor do they place heavy restrictions on a released defendant. This, however, clashes with the actual practice in the region of not using bail very often at all. The United States has its code rooted deep in hundreds upon hundreds of years of common law, as well as trial and error to determine what types of laws work best for the United States via the labs of democracy that are the fifty states and the federal acts that have varied widely in their

approach to bail. These experiments in justice have resulted in a general bail system at both the state and federal level, rooted in the Bail Reform Act of 1984, that could work anywhere with minor tweaking. This, however, is not to say that BiH needs to adopt the United States' approach to bail. BiH has a harmonized system, and this alone is enough to suggest the system in place in this area of the world is working for that particular area, yet this could also be due to the fact that bail is actually not often used in the Balkans. BiH also does not employ an adversarial system, which is key in protecting a defendant's rights in the United States under the Bail Reform Act of 1984. While the United States' body of law on bail could work in BiH to deter crime and protect the citizenry from violent offenders, the system currently in place in the Balkans is predictable from area to area. While this harmonization of laws is rare and therefore a plus in BiH, the fact that bail is provided for in the codes but rarely utilized is troubling.

While both systems of bail work in each region to varying degrees, each could be improved upon based on the original founding principles pertaining to bail upon which the American framers relied. The goals of bail are largely twofold: Ensure the accused returns to stand trial and protect the general public by keeping a likely dangerous defendant detained or restricted in some manner. In BiH, while there are codified bail laws that are nearly identical across the Balkan nations, bail is generally ignored and not used frequently. This, then, means that defendants are made to remain in custody no matter how small their offense or how spotless their record is. Meanwhile, in the United States, judges rely on bail schedules and apply bail as a set amount based on the crime. The totality of the circumstances of a defendant and his charges are not given as much

weight as intended in the writings the Founding Fathers relied upon nor in the current Bail Reform Act of 1984.

In both regions, a bail hearing should be implemented with the intent to ensure the accused will return to stand trial. At these hearings, a judge should set a bond amount that uses the Bail Reform Act of 1984 as a model. Using the Act as guide, the judge should begin with the presumption that the accused will appear, as the Act starts with a preference to release a defendant on his own recognizance. If a judge is not satisfied that the accused will return for trial, the judge should then set a bond in a mount that will ensure that that particular defendant will return before the court. This would require the judge to consider the defendant's financial circumstances, community ties, and criminal record. For instance, if a defendant's mother is willing to put her home up as collateral, this could be considered sufficient bail regardless of the home's value because the mother is willing to offer something of great value to her that could lead to her own financial ruin and is also showing that she is taking on responsibility for the defendant. A defendant can also be made to wear a tracking device, which would also work to ensure he will appear for trial without having to pay a bail. When implemented in this manner, bail is not solely based on income nor is it used as a punishment.

From Tennessee to the American federal criminal system to each Balkan nation, the individual himself should be considered as prescribed by the Bail Reform Act of 1984. High bail—or any bail—should not be set, generally regardless of the crime, if the defendant is not a danger and is likely to appear to stand trial. Pretrial detention should be used for defendants that are deemed dangerous. Using bail to ensure appearance is the key, while pretrial detention solves the issue of likely dangerous defendants being let

loose on the public after meeting bail or having no bail imposed. This would also lessen the issues present with cash bail because low-income defendants would have less use for these services if bail was set in accordance with an individual's circumstances and with the solitary goal of ensuring appearance for trial. By implementing bail hearings that place the focus on making sure the accused returns to court to stand trial, with the initial presumption that the defendant will return for trial, by considering the unique individual in these hearings, and by using pretrial detention with no bail for dangerous defendants, both the United States and the Balkan nations can promote individual liberty, uphold the principle that the accused is innocent until proven guilty, and protect the general public.