2000

Criminal Constitutional Law—Any Means to an End: Bail, the Constitution, and the Liberty Interest

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I. INTRODUCTION

The Minnesota Supreme Court recently removed an arrow from the quiver used by judges to administer pretrial detention, namely: cash only bail. The court held, on constitutional grounds, trial judges may no longer set a monetary bail amount for an accused that can only be met by a cash deposit for the full amount of the bail. Broadly speaking, the question at issue involved what limits, if any, exist on judicial discretion to command a
specific form of acceptable bail, where a range of surety options are available. The opinion was narrowly crafted, thus, avoiding many pretrial detention pitfalls surrounding liberty rights.

In Part II, this Note briefly examines the history of Anglo-American bail, examines three recent federal decisions surrounding the topic, and looks at Minnesota practices in a bail context. In Part III, the Note reviews the circumstances and decision of the Brooks court. Part IV analyzes the basis for the court’s decision, identifies alternative issues, and proffers a question on post-conviction relief. Finally, the Note concludes a continuing Minnesota judiciary devotion to the rights of an accused person, concerning both substantive due process and equal protection under the law.

With the court’s holding, Minnesota joins the ranks of a handful of jurisdictions explicitly asserting an individual’s liberty interest in bail proceedings, thereby expanding federal constitutional safeguards.

II. HISTORY

The traditional purpose of bail is to ensure, upon release, the accused’s physical presence at a later trial, and submission to the judgment of the court. A court will weigh the seriousness of the alleged crime, together with an assessment of flight risk by the accused; in the process coming to grips with whether any bail is warranted, and if so, what amount is sufficient to ensure submission. Historically, bail use has ebbed and expanded over time, subject to the changing needs of the society.

4. Id. at 353.
5. E.g., Douglas L. Colbert, Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings, 1998 U. ILL. L. REV. 1, 2-5 (1998). The bail proceeding lies in the period between arraignment and trial, and is critical for ensuring that an accused has an opportunity to prepare a defense, is represented by counsel, and has the benefit of any protections afforded by due process rights. At the state level, most states do not guarantee a liberty interest at this stage of the proceeding. However, some states do make provisions for a right to counsel for indigent defendants, thus following the federal model. Id.
7. BLACK’S LAW DICTIONARY 140 (6th ed. 1990). “To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and a place certain, which security is called 'bail'...” Id.
8. See generally 8A AM. JUR. 2d Bail & Recognizance § 2, 249-448 (2nd ed. 1997)(referring to Part III, and the particular factors affecting right or granting of bail or recognizance).
A. Anglo-American Common Law

The roots of bail lie shrouded in the mists of medieval antiquity. It was not until enactment of the Statute of Westminster in 1275, that rules surrounding bail were codified and a class system put in place.

English colonists brought with them the underpinnings on bail, as promulgated by the earlier Statute of Westminster. Colonial America experienced much less crime in everyday life than England did. Hence, the colonial courts rarely used pretrial detention in administering justice. In 1641, Massachusetts became the first colony to depart from the English tradition by recognizing "all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where proof is evident, or the presumption great."

Many colonies, and later states, followed this bail model.

The framework of the modern common law surrounding bail, pretrial detention, and federal constitutional safeguards has its foundation in three decisive cases from the latter half of the twen-

9. Compare RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 6-14 (1965) (stating that bail was a term analogous with "getting out", and further, it was derived from the French term baille, meaning "to deliver." In addition, Goldfarb ties the terminology to that of Sir Edward Coke, in his work, Treatise of Bail and Mainprize, where Coke says "[b]aily is an old Saxon word [signifying] a safekeeper or protector [so] when a man upon surety is delivered out of prison...he is delivered into bayle."); with June Carbone, Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail, 34 SYRACUSE L. REV. 517, 519-521 (1983) (stating that the origin of Anglo-Saxon bail was a complement to a money fine, or "bot", which the surety of an accused would pledge, or "borh," so as to guarantee the appearance of the accused at trial and payment of a fine upon conviction).

10. Carbone, supra note 9, at 523. The Statute of Westminster not only codified existing practices surrounding bail, it also introduced the concept of corporal punishment for more serious offenses. Id. at 524-25. Five centuries passed before the next round of substantive change in bail administration. Id. at 523.

11. Id. at 523. Corporal punishment for more serious offenses effectively provided an entire class of defendants (i.e. those charged with homicide penalized with death), with the incentive to flee from the court's jurisdiction. Id. at 522.

12. Id. at 529.

13. Id. at 530.

14. Id.

15. Donald B. Verilli, Jr., The Eighth Amendment and the Right to Bail: Historical Perspectives, 82 COLUM. L. REV. 328, 357 (1982). As of 1976, forty states had adopted a constitutional right to bail. Most of these states based the decision upon the Massachusetts model. Id. at 353. Minnesota is one of these states, however, the Minnesota bail clause model is generally thought to be modeled after the Pennsylvania Constitution, enacted subsequent to the Massachusetts offering. State v. Brooks, 604 N.W.2d 345, 352, 355 n.4 (Minn. 2000).
tieth century.

B. Federal Bail Law

1. Stack v. Boyle

The United States Constitution does not contain any explicit right to bail. However, in *Stack v. Boyle*, the United States Supreme Court determined that the Framers intended to protect pre-trial liberty. Further, the court noted, from colonial times through the dawn of the twentieth century, federal law has mandated admission to bail for all non-capital offenses, classifying bail as a "right to freedom before conviction.

In *Stack*, the defendants were accused Communist sympathizers and conspirators, charged with a violation of the Smith Act during the McCarthy era. Once charged, the court admitted each of the twelve defendants to bail at $50,000, a significant amount in 1950; none of the accused was able to post a surety. The court held bail serves a dual purpose. First, bail keeps the accused out of jail so they can mount a case unhampered. Second, bail allows the wrongly accused to avoid any punishment implicit in imprisonment while awaiting trial. In addition, every accused person is deemed to "stand[] before the bar of justice as an individual." Hence, in a bail decision individual factors relating to each accused must be considered.

16. U.S. CONST. amend. VIII (stating "excessive bail shall not be required...").
17. 342 U.S. 1, 4 (1951).
18. Id. at 4 (holding that excessive bail is prohibited by the Eighth Amendment and implying a right to bail) (emphasis added).
20. ALIEN REGISTRATION ACT OF 1940, 18 U.S.C. § 2385 (1940). This legislation made it a crime to commit an act of conspiracy against, advocate the overthrow of, or participate in sedition against the United States. Id.
21. Daniel J. Flynn, *Rethinking McCarthyism*, CAMPUS REPORT (Sept. 1998) at http://www.academia.org/CampusReport/September1998/mccarthyism.htm. "McCarthyism" refers to the political period in the United States between 1950 and 1956 when Sen. Joseph McCarthy from Wisconsin engaged in Communist "witch hunts" within the U.S. government. Id. Today, these acts, and the public support they engendered, are often cast as a period of demagoguery. Id. Interestingly, Communists within this country were early supporters of the Smith Act, feeling it would aid them in their fight against Trotskyites and German Bundists. Id.
23. Id. at 8.
24. Id.
25. Id. at 9.
2. United States v. Hazzard

During the latter half of the twentieth century, collateral to the civil rights movement, and later during the Reagan era, Congress sought to make fundamental changes to bail administration in American courts.26

The Bail Reform Act of 1984,27 via its pretrial detention clause,28 resulted in a significant shift away from focus on the accused’s liberty interest. For the first time, the judiciary thrust itself into a prediction relating to future “dangerousness” of the accused in the bail decision, thereby, calling into question a fundamental right—the presumption of innocence.29 If a judge determined the likelihood existed for an accused to commit further crimes while on pretrial release, then preventive detention was warranted.

The Hazzard case30 was one of the first opportunities for appellate review of the Bail Reform Act of 1984.31 Here, the defendant was on trial for kidnapping and rape.32 Subsequent to defendant’s arrest a federal magistrate, employing the recently codified provisions of the Bail Reform Act,33 denied bail because he felt no com-

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26. 18 U.S.C. §§ 3146-3152 (1966). The Bail Reform Act of 1966 codified a presumption in favor of pretrial release, laid out non-monetary forms of release, and added community ties as a consideration for release. In practice, the concept of community ties as a condition of release element never seemed to work. The apparent virtue of this approach is that it relies completely on flight risk, as opposed to, seriousness of offense in the consideration. The principal purpose of this legislation was to ensure that those persons economically, or socially disadvantaged are able to obtain some measure of relief if unable to achieve release on their own recognizance. Carbone, supra note 9, at 554.


28. Id. § 3142.


31. Id. at 1455.

32. Id. at 1446.

33. 18 U.S.C. § 3141–3150. The factors a judicial officer must assess include: 1) nature and circumstance of the offense charged; 2) weight of the evidence against the accused; 3) history and characteristics of the person, including their: a) the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and b) whether the accused is on probation, parole, or release pending other trial, sentencing, or appeal. Id. § 3142.
bination of conditions of pretrial release would reasonably assure the safety of the community.\textsuperscript{34}

The defense contended both facial and as applied constitutional rights deprivations of equal protection of the law and due process.\textsuperscript{35} In framing its holding, the Illinois court developed a two-part test.\textsuperscript{36} First, does preventative detention under a statute serve a legitimate governmental objective? Second, are the procedural safeguards within the statute sufficient to ensure that at least some defendants are not subject to pretrial detention? Presumably, if both questions are answered affirmatively, due process and equal protection concerns are satisfied.\textsuperscript{37}

However, the real significance of \textit{Hazard} is simple. It provides judicial endorsement of community safety interest in the federal bail decision.\textsuperscript{38}

3. United States v. Salerno

In \textit{Salerno},\textsuperscript{39} the United States Supreme Court affirmed, by a six to three majority, that focus on the accused's propensity for “dangerousness” in the bail decision is facially constitutional. Such a holding meanders through the root and soil system of the liberty tree. Inevitably, the result has been a spirited dialogue among commentators and the judiciary.\textsuperscript{40}
The defendants in the *Salerno* case, alleged Mafia chieftains, were charged with various racketeering activities. The district court ordered the accused detained, without bail, citing their danger to the community. The Court of Appeals for the Second Circuit reversed, finding a ground of future dangerousness violates substantive due process under the Fifth Amendment.

The Supreme Court held that provisions of the Bail Reform Act of 1984 constitute "permissible regulation rather than impermissible punishment," and further, a regulatory interest in public safety may "outweigh an individual’s liberty interest." In essence, the logic is if legislative intent was not punitive, and a pressing societal need is satisfied, then the detention is regulatory in nature.

In a stinging dissent, Justice Marshall criticized "the ease with which the conclusion is reached suggests the worthlessness of the achievement." Indeed, he attacks the majority’s technique of restating the foundational logic for infringing a basic right upon "obfuscation;" that is, just "redefine any measure which is claimed to be punishment as regulation and, magically, the Constitution no longer prohibits its imposition." The states, when not abridging a federal constitutional right, were free to digress.

C. Minnesota Bail Law

Modern Minnesota bail law is based upon the federal Bail Reform Act of 1966, and embodied in Minnesota procedural law.

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41. *Salerno*, 481 U.S. at 743.
42. *Id.* at 743-44.
43. *Id.* at 744.
44. *Id.* at 740.
45. *Id.*
46. *Id.* at 759 (Marshall, J., dissenting).
47. *Id.* at 760.
49. *Carbone*, *supra* note 9, at 523-27.
50. MINN. R. CRIM. P. 6.02. The rule fixes a preference for pretrial release.
A number of specific bail provisions are provided by statute, including admission to bail for all non-capital offenses, maximum bail amounts for common crimes, use of bail money, electronic monitoring while on release, and surety or recognizance bonds.

In only a single case, *State v. Pett*, has the Minnesota Supreme Court interpreted the “bail clause” of the constitution. The significance of *Pett* is that all crimes are now bailable at common law in Minnesota.

Further, the question of cash only bail reached the Minnesota Supreme Court on but a single occasion before *Brooks*. In that instance, the court failed to decide the point, holding the mootness doctrine precluded arrival at the issue.

III. THE BROOKS DECISION

A. The Facts

Brooks, a Minnesota citizen, was serving a one-year sentence with no monetary conditions attached. *Id.* However, in the interest of public safety, a judge may place the person in the care of a designated person; place restrictions on the travel, associations or places of abode of the accused; require the execution of an appearance bond; or impose any other condition deemed reasonably necessary to assure appearance. *Id.*

*51. MINN. STAT. § 629.16 (1998).*
*52. Id. § 629.471 (1998).*
*53. Id. § 629.53.*
*54. Id. § 629.531.*
*55. Id. § 629.67.*
*56. 255 Minn. 429, 92 N.W.2d 205 (1958).*
*57. 92 N.W.2d at 206. In *Pett*, the court confronted the issue of whether bail could be denied after abolition of the death penalty. *Id.* The state argued the abolition action was directed at an offense, not a punishment; however, the court held a trial court has no discretion except to fix the amount of the bail. *Id.* at 209.
*58. State v. Brooks, 604 N.W.2d 345, 352 (Minn. 2000).*
*59. State v. Arens, 586 N.W.2d 131 (Minn. 1998).* Interestingly, *Arens* argued an exception to the mootness doctrine because the issue of cash only bail was capable of repetition, yet evaded review; was functionally justiciable; and was of statewide significance. *Id.* at 135. *Arens* was defeated on appeal. *Id.* Yet, on identical grounds, and less than one year later, the court reversed course, claiming a mootness exception in the *Brooks* case. *Brooks*, 604 N.W.2d at 348.
*60. Arens, 586 N.W.2d at 133.*
*61. Brooks, 604 N.W.2d at 346. Brooks is a member of the Mdewakanton Sioux tribe, and thus eligible for a substantial income from casino gaming profits. The appeals court took note of this fact. *Id.* In addition, this was Brooks eleventh conviction for driving after license revocation. *Id.* Also, he is a convicted felon. Respondent’s Informal Brief and Appendix at 11, State v. Brooks, No. CI-98-2388, 1999 WL 153793 (Minn. Ct. App. Mar. 23, 1999).*
through electronic home monitoring. Terms of the sentence called for Brooks to undergo periodic controlled substance testing. The results of a first test were positive for cocaine, so Brooks underwent a second test. The results of the second test were also positive, hence Brooks was found to be in violation of the conditions for his ‘at home’ sentence.

Local law enforcement attempted to take Brooks into custody, however Brooks fled upon police arrival. Subsequently, Brooks was charged with escape from custody, apprehended in Florida and returned to Minnesota.

At the bail hearing the state requested “cash bail” at the statutory maximum for a gross misdemeanor, citing Brooks’ predisposition for flight. At the next hearing, Brooks moved for bail reduction or allowance for bond. The court denied the motion, and imposed cash bail for the maximum amount. Later, a second judge at the pretrial omnibus hearing denied a similar motion.

Brooks appealed the district court ruling arguing that “cash only” bail is unconstitutional. The court of appeals held “cash only” bail does not violate the Minnesota Constitution, because the term “sufficient sureties” does not create a constitutional right to post bond.

B. The Court’s Holding

The Minnesota Supreme Court reversed the lower court, holding that cash only bail is unconstitutional. It reached this conclusion following a review of cash only bail

63. Id.
64. Id.
65. Id.
66. Id.
67. Id.
68. Id.
69. Id. at 347.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
75. Id. In addition, the court of appeals reasoned that “[t]he form of the security, as much as its sufficiency, is for the protection of the court and is not a matter of the constitutional right of the defendant.” State v. Brooks, No. C1-98-2388, 1999 WL 153793, at *2 (Minn. Ct. App. Mar. 23, 1999).
76. Brooks, 604 N.W.2d at 354.
in other states with identical or similar constitutions, an examination of the term “sufficient sureties” as set forth in the bail clause of the Minnesota Constitution, and a reasoning vis-à-vis how these forms of surety would apply in the Brooks circumstance.

The court believed “[s]urety can encompass a broad array of undertakings, often by a third person, that provide adequate assurance for the performance of an obligation.” In addition, the court concluded that any of these surety forms of guarantee could satisfy a monetary bail amount necessary to ensure the accused’s appearance.

Further, the court reasoned exercise of unlimited discretion by a judge would result-over time-in a requirement for unacceptable forms of guarantee. The problem with cash only bail, according to the court, is a limitation imposed by the judiciary on the form of acceptable bail.

Ruling carefully, the court explicitly avoided the issue of release conditions, as might be encountered in the preventive detention inferno surrounding Salerno, and strictly limited their holding to the constitutionality of cash only bail.

Justice Stringer, through a dissenting opinion, expressed a concern that the court was limiting judicial discretion. Justice Stringer makes two points. First, the majority is incorrect when claiming the purpose of the Bail Clause is to protect the defen-

77. Id. at 352. The court mentioned three foreign jurisdictions: Ohio, Louisiana, and Tennessee. Id. The Ohio Supreme Court held cash only bail was unconstitutional relying on both the plain meaning of its state constitution and procedural law. Id.; State ex rel. Jones v. Hendon, 609 N.E.2d 541, 543-44 (Ohio 1993). Louisiana reached the same point via the plain meaning of the word “surety” as applied in statute. Brooks, 604 N.W.2d at 352; see also State v. Golden, 546 So. 2d 501, 503 (La. Ct. App. 1989), writ denied, 547 So. 2d 365 (La. 1989). While the Tennessee Court of Appeals discussed the constitutionality of cash only bail in dicta, that court interpreted the statute as not allowing cash only bail. Brooks, 604 N.W.2d at 352; Lewis Bail Bond Co. v. Gen. Sessions Ct., 1997 WL 711137, at *3 (Tenn. Ct. App. Nov. 12, 1997) (No. C-97-62).

78. Brooks, 604 N.W.2d at 352-53.
79. Id. at 353.
80. Id.
81. Id. The example employed by the court was a situation where a judge levied bail consisting of real property, and the accused had no real property. Id. The result is a constitutional deprivation of rights. Id.
82. Id.
83. Id. at 354 (emphasizing that “this case addresses only the issue of constitutionality of cash only bail and does not involve release conditions”).
84. Id. at 355 (Stringer, J., dissenting) (arguing that the “district court could not be reasonably assured of [Brooks] next appearance in court”).
dant. Instead, both state and federal precedent define bail's purpose as ensuring accused appearance and submission to the court's judgment. Second, the majority construction of "sufficient sureties" to mean access to third parties is not appropriate.

IV. ANALYSIS

In Brooks, the court is concerned with the potential for judicial abuse relating to pretrial custody arrangements. Unspoken in the decision, but rippling like an undercurrent throughout it's fabric, are the twin canons of equal protection and substantive due process. Indeed, the ability of a state to exert a subtle, yet compelling, influence over due process cash bail questions is also a subject of scrutiny in other jurisdictions.

The impetus behind the Bail Reform Act of 1966, and Minnesota's subsequent statutory modifications, was a liberty interest for the disadvantaged. Cash only bail is not a principal means of pretrial release, but its improper use constitutes denial of equal protection under the law. Such was the case in Brooks, where the accused was deprived of a fundamental right to freedom before conviction. The court reinforced this aspect when noting "cash only bail orders can be used to deny bail to accuseds who have other means of providing sufficient surety." By way of illustration, as recently as 1992, clear and convincing

85. Id. at 354 (Stringer, J., dissenting).
86. Id.
87. Id. at 355 (Stringer, J., dissenting).
88. Brooks, 604 N.W.2d at 351-353.
89. U.S. CONST. amend. XIV, § 1. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
91. Supra note 16 and accompanying text.
92. Sourcebook of Criminal Justice Statistics Online, Table 5.51, Type of Pretrial Release or Detention of Felony Defendants in the 75 Largest Counties (1996), http://www.albany.edu/sourcebook/1995/pdf/t551.pdf. In a recent assessment of felony arrests, 34% of the defendants obtained non-financial pretrial release, 29% received a financial release, and 37% detained until trial. Id. Only 2% of felony arrests resulted in the imposition of cash only bail. Id.
93. State v. Raddatz, No. CX-98-2292, 1999 WL 243637 (Minn. Ct. App. Apr. 27, 1999). Here, defendant failed to argue the issue of constitutionality of cash only bail, instead, relying on an argument of "unreasonability"—which the court found unconvincing. Id.
95. State v. Brooks, 604 N.W.2d 345, 353 (Minn. 2000).
evidence existed supporting a conclusion that racial discrimination may be a factor in the bail decision for Minnesota's most populous county. 96 The Brooks court, aware of a need for vigilance concerning equal protection, was like a carpenter with a small nail trying to fix a noisy doorframe. That is, the court was seeking to buttress individual liberty interests against the backdrop of daily court administration. In doing so, the court merely made it more difficult for a judge to deprive a citizen of his liberty by "restricting his right to post bail by providing alternative forms of sufficient surety."97

A variety of forms of guarantee are available in Minnesota, among them: surety bonds, deposit bonds, property bonds, and cash. 98 Bail schedules, outlining bail amounts for each type of offense, were once common in American courtrooms, although emphasis on pretrial release has limited their widespread use in recent years.99 In Minnesota, after Brooks, a judge sets an amount for monetary bail, while the defendant chooses the form of guarantee most appropriate for his or her circumstance. Otherwise, preconviction freedom would be unfairly determined by a defendant's ability to pay, and any ensuing mandated detention is not blind before the law.100

Since the court was dealing only with interpretation of constraints contained in the Bail Clause, and because the Bail Clause is limited to pre-conviction relief, it is unclear whether its holding also applies to post-conviction release on appeal.

In addition, the court expressly excluded a cash deposit for

96. Sharon Krmpotich, Symposium on Racial Bias in the Judicial System, Appendix D — Data Analysis Reports, 16 Hamline L. Rev. 832, 838 (1993). In a 1993 study of misdemeanor arrests in Hennepin county, it was established that release without bail, for those defendants without a prior arrest record, occurred in the following proportions: White (Assault) 20% Minority (Assault) 8%; White (Prostitution) 24% Minority (Prostitution) 16%; White (Theft) 63% Minority (Theft) 40%. Among those with prior records, a similar theme prevails: White (Assault) 13% Minority (Assault) 5%; White (Prostitution) 25% Minority (Prostitution) 16%; White (Theft) 46% Minority (Theft) 32%. Clearly, race is a factor in the bail decision. Id. But see Ian Ayres & Joel Waldfogel, A Market Test for Race Discrimination in Bail Setting, 46 Stan. L. Rev. 987, 990 (1994) (stating that a core finding of a bail bond study was that bond dealers in New Haven charged significantly lower rates to minority defendants than to whites).

97. Brooks, 604 N.W.2d at 354.

98. Lay & De La Hunt, supra note 29, at 935-41.


less than the full amount of bail from its definition of cash only bail.\textsuperscript{101} This is similar to the ten-percent deposit provisions found in some jurisdictions.\textsuperscript{102} A motivating factor for this exclusion may be concern for disadvantage suffered by poor defendants, and the exclusion is consistent with a liberal view of the rights of an accused.\textsuperscript{103}

V. CONCLUSION

An accused’s right to a presumption of innocence, to rouse a defense, and to conduct his or her affairs unfettered before trial are fundamental to a free society. In the federal system, these rights have been undergoing a significant transformation over the past twenty years.\textsuperscript{104}

In \textit{Brooks},\textsuperscript{105} the Minnesota Supreme Court merely casts a shroud of safety over any citizen accused of crime—some rightly, some wrongly—by making a judge choose the amount of monetary bail.\textsuperscript{106} An accused may satisfy this bail through a range of monetary

\textsuperscript{101} \textit{Brooks}, 604 N.W.2d at 346 n.1.

\textsuperscript{102} \textit{See generally} Robert A. Kaye, \textit{Oregon's Ten Percent Deposit Bail System—Rethinking the Professional Surety's Role}, 66 OR. L. REV. 661, 683-84 (1987). As a method of mitigating the issue attendant with professional bail bondsmen, some jurisdictions have allowed a defendant to post a cash amount, usually ten percent of the bail amount, with the court. \textit{Id.} at 661, 672. In theory, this eliminates the need for a bondsman and works to aid an accused that may already be economically deprived. \textit{Id.} at 661, 673. Oregon, however, has identified a number of problems surrounding this approach after nearly twenty years in operation. \textit{Id.} at 673-74. Among the problems identified: higher failure to appear rates for those paying a deposit; inability to raise the deposit amount; and lack of an administrative method for collecting remaining security from those defendants failing to appear. \textit{Id.} These issues have caused at least some commentators to call for a reexamination of the use of low cash deposit surety within the State of Oregon. \textit{Id.} at 674.

\textsuperscript{103} \textit{Supra}, articles cited note 40. More recently, courts have shown a predisposition toward use of the security bond, as opposed to the surety bond. The security bond normally calls for a ten percent cash deposit by a defendant with the court, while the surety bond calls for this deposit with a commercial bail bondsman. Kaye, \textit{supra} note 102, at 663. Security bonds control a defendant through threat of additional criminal penalties, loss of deposit, and potential loss of more money if a court sues for the remainder. On a surety bond, all control is vested with the bondsman. \textit{Id.}

\textsuperscript{104} \textit{E.g.}, United States v. Salerno, 481 U.S. 739, 748 (1987) (stating preventative detention does not constitute impermissible punishment before trial); Schall v. Martin, 467 U.S. 253, 278 (1984) (stating "there is nothing inherently unattainable about a prediction of future criminal conduct"); Bell v. Wolfish, 441 U.S. 520, 533 (1979) (stating a presumption of innocence applies only in a trial context and has no application to pretrial detention).

\textsuperscript{105} 604 N.W.2d 345.

\textsuperscript{106} \textit{Id.} at 354.
options.\textsuperscript{107}

The Brooks decision is narrowly constructed. Whether by design or neglect, the court failed to take this opportunity to clarify the concept of punishment and bail as applied to specific due process standards. Particularly important is a need for \textit{consistency of application} surrounding fundamental rights afforded an accused, between a defendant’s initial contact with a criminal justice authority and any subsequent trial. Altogether too often, the current federal model is overly accepting of contraction and expansion of a given right at different points along the criminal justice highway. Citizens of Minnesota would benefit by shining a judicial light on this often-neglected area.

In addition, the court found the purpose of the Bail Clause is to limit “government power to detain an accused prior to trial”\textsuperscript{108} thus broadening fundamental rights granted to citizens under the Minnesota Constitution. The court afforded no guidance on the applicability of cash only bail for post-conviction release. It is likely where a final judgment has been rendered courts will defer to legislative intent and direction during the appellate review process for the convicted criminal.

Cash only bail is no longer an option for the criminal courts while the accused awaits trial in Minnesota. The liberty interest of a criminal detainee, while not unfettered, remains strongly tied to state constitutional safeguards. In Minnesota, it’s the law.

\textsuperscript{107} Id. at 353.
\textsuperscript{108} Id. at 350.