NOTES

YOU MADE GIDEON A PROMISE, EH?: ADVOCATING FOR MANDATED PUBLICLY APPOINTED COUNSEL AT BAIL HEARINGS IN THE UNITED STATES THROUGH DOMESTIC COMPARISONS WITH CANADIAN PRACTICES AND LEGAL CONSIDERATIONS

Lauren Elizabeth Lisauskas[*]

TABLE OF CONTENTS

I. INTRODUCTION 159

II. BACKGROUND 162
A. The History of Bail 162
i. United States of America 163
ii. Canada 165
B. Criminal Justice Systems and Indigent Counsel 166
i. United States of America 166
ii. Canada 167

III. ANALYSIS 169
A. American Practices 169
i. Sources of Law 169
ii. Open Questions of Law 171
a. What is a "Critical Stage"? 171
b. Is There a Non-Constitutional Remedy? 174
B. Canadian Practices 175
i. Sources of Law 175
ii. Open Questions of Law 178
C. Commonalities 178
D. Distinctions 182
E. Policy and What We Can Learn from Each Other 183
F. Counter-Arguments Regarding the Practicality of Implementation 187

[*] J.D. Candidate, University of Georgia School of Law, 2020. B.A. in Communication, Clemson University, 2017.

IV. CONCLUSION 188

I. INTRODUCTION

It is a hot July day in Texas. You are minding your own business when, suddenly, the police knock on your door. You open it, speaking with candor and respect, to inquire about the purpose for their visit. Abruptly, you are handcuffed. Amidst your confusion and shock, you hear the officers mention things like "California" and "felon." You are perplexed; the only trouble you had with the law was a lifetime ago, when felonious charges were entirely dismissed through a diversion program you successfully completed. Your neighbors are watching, and the embarrassment and shame already begin to rush through your body.

It turns out the officers had no warrant to search you, and moreover, they were erroneous in their belief that you had a prior felony conviction. But, that is irrelevant, at least for now. You are booked into jail. You have seen enough television shows to know that you ought to get a lawyer, and you ask for appointed counsel, since money is tight and you cannot afford to pay for an attorney yourself. However, no one shows up that night to talk to you and hear you explain your side of the story. You spend the night in a cold cell, scared and alone.

The next morning, you see a judge who tells you that while no formal charges have been brought against you yet, you still have a bond for $5,000. Again, the judge says you can hire an an attorney and request that attorney to come to court if you want, but it is an embarrassing reminder that you simply cannot afford one, especially on top of the price you are going to have to pay the bail bondsman. You keep telling anyone you can that there is no way you could have committed this crime because you do not have a prior felony conviction. Therefore, you cannot be charged as a prior felon in possession of a firearm–it is a logical impossibility. No one listens.

While out on bond, you continue asking for a court appointed lawyer, since your financial status entitles you to representation by a public defender. Despite your persistence, you have not had any contact from counsel or the court. Six months later, just as you start to relax after the scare of the first arrest, the police show up again, and there you are, back in cuffs. A grand jury has returned an indictment for the charge. It is the same routine: you sit in jail for a night, you see the judge and ask for a lawyer, and nothing happens. It is not until you have spent five more days in confinement and made another request that you are finally appointed an attorney.

Then, finally, someone listens to you: you are not a felon. The public defender with tired eyes and a briefcase filled to the brim with different client files uncovers the truth and presents it to the court. Finally, in late April, the charges are dropped for a crime you could not have conceivably committed.

The hell is over, almost a year later. By legal standards, your name is "clean," but in the court of public opinion, it is anything but. Your neighbors remember you being taken away in the cop cars, not once, but twice, and they

don't look at you the same way anymore. You are quickly falling behind on your rent payments. Your marriage is strained. You cannot focus at work, which results in reprimands from supervisors and threats that you will lose your job. More than anything, you are constantly in fear that you will be picked up by the police at any time in any place all over again.

While this sounds like a painful allegory warning us about the power of overzealous courts and mistaken identity, this story was reality for Walter Rothgary.[1] Despite countless requests for representation by a publicly appointed attorney he was entitled to, Mr. Rothgery was held hostage by the court system for close to a year on a clerical error which was quickly resolved with finality and ease once his lawyer was properly assigned. This is an issue that would have been fixed within a day if Mr. Rothgery had counsel present with him at the initial bail hearing as he requested.

An unanswered question under United States constitutional law is whether the Sixth Amendment right to counsel extends to bail hearings.[2] The Sixth Amendment, in part, provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[3] Based off of this text, it has become settled law in the United States that when facing any charge that might carry a sentence of incarceration, a person has a right to effective assistance of counsel, coupled with the right to be appointed counsel if he or she cannot afford to hire one.[4]

Technically, this right attaches at a first appearance before a judicial officer.[5] However, this guarantee does not necessarily mean counsel must be present at a bail hearing, commonly the first hearing involving a magistrate. Instead, the Supreme Court of the United States has held that once the right arises, "counsel must be appointed within a reasonable time . . . to allow for adequate representation at any critical stage before trial, as well as at trial itself."[6]

---

[1] Complaint at *1, Rothgery v. Gillespie County, (W.D.Tex. 2004) (No. A04CA456LY), 2004 WL 5470930.

[2] *See* Alexander Bunin, *The Constitutional Right to Counsel at Bail Hearings*, 31 CRIM. JUST. 23, 24 (2016); GA. STATE UNIV. COLL. OF LAW CTR. FOR ACCESS TO JUSTICE, MISDEMEANOR BAIL REFORM AND LITIGATION: AN OVERVIEW (2017), https://law.gsu.edu/files/2019/06/9.13-Final-Bail-Reform-Report-Center-for-A2J.pdf; Sandra Guerra Thompson, *Do Prosecutors Really Matter?: A Proposal to Ban One-Sided Bail Hearings*, 44 HOFSTRA L. REV. 1161 (2016).

[3] U.S. CONST. amend. VI.

[4] *See* Powell v. Alabama, 287 U.S. 45 (1932); Betts v. Brady, 316 U.S. 455 (1942); Gideon v. Wainwright, 372 U.S. 335 (1963); Strickland v. Washington, 466 U.S. 668 (1984); McMann v. Richardson, 397 U.S. 759 (1970).

[5] *See* Michigan v. Jackson, 475 U.S. 625, 629, n.3 (1986); Brewer v. Williams, 430 U.S. 387, 398–99 (1977).

[6] Rothgery v. Gillespie County, Tex., 554 U.S. 191, 212 (2008).

The crux of answering this query is dependent upon whether a bail hearing itself is considered a "critical stage."[7] Unfortunately, the term "critical stage" has no clear or uniform definition in American jurisprudence.[8] In the U.S., there is no recognized constitutional right to the presence of appointed counsel for the indigent at bail hearings.[9] When state trial and appellate courts have tackled this issue before, there have been varied responses.[10] In fact, only ten states in America uniformly provide counsel at an accused's first appearance before a judicial officer.[11] While a number of scholars are wrestling with this issue domestically[12], this Note will consider the legal sources that provinces in Canada have considered in their journey toward mandated counsel for the indigent at bail hearings in order to provide further guidance and suggestion to future American court decisions.

Part II provides a comparative background of the American and Canadian criminal justice systems, specifically focusing on the history of bail in both nations, as well as current approaches toward publicly-appointed counsel for the indigent and bail hearings.

Part III includes an analysis of Canadian and American courts' considerations of what rights should be afforded to criminal defendants at the bail hearing stage, primarily the current state of the mandatory counsel representation for the indigent at bail hearings. The current practices in each country will be compared against the source of law from which the right to publicly-appointed counsel is derived in each nation respectively. Additionally, this Note will compare the systems against one another to determine the legality of current practices, as well as the fulfilment of these practices to each country's underlying values and goals of justice. This section goes on to identify the open legal questions that need resolution before mandated public counsel in bail

---

[7] *Id.*

[8] Paul Heaton, Sandra G. Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 774 (2017).

[9] John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA. L. REV. 831, 840 (2018).

[10] *See* Charlie Gerstein, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513, 1516 (2013); *see also* Douglas L. Colbert, *Coming Soon to a Court Near You–Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court's Sua Sponte Rejection of Indigent Defendants' Right to Counsel*, 36 SETON HALL L. REV. 653, 658 (2006).

[11] Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 345 (2011).

[12] *See id.*; Michael M. O'Hear, *New Right-to-Counsel Rulings Address Bail and Waiver*, MARQ. U. L. SCH. FAC. BLOG (Oct. 8, 2010), https://law.marquette.edu/facultyblog/2010/10/08/new-right-to-counsel-rulings-address-bail-and-waiver/; Britta Palmer Stamps, *The Wait for Counsel*, 67 ARK. L. REV. 1055 (2014); Sarah Hook, *Reality and the Right to Counsel in Maryland*, BRENNAN CTR. FOR JUST. (Nov. 29, 2011), https://www.brennancenter.org/blog/reality-and-right-counsel-maryland; Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, U. PA. FAC. SCHOLARSHIP (Mar. 13, 2017).

hearings can be affirmatively granted and make predictive assessments of how those questions will be answered, given court precedent in each nation. Finally, the analysis in this Note will highlight growing policy considerations from both nations and the impact those values have had in shaping growing trends or pilot programs relating to counsel for the indigent at bail hearings.

Part IV concludes that in both Canada and the United States requiring publicly-appointed counsel to criminal defendants at their first bail hearing is the best way to ensure fairness and equality in the legal system and to properly protect their constitutionally guaranteed rights. Further, if Canada and the United States were to implement this practice in tandem, the move would constitute a huge stride forward for criminal justice reform worldwide and encourage other nations to take conscientious steps forward to protect the rights of the accused.

II. BACKGROUND

A. The History of Bail

The concept of bail derives from Anglo-Saxon practices from the Middle Ages.[13] However, money was not the original form of insurance for the courts.[14] Instead, the custom during the 13th century was for a person to serve as the "surety."[15] In other words, criminal defendants were forced to call on friends, family, employers, or good-willed acquaintances of moral regard to ensure their bonds.[16]

Three centuries later, the English Parliament passed the Habeas Corpus Act of 1679, "which, among its provisions, established that magistrates would

---

[13] Kurt X. Metzmeier, *Preventative Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT'L L. REV. 399, 401 (1996); *see also* Jacob Silverman, *How Bail Works*, HOW STUFF WORKS, https://money.howstuffworks.com/bail3.htm (last visited Oct. 1, 2018); *Bail*, BLACK'S LAW DICTIONARY (6th ed. 1990) ("Monetary amount for or condition of pretrial release from custody, normally set by a judge at the initial appearance. The purpose of bail is to ensure the return of the accused at subsequent proceedings. If the accused is unable to make bail, or otherwise unable to be released on his or her own recognizance, her or she is detained in custody.").

[14] *Stuff You Should Know: How Bail Works*, HOW STUFF WORKS (Feb. 23, 2010), https://www.stuffyoushouldknow.com/podcasts/how-bail-works.htm.

[15] *Id.*

[16] *Id.*; *see also* Burton F. Brody*, Anglo-Saxon Contract Law: A Social Analysis*, 19 DEPAUL L. REV. 270, 275 (1969) ("The defendant's appearance was guaranteed by placing him in the custody of his sureties. In this respect the procedural contract is the forerunner of bail bond systems. Although the typical procedural contract guaranteed both appearance and compliance, there were provisions for separate guarantees. The laws of King Edgar required every accused to have a surety to guarantee justice, and if the accused fled, the surety had to answer. A special provision applying to thieves is particularly akin to bail in that the surety was allowed twelve months to pursue the thief and recapture him.").

set terms for bail."[17] The Habeas Corpus Act of 1679 was the first law to provide for monetary bail in lieu of another's word. [18] With the enactment of the English Bill of Rights in 1689, further parameters were instituted by parliament in an effort to prevent excessive bail.[19]

Bail is still a relevant part of criminal justice systems today in countries which derived from the British Empire, including England, the United States, and Canada.[20]

i. United States of America

After the American colonists gained their independence and began developing their new government, the Framers of the Constitution looked heavily upon the nearly century-old English Bill of Rights for guidance.[21] This led to the young nation adopting an English common law judiciary system.[22] Additionally, the United States' Bill of Rights has a clear textual reliance on its British precursor.[23] One need only look to the Eighth Amendment to find language nearly identical to those words whose failed implementation was part of the powder-keg which sparked the American Revolution in the first place.[24] However, "American bail law is actually rooted in legislation."[25] The Judiciary Act of 1789, among other things, provided that bail was available for all non-capital offenses, and the setting of such bail was within the judge's discretion.[26] An important distinction to note when considered against its English roots is that at no time in American practice was personal surety a requirement.[27]

---

[17] Silverman, *supra* note 13; Habeas Corpus Act 1679, 31 Car. 2, c. 2, § 2 (Eng.).

[18] HOW STUFF WORKS, *supra* note 14.

[19] Bill of Rights 1689, 1 W. & M. c. 2, (Eng.) ("[E]xcessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); NCC Staff, *On This Day, the English Bill of Rights Makes a Powerful Statement*, NAT'L CONST. CTR.: CONST. DAILY (Feb. 13, 2019), https://constitutioncenter.org/blog/on-this-day-the-english-bill-of-rights-makes-a-powerful-statement.

[20] Metzmeier, *supra* note 13, at 399.

[21] Silverman, *supra* note 13.

[22] William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 426 (1968).

[23] NAT'L CONST. CTR., *supra* note 19.

[24] *Compare* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .") *with* Bill of Rights 1689, 1 W. & M. c. 2, (Eng.) ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . . ").

[25] Silverman, *supra* note 13.

[26] Marie VanNostrand & Gena Keebler, *Our Journey Toward Pretrial Justice*, 71 FED. PROB. 20 (2007); Judiciary Act of 1789, 1 Stat. 73; *About Bail - History of Bail*, PROF'L BAIL AGENTS OF THE U.S., https://www.pbus.com/page/14 (last visited Mar. 7, 2019).

[27] *Congress Reforms Federal Bail Procedures*, CQ ALMANAC, https://library.cqpress.co

For nearly two centuries, statutory law and legal precedent relating to bail in the United States remained relatively dormant. However, an abrupt change came in 1966, when Congress passed the Bail Reform Act. [28] This piece of legislation "amended federal law to require the pretrial release of an individual charged with a noncapital federal offense upon personal recognizance or an unsecured appearance bond, unless the court determined they were likely to be insufficient to assure the appearance of the accused at trial."[29] In other words, Congress' motivations in enacting this statute were to increase releases of defendants who were not significantly dangerous or at risk of flight, as well as to decrease the financial burden on the accused as much as possible.

Congress passed an updated Bail Reform Act in 1984, replacing the 1966 antecedent.[30] This legislation rose out of fears that potential gaps from the earlier version were subject to exploitation at a risk to society:

> While the previous Reform Act had helped to overturn discrimination against the poor, it had left open a serious loophole that allowed many dangerous suspects to receive bail as long as they didn't appear to be flight risks. This new law stated that defendants should be held until trial if they're judged dangerous to the community.[31]

Moreover, the updated Act categorically identified individuals who were allowed to be held without bail ("[M]ostly those charged with very serious crimes, repeat offenders, the potentially dangerous and anyone who might be a flight risk . . . .").[32] Finally, Congress ensured through this statute that defendants eligible for bail were entitled by law to a bail hearing.[33] This marked the end of America's modern bail-related legislation at a sweeping federal level to date.

---

m/cqalmanac/document.php?id=cqal66-1302070 (last visited Sept. 28, 2019).

[28] Bail Reform Act of 1966, 80 Stat. 214 (1966).

[29] CHARLES DOYLE, CONG. RESEARCH SERV., R40221, BAIL: AN OVERVIEW OF FEDERAL CRIMINAL LAW 3 (2017).

[30] Bail Reform Act of 1984, 18 U.S.C.S. § 3142 (1984).

[31] Silverman, *supra* note 13.

[32] *Id.*

[33] *Id.*

ii. Canada

Since Canada's earliest days, bail has been a matter of right for misdemeanors and was discretionary for felonies.[34] This rule came from British legal precedents, which constituted the nation's laws until the creation of the Canadian Confederation through the British North American Act in 1867.[35] The Act Respecting the Duties of Justices of the Peace, one of Canada's first pieces of criminal legislation, "gave magistrates the discretion to grant bail for all crimes."[36]

In the 1960's, Canadian Martin Friedland studied bail practices within the Toronto Magistrates Court, and his findings of "inequities in the application of the laws based on economic status," coupled with other contemporary sentiments, "led to the appointment of a Royal Commission and subsequently the Canadian Committee on Corrections (CCC) to examine bail practices and to recommend reforms."[37] Notably, Friedland's study was inspired by the U.S. Manhattan Bail Project, an early indication of an American-Canadian partnership in support of criminal justice reform, specifically regarding bail policy.[38] The CCC in its 1969 report went on to make holistic and foundationally impactful recommendations, including "that there should be a central registry in each province for the purpose of maintaining a record of those persons charged with indictable offences who are on bail so that this information would be readily available to the judge, magistrate, justice or police in connection with a further bail application," that an individual charged with the crime should have the presumptive right to bail unless "(i) It is made to appear that there are reasonable grounds for believing that the accused will not attend to stand his trial if released on bail, or (ii) It is made to appear that there are reasonable grounds for believing that the protection of the public requires that

---

[34] Metzmeier, *supra* note 13, at 417.

[35] *Id.*

[36] *Id.*; Act Respecting the Duties of Justices of the Peace, S.C. 1969, c 31.

[37] Metzmeier, *supra* note 13, at 419.

[38] The Manhattan Bail Project was implemented by the Vera Institute of Justice in 1961 as a result of growing concern over the injustices presented by the current monetary bail system in place in the United States. Objective inquiries were led by a team of researchers to determine whether accused criminal defendants could be trusted to return for their trial dates without the surety of a monetary bail bond. During the project's three years, 3,505 accused individuals were released without any bail requirement, and only 1.6% of those people failed to show up for their trial date for reasons within their control. This experiment gained national support, including from the Department of Justice. Upon signing the national Bail Reform Act in 1966, President Johnson credited Vera and the Manhattan Bail Project as the catalyst for the legislation. *See* Jerome E. McElroy, *Sentences Before Sentencing: Introduction to the Manhattan Bail Project*, 24 FED. SENT'G REP. 8 (2011); JOEL L. FLEISHMAN, J. SCOTT KOHLER & STEVEN SCHINDLER, CASEBOOK FOR THE FOUNDATION: A GREAT AMERICAN SECRET 81 (2007); *Manhattan Bail Project*, VERA INST. OF JUSTICE, https://www.vera.org/publications/manhattan-bail-project-official-court-transcripts-october-1961-june-1962 (last visited Mar. 7, 2019).

the accused be kept in custody pending his trial," and that bail should be based upon a defendant's own recognizance, with a monetary surety only being implemented when viewed as completely necessary to ensure later appearance.[39] Three years later, the vast majority of the CCC's recommendations were codified for all provinces into the Criminal Code (§515-526) by way of the Bail Reform Act of 1972.[40]

B. Criminal Justice Systems and Indigent Counsel

Both of these common law systems derived from a British foundation, so it makes sense that the legal structures of America and Canada appear alike, especially from a criminal procedure perspective.[41] However, this section aims to highlight the fundamental similarities and distinctions of the two criminal justice systems, in order to serve as a backdrop to the rest of this Note's analysis.

i. United States of America

In the United States, the criminal justice system encompasses two larger structures: the state and the federal level.[42] The federal and each state government have their own promulgated substantive and procedural criminal law, which is then enforced, adjudicated, and punished at the state or federal level, respectively.[43] It is important to note for the purposes of future analysis and policy recommendations a major distinction between American and Canadian courts' deference to international matters. Whereas Canadian courts will readily consider international decisions and materials in reaching legal conclusions, American courts are far more conservative and hesitate to give deference or cite non-binding, international materials.[44]

Indigent criminal defendants are appointed lawyers since, "[u]nder the Sixth Amendment right to counsel, the defendant is entitled to a lawyer in all

---

[39] CAN. COMM. ON CORR., REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS 111-13 (1969).

[40] Bail Reform Act, S.C. 1972, c 37. (Can.); Criminal Code, ch. 51, 1953-1954 S.C. §§ 515-526 (Can.).

[41] Metzmeier, *supra* note 13, at 417.

[42] *Intro to the American Criminal Justice System*, CORRECTIONALOFFICER.ORG, https://www.correctionalofficer.org/us-criminal-justice-system (last visited Sept. 28, 2019).

[43] James B. Jacobs, *Criminal Justice in the United States: A Primer*, 49 AM. STUD. J. 8 (2007).

[44] Peter Bowal, *Ten Differences (Between Canadian and American Law),* U. ALTA. LEGAL RESOURCE CTR. (2002), https://dspace.ucalgary.ca/bitstream/handle/1880/48043/Bowal_Tendifferences2002_LawNow.pdf?sequence=1.

cases in which imprisonment is imposed."[45] The United States has a relatively liberal approach to a defendant's right to fair representation at the trial level. For example:

> The right to counsel also encompasses other expert assistance if necessary for a fair trial. For instance, the Supreme Court of the United States has held that the defendant has a right to her own mental health professional to assist her defense in a case in which a serious insanity claim was being offered.[46]

ii. Canada

Canada's criminal justice system has its own idiosyncrasies, while maintaining a general resemblance to the American system. First, there are two prevailing legal traditions that operate harmoniously in Canada: civil law in Quebec and common law in the other provinces and territories.[47] This is a co-existence of law known formally as "bijuralism."[48] Moreover, the Canadian Department of Justice supports both official languages of the country (English and French) in its bijuralism efforts.[49]

Next, the court systems of Canada are divided at a federal and provincial level, with distinct jurisdictions, much like in the United States.[50] However, the Canadian courts are distinguishable in that there is not such a strict chasm of sovereignty between the local and national divide as in America:

> Provincial courts in Canada deal with less serious criminal and civil matters. All courts above are superior courts in the same system, all the way through the Supreme Court of Canada, the jurisdiction of which is binding on each court in the country. About half of all judges, and all those sitting on superior courts, are appointed and paid by the federal government.

---

[45] Paul Marcus, *The United States Criminal Justice System: A Brief Overview*, WM. & MARY L. SCH. SCHOLARSHIP REPOSITORY 1, 6 (1996); Gideon v. Wainwright, 372 U.S. 335 (1963).

[46] Marcus, *supra* note 45; Gideon, 372 U.S. at 335.

[47] *Bijuralism and Harmonization*, GOV'T OF CAN. DEP'T OF JUSTICE (Sept. 18, 2017), http://www.justice.gc.ca/eng/csj-sjc/harmonization/index.html.

[48] *About Bijuralism*, GOV'T OF CAN. DEP'T OF JUSTICE (Jan. 7, 2015), http://www.justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/aboutb-aproposb.html.

[49] GOV'T OF CAN. DEP'T OF JUSTICE, *supra* note 47.

[50] *How the Courts are Organized*, GOV'T OF CAN. DEP'T OF JUSTICE (July 27, 2017), http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/02.html.

> [There is] a small federal court that operates as one travelling court for limited federal matters.[51]

Finally, criminal law, though codified as in America, is more streamlined in Canada. In other words, "being a criminal lawyer in Canada is easy because there is only one criminal law and procedure" adopted as federal law and applied in all of the country's provinces.[52]

Canadian courts do not recognize a general constitutional right to legal aid or appointed counsel for the indigent.[53] Despite this holding by the Supreme Court of Canada, there are certain circumstances in which Canadian courts recognize the right for a publicly-funded attorney for a criminal defendant.[54] The Ontario Court of Appeal held in *R. v. Rowbotham* that "sections 7 and 11(d) of the Charter do provide accused with the right to counsel in situations where lack of counsel would compromise their right to a fair trial."[55]

Nevertheless, Canada developed a system of legal aid in the 1970s based on a program instituted by the federal government, in which the provinces and national government entered a system of cost sharing.[56] From there, the provincial level of government, which holds jurisdiction over the administration of justice, maintains the funding and delivers legal aid in cases of "young persons facing proceedings under the Youth Criminal Justice Act," the economically disadvantaged facing criminal charges with the possibility of incarceration, individuals in certain provinces falling under the provisions of the Immigration and Refugee Protection Act, economically disadvantaged individuals facing terrorism prosecutions, and in federal prosecutions "where the Attorney General of Canada is ordered by the court to provide funded defence counsel."[57] Eligibility and specific services differ between provinces.[58]

---

[51] Bowal, *supra* note 44.

[52] *Id.*

[53] ERIKA HEINRICH, LAWYERS' RIGHTS WATCH CAN., CANADIAN JURISPRUDENCE REGARDING THE RIGHT TO LEGAL AID 1 (2013); *see* British Columbia (Attorney General) v. Christie, [2007] 1 S.C.R. 873 (Can.) (In which the Supreme Court of Canada held that "a review of the constitutional text, the jurisprudence and the history of the concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.")

[54] Rowbotham v. Regina, [1988] O.A.C. 321.

[55] HEINRICH, *supra* note 53, at 2.

[56] *Legal Aid Program*, GOV'T OF CAN. DEP'T OF JUSTICE (July 3, 2018), http://www.justice.gc.ca/eng/fund-fina/gov-gouv/aid-aide.html.

[57] *Id.*

[58] GOV'T OF CAN. DEP'T OF JUSTICE, *supra* note 56.

III. ANALYSIS

A. American Practices

At the state level, whether an indigent individual receives a lawyer at the bail hearing currently remains a creature of statute or rule.[59] However, there is discrepancy amongst the states. At this time, most states do not require the attorney's presence at the bail hearing.[60]

Currently, the federal courts require that an attorney be appointed in time to advocate during the bail hearing, but they do not necessarily require that attorney's presence at that proceeding.[61]

i. Sources of Law

In order to better understand the questions facing courts in the United States today, it is necessary to analyze the sources of law from which a mandated counsel for the indigent at bail hearings would derive. First and foremost, the Sixth Amendment provides the right to "have the assistance of counsel" in a criminal defendant's case-in-chief.[62] Beyond the Sixth Amendment, legal scholars have argued that additional underlying constitutional principles support mandating counsel at the bail hearing stage for indigent defendants.[63]

Nearly 200 years after its ratification, the Sixth Amendment received its grandest interpretive expansion in *Gideon v. Wainwright*.[64] This 1963 case resulted in the Supreme Court of the United States holding that "states have a constitutional obligation under the Fourteenth Amendment to provide Sixth Amendment lawyers to the indigent accused."[65] Although this right was initially presumed to only be applicable in felony criminal cases, the Supreme Court of the United States has gone on to hold that the right to appointed

---

[59] *See* Bunin, *supra* note 2, at 23.

[60] *See id.*

[61] *See id.*

[62] U.S. CONST. amend. VI.

[63] *See* Ginny Sloan, *Pretrial Justice Demands Accused Have a Lawyer for Initial Bail Hearing*, HUFFINGTON POST (July 20, 2015), https://www.huffingtonpost.com/ginny-sloan/pretrial-justice-demands_b_7833294.html ("The right to counsel at first appearance proceedings underlies basic constitutional rights for our nation's most vulnerable populations, including the assurance of equal treatment and due process.").

[64] Gideon v. Wainwright, 372 U.S. 335 (1963).

[65] *Effective Assistance at Critical Stages*, SIXTH AMENDMENT CTR., http://sixthamendment.org/the-right-to-counsel/effective-assistance-at-critical-stages/ (last visited Mar. 8, 2018).

counsel for the indigent encompasses misdemeanors with potential incarceration, as well as misdemeanors with suspended sentences.[66]

In 2008, the Supreme Court of the United States articulated that "the question of whether the right to counsel has attached is distinct from the question of whether a particular proceeding is a 'critical stage' at which counsel must be present as a participant."[67] In other words, a defendant has a constitutional right to an attorney only when the right to counsel has "attached," and the proceeding the defendant is facing is a "critical stage" of the prosecution.[68] This Note argues why a bail hearing definitively constitutes a critical stage later on in this analysis; however, for now it is important to take notice that "'[a]ttachment' occurs at the first formal, adversarial proceeding against the defendant, even if the procedure does not involve a prosecutor."[69] A bail hearing, despite its frequency and (in some jurisdictions) casual demeanor, is indeed one of the first formal adversarial proceedings against the defendant.[70] Therefore, without engaging in the critical stage discussion, we can affirm that at least the first step of the constitutional inquiry regarding the right to counsel's presence—that the right to counsel has attached—is satisfied at a bail hearing.[71]

Finally, in order to understand the basis for proposed remedies for a defendant deprived of counsel representation at a bail hearing, this Note turns to *United States v. Cronic*.[72] In this case, the Supreme Court of the United States held that there are two ways in which the right to effective assistance of counsel (as established in *McMann v. Richardson*[73]) is violated: by actual denial of counsel and by constructive denial of counsel.[74] This case further solidified that the absence of counsel at a "critical stage" of a defendant's prosecution would implicate a presumption of ineffectiveness.[75] Although intuitive, it is important to note that there is no valid claim of a Sixth Amendment right of effective assistance where no Sixth Amendment right to counsel is present.[76] Therefore, the remedy will not be available until courts recognize the legitimacy of the constitutional harm of depriving individuals of counsel at bail

---

[66] *Id.*

[67] *Id.*

[68] Gerstein, *supra* note 10, at 1514.

[69] *Id.*

[70] *How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pre-trial_appearances/.

[71] Gerstein, *supra* note 10, at 1523 ("Bail hearings are sufficiently formal and judicial to trigger attachment of the right to counsel.").

[72] United States v. Cronic, 466 U.S. 648 (1984).

[73] McMann v. Richardson, 397 U.S. 759 (1970).

[74] Cronic, 466 U.S. at 648.

[75] SIXTH AMENDMENT CTR., *supra* note 65.

[76] Wainwright v. Torna, 455 U.S. 586 (1982).

hearings. However, once the harm is recognized, the remedy will have sharp teeth, ready to bite at counsel's absence from a bail hearing.

ii. Open Questions of Law

a. What is a "Critical Stage"?

The requisite finding the Supreme Court of the United States needs to reach in order to create a mandated presence of legal counsel at the bail hearing is to unequivocally define that proceeding as a "critical stage" of the defendant's prosecution, since "no critical stage in a criminal case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of his right to counsel."[77] After *Gideon* was decided in 1963, the Supreme Court incrementally extended its ruling to guarantee indigent defendants the right to publicly appointed counsel in misdemeanor cases and specific pre-trial proceedings that were considered critical stages.[78] Over the next decade, the Supreme Court developed two strains of methodology that dominate critical-stage analysis doctrine.[79] While the ultimate question rests upon "whether denying counsel at a given stage has the potential to work an unfair outcome at the ultimate criminal trial," two cases that reached the high court portray two different ways to frame the analysis.[80] The pathway developed in 1967 when the court decided *United States v. Wade* is "whether counsel is necessary at the stage to secure the defendant's trial rights."[81] Six years later, the Court shifted its perspective in *United States v. Ash*, considering "whether counsel is necessary because the stage is sufficiently trial-like and tricky."[82]

The slow march toward the indigent's right to counsel came to a sudden halt in 1974 with the Supreme Court's decision in *Gerstein v. Pugh*, where it was held that there is no constitutional right to representation for an initial probable cause determination.[83] Despite this denial, the Supreme Court of the United States has never implied that there is a cap on which events can be considered critical stages, and they have explicitly held that the following definitively fall within the "critical" category: "custodial interrogations both before and after commencement of prosecution,[84] preliminary hearings prior to

---

[77] SIXTH AMENDMENT CTR., *supra* note 65.

[78] Gideon v. Wainwright, 372 U.S. 335 (1963); Colbert, *supra* note 11, at 336.

[79] Gerstein, *supra* note 10, at 1517.

[80] *Id.*

[81] *Id.*; United States v. Wade, 388 U.S. 218 (1967).

[82] United States v. Ash, 413 U.S. 300 (1973); Gerstein, *supra* note 10, at 1518.

[83] Gerstein v. Pugh, 420 U.S. 103 (1975).

[84] Brewer v. Williams, 430 U.S. 387 (1977); Miranda v. Arizona, 384 U.S. 436 (1966); Massiah v. United States, 377 U.S. 201 (1964).

commencement of prosecution where 'potential substantial prejudice to defendant[s'] rights inheres in the . . . confrontation', [85] lineups and show-ups at or after commencement of prosecution, [86] during plea negotiations and at the entry of a guilty plea, [87] arraignments,[88] during the pre-trial period between arraignment and the beginning of trial,[89] trials,[90] during sentencing,[91] direct appeals as of right,[92] probation revocation proceedings and parole revocation proceedings to some extent.[93]"[94]

On the foundation of the *Wade* and *Ash* methodology and exemplary proceedings already deemed critical stages, it seems likely that the Supreme Court of the United States should extend the category to encompass bail hearings.[95] In *Rothgery v. Gillespie County*, "[t]he justices' responses during oral argument suggest that the narrow issue decided . . . could indicate that the Court is ready to consider . . ." bail hearings as critical stages requiring the presence of counsel for the indigent.[96]

Regardless of how the Supreme Court chooses to frame the question today, a bail hearing would likely satisfy both the *Ash* and *Wade* methods, since the Court already recognized "[i]n today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[97] Empirical evidence indicates that "pretrial detention puts defendants at a profound disadvantage in plea negotiations," since "approximately 17% of the detained misdemeanor defendants who pleaded guilty would not have been convicted at all but for their detention."[98] By the Supreme Court's standards, these plea negotiations at the bail hearing

---

[85] Coleman v. Alabama, 399 U.S. 1 (1970).

[86] Moore v. Illinois, 434 U.S. 220 (1977); Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967).

[87] Lafler v. Cooper, 566 U.S. 156 (2012); Padilla v. Kentucky, 559 U.S. 356 (2010); McMann v. Richardson, 397 U.S. 759 (1970).

[88] Hamilton v. Alabama, 368 U.S. 52 (1961).

[89] Brewer v. Williams, 430 U.S. 387 (1977); Powell v. Alabama, 287 U.S. 45 (1932).

[90] Alabama v. Shelton, 535 U.S. 654 (2002); Argersinger v. Hamlin, 407 U.S. 25 (1972); In re Gault, 387 U.S. 1 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963).

[91] Lafler v. Cooper, 566 U.S. 156 (2012); Wiggins v. Smith, 539 U.S. 510 (2003); Glover v. United States, 531 U.S. 198 (2001); Mempa v. Rhay, 389 U.S. 128 (1967).

[92] Halbert v. Michigan, 545 U.S. 605 (2005); Douglas v. California, 372 U.S. 353 (1963).

[93] Gagnon v. Scarpelli, 411 U.S. 778 (1973). *But see* Morrissey v. Brewer, 408 U.S. 471 (1972).

[94] SIXTH AMENDMENT CTR., *supra* note 65.

[95] United States v. Ash, 413 U.S. 300 (1973); United States v. Wade, 388 U.S. 218 (1967).

[96] Rothgery v. Gillespie County, Tex., 554 U.S. 191 (2008); Colbert, *supra* note 11, at 335.

[97] Ash, 413 U.S. at 300; Wade, 388 U.S. at 218. Missouri v. Frye, 566 U.S. 134, 144 (2012).

[98] Heaton et al., *supra* note 8, at 776.

stage made the bail hearing itself a critical stage because, under *Ash*, it became trial-like (entering a disposition), and under *Wade*, it made a potentially unfair impact to the ultimate trial stage since convictions were entered not for proof of guilt but for escape from detention.[99]

Furthermore, in *Coleman v. Alabama*, "the Court concluded that an Alabama preliminary hearing was a critical stage for reasons that could also apply to bail hearings."[100] In this case, the Supreme Court observed that preliminary hearings invite a defense attorney to "expose fatal weaknesses in the state's case, learn about the allegations in order to prepare 'a proper defense,' and make 'effective arguments' for an early psychiatric examination or release"—all viable advocacy postures counsel at a bail hearing can take as well.[101] *Coleman* serves as strong precedent for the bail hearing as a critical stage argument, and stare decisis dictates that legal arguments of nearly identical contours should receive judicial respect as well.[102]

Persuasively, since the Supreme Court's decision in *Rothgery*, both Connecticut and New York highest courts have held that bail hearings are critical stages requiring the presence of publicly appointed counsel for the indigent.[103] Trial and appellate-level state courts have made the same finding as well.[104] However, not all jurisdictions have reached the same conclusion. "Three states have interpreted *Rothgery* to not require counsel to be present at a defendant's pretrial release decision,"[105] since the right to counsel does not attach until after that decision is made, necessarily meaning the bail hearing itself cannot be a critical stage after the right to attach.[106] Additionally, *Gerstein v. Pugh* appears to quash the issue at hand.[107] In this case, the Supreme Court held that while "pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense, . . . this does not present the high probability of substantial harm identified as controlling in *Wade* and

---

[99] Ash, 413 U.S. at 300; Wade, 388 U.S. at 218.

[100] Heaton et al., *supra* note 8, at 775 (citing Coleman v. Alabama, 399 U.S. 1 (1970)).

[101] *Id.*

[102] *Id.*; Coleman, 399 U.S. at 1.

[103] Hurrell-Harring v. State, 930 N.E.2d 217, 223 (N.Y. 2010); Gonzalez v. Comm'r of Correction, 68 A.3d 624, 63536 (Conn.), cert. denied, 134 S. Ct. 639 (2013).

[104] *See* Ditch v. Grace, 479 F.3d 249, 253 (3d Cir. 2007); State v. Fann, 571 A.2d 1023, 1030 (N.J. Super. Ct. App. Div. 1990); State v. Detter, 260 S.E.2d 567, 583 (N.C. 1979).

[105] People v. Rojas-Ruiz, No. 2-14-1129 Il. App. (2d) LEXIS 141129-U (Ill. App. Ct. May 16, 2016); Ex parte Cooper, 43 So. 3d 547 (Ala. 2009); People v. Hurt, No. 301915, 2013 WL 2120275, at *12-13 (Mich. Ct. App. May 16, 2013).

[106] SARA SAPIA, NAT'L CTR. FOR STATE COURTS' PRETRIAL JUSTICE CTR. FOR COURTS, ACCESS TO COUNSEL AT PRETRIAL RELEASE PROCEEDINGS 1 (2016), https://www.ncsc.org/~/media/microsites/files/pjcc/pretrial%20counsel%20brief%207.ashx (last visited Sept. 28, 2019); Rothgery v. Gillespie County, Tex., 554 U.S. 191 (2008).

[107] Gerstein v. Pugh, 420 U.S. 103, 123 (1975).

Coleman."[108] However, since this decision was announced in 1974, there has been an expansion in relevant empirical data and qualitative research, which might provide helpful guidance to the Court in recognizing the true ramifications of bail proceedings.[109]

b. Is There a Non-Constitutional Remedy?

The final open question for American state and federal courts regarding mandated counsel at bail is how to remedy the harm caused by such a lack of representation. As previously discussed, should the Supreme Court of the United States finally acknowledge a bail hearing rightfully as a "critical stage" in the prosecution, the absence of counsel at a bail hearing would automatically trigger a remedy through a claim of ineffective assistance of counsel under the Sixth Amendment as held in *Cronic*.[110] Until then, it appears that individuals face a rocky, unpaved road in seeking relief. First of all, individuals are often unaware that it is their duty to request counsel at the initial hearing, so typically this issue is not preserved if they have not explicitly been made aware of that right.[111] Even if they have properly preserved the issue by requesting counsel at the initial hearing, relief is not guaranteed since some cases require a showing of prejudice when there is a claim of violation of the right to counsel.[112] Moreover, "[a]ctual prejudice may be difficult to attribute because causation between pretrial detention and an unfavorable disposition—while statistically significant—is difficult to show in any particular case."[113] Therefore, constitutional litigation is very rare over the denial of counsel at bail hearings while still in the criminal trial or post-conviction appeal stage.[114]

There is a glimmer of hope for defendants who suffered as a result of a lack of representation at their bail hearings. Civil lawsuits featuring attacks on "systemic violations, not individual defendants appealing criminal convictions," have found more success within the legal system.[115] However, these suits are often brought by third-party non-profit organizations like the

---

[108] *Id.* (citing United States v. Wade, 388 U.S. 218 (1967); Coleman v. Alabama, 399 U.S. 1 (1970)).

[109] Gerstein, 420 U.S. at 123.

[110] United States v. Chronic, 466 U.S. 648 (1984).

[111] *See* Bunin, *supra* note 2, at 26.

[112] Mickens v. Taylor, 535 U.S. 162 (2002); *c.f.* United States v. Gonzalez-Lopez, 548 U.S. 140 (2006); *see also* Bunin, *supra* note 2, at 26 ("Standing alone, denying counsel at a pretrial bail hearing is unlikely to be held as a basis to presume a defendant did not get a fair trial.").

[113] Bunin, *supra* note 2, at 26.

[114] *Id.*

[115] *Id.*; *see, e.g.*, Rothgery v. Gillespie County, Tex., 554 U.S. 191 (2008); Hurrell-Harring,v. State, 930 N.E.2d 217 (N.Y. 2010).

American Civil Liberties Union and state-run civil rights groups, whose limited financial resources and man-power make it impossible to provide advocacy for all of those who are injured as a result of bail hearings without counsel.[116] While civil litigation has opened the door for vindicating defendants' rights, it will continue to only serve as a limited proxy for the true constitutional claims these individuals have a right to bring.

B. Canadian Practices

In the United States Supreme Court's decision in *Gideon v. Wainwright*, the Court recognized that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[117] Canada has grappled with its value of the fair processes of criminal prosecutions, while acknowledging that the nation has no constitutional right to appoint such representation for the indigent who cannot afford representation for themselves.[118] While certain pilot programs discussed later in this Note have implemented publicly appointed counsel for the indigent at bail hearings, most provinces require the defendant to represent himself or herself at the proceeding.[119]

i. Sources of Law

While the Canadian constitution does not provide the right to publicly appointed counsel for the indigent[120], it does guarantee the right to not be denied reasonable bail without just cause.[121] Further, although "[l]egal aid for needy persons in criminal matters in Canada is somewhat in the embryo stage at the present time," there are legal sources to support the steadily increasing trend toward government-funded representation, specifically at the bail hearing stage.[122]

The Supreme Court of Canada has yet to rule on this issue explicitly, but Ontario provincial courts have held that section 10(b) of the Canadian Charter of Rights and Freedoms (a bill of rights entrenched within the Constitution of

---

[116] Bunin, *supra* note 2, at 26.

[117] Gideon v. Wainwright, 372 U.S. at 344.

[118] *See* Rowbotham v. Regina, [1988] O.A.C. 321.

[119] *Alberta Government Makes Legal Aid Lawyers Available at Bail Hearings*, CBC (Apr. 18, 2018), https://www.cbc.ca/news/canada/calgary/alberta-legal-aid-bail-hearings-available-1.4625535.

[120] Rowbotham, [1988] O.A.C. 321.

[121] Canadian Charter of Rights and Freedoms, Part I of The Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 10, §§ 7, 10(b), 11(d) (Can.) [hereinafter Charter].

[122] William B. Common, *The Administration of Criminal Justice in Canada*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 2, 11 (1952).

Canada, drafted in 1982), when read in conjunction with sections 11(d) and 7, imposes the right to legal aid when doing so is essential to trial fairness.[123] On the basis of this language, Canadian courts have delineated three factors which invoke the requisite representation of publicly appointed counsel.[124] First, the accused defendant must not be able to afford his or her own representation, as determined through the presence of an affidavit.[125] Next, the accused in the criminal context must face a threat to his or her life, liberty, or security of person, typically meaning a threat of jail time.[126] Finally, the accused cannot have the ability to effectively participate in the hearing without the assistance of a lawyer.[127] This is a subjective, context-specific consideration made by the court.[128] Further, the province will only fund the defendant's counsel in cases where doing so is "essential to trial fairness where the charges are sufficiently serious and complex."[129] Therefore, the court will consider the "accused's age, intelligence, education and employment background, their ability to read, their communication skills and whether they suffer from any disabilities such as mental illness or addictions" in deciding if government-appointed counsel is necessary.[130] All three of these predicates must be satisfied to trigger a provincially funded defense; if they are established, the right to an appointed lawyer is constitutionally guaranteed.[131]

Unfortunately, there is a major limitation in this legal analysis as applied to bail hearings. First, meeting these conditions does not constitute a right to immediate representation at the time of an arrest.[132] More consequentially, courts have held that the right does not include a guarantee to counsel's presence at all stages of a criminal prosecution.[133] This is a major hurdle advocates must overcome in efforts to reach a mandated presence of counsel at Canadian bail hearings.

However, certain precedents provide an optimistic view of rights of the accused in Canada. In *Queen v. Prosper*, the Supreme Court of Canada faced the question of whether "section 10(b) of the Charter imposed a positive constitutional obligation on governments to ensure that free and immediate

---

123 Charter at §§ 7, 10(b), 11(d); R. v. Smart, [2014] ABPB 175, para 47 (Can.).

124 Smart, [2014] ABPB 175 at para 47.

125 *Id.*

126 *Access to Justice as a Right*, ALTA. C.L. CTR., http://www.aclrc.com/new-page/ (last visited Sept. 28, 2019).

127 *Id.*

128 *Id.*

129 *Id.*; *see* Rowbotham v. Regina, [1988] O.A.C. 321.

130 ALTA. C.L. CTR., *supra* note 126; R. v. Smart, [2014] ABPB 175, para 160 (Can.).

131 Regina, [1988] O.A.C. 321 at para 156.

132 R. v. Prosper, [1994] 3 S.C.R. 236 (Can.).

133 *See generally* Rowbotham, [1988] O.A.C. 321.

preliminary legal advice is available upon arrest or detention."[134] While the Court ultimately decided there was no such constitutional right, it did find that in jurisdictions with duty counsel (lawyers paid by the provincial government who provide limited information, guidance, and advice prior to an unrepresented defendant's court appearance), if a duty counselor is unavailable at the exact time of detention, section 10(b) requires the province to "hold off" from inquiring for evidence from a detainee until he or she is present and available.[135] Notably, this decision did not imply these duty counselors were constitutionally mandated; it only went so far as to decide that "the non-existence or unavailability of such services could, in some circumstances . . . give rise to issues of fair trial."[136] This case indicates the Court's acknowledgement of the benefits of pre-trial legal assistance and the ramifications it can have on long-term trial results.[137] Potentially burdensomely for this Note's argument, the case also illustrates recognition of the Canadian Charter's framers' intent to limit interference with limited public funds by expanding these services beyond a manageable scope.[138]

Furthermore, the potential for Canadian courts to take into account additional considerations for providing publicly appointed counsel is exemplified in *Queen v. Hill*.[139] In this case, the defendant was charged with driving while intoxicated. Although he petitioned twice to receive the assistance of legal aid, he was denied both times.[140] The defendant argued to the Ontario Court of Justice that although there was little chance a conviction at trial would result in incarceration time (as earlier mentioned, a necessary factor in obtaining publicly funded counsel in Canada), forcing him to go to trial without the assistance of counsel would nonetheless violate his section 7 guarantees.[141] In advocating for his position, the defendant argued that if he was ultimately convicted, the resulting criminal record would affect his ability to find a job, and the monetary fines would result in a "significant penalty" given his status as a welfare recipient.[142] In reaching its decision, the Court held that "[o]ther factors in the right to counsel analysis should include the penalties, both

---

[134] Prosper, [1994] 3 S.C.R. 236; Dorothy Nicole Giobbe, *Legal Aid and the Right to Counsel Under Canada's Charter of Rights and Freedoms*, 25 BROOK. J. INT'L L. 205, 225 (1999); Charter at §10(b); *see also* SIMON VERDUN-JONES & ADAMIRA TIJERINO, A REVIEW OF BYRDGES: DUTY COUNSEL SERVICES IN CANADA (2015), http://justice.gc.ca/eng/rp-pr-csj-sjc/jsp-sjp/rr03_la4-rr03_aj4/rr03_la4.pdf.

[135] Prosper, [1994] 3 S.C.R. at 269; Charter at §10(b).

[136] *Id.* at 274.

[137] *Id.*

[138] *Id.* at 267.

[139] R. v. Hill, [1996] O.J. No. 677.

[140] *Id.* at 347.

[141] *Id.*

[142] *Id.* at 348.

financial and social, that might result from conviction." [143] Considering the social issues raised by the defendant, amongst the other Charter factors, the court decided that he was entitled to publicly funded counsel at his trial.[144]

While this holding is obviously limited to the defendant's request for counsel at his actual trial, many of the social policy issues that persuaded the court on Hill's behalf are applicable at the bail hearing proceeding. Hill raised concerns of the stigma of a criminal record in searching for employment, as well as the compounded difficulties the poor encounter when saddled with further pecuniary punishments.[145] Pre-trial detainment and decisions at the bail-hearing stage of a criminal prosecution in Canada present all these same issues, as the Supreme Court of Canada recognized in *Prosper*.[146] These two cases, in conjunction with the underlying principles of the Canadian Charter and values of the national system of justice, provide solid starting points, albeit limited, as sources of law in the quest toward mandated presence of counsel for the indigent at bail hearings from a constitutional standpoint in Canada.[147] By leaning into these arguments, coupled with the success of provincial pilot programs outlined later on in this Note, Canadian attorneys (most likely Legal Aid counsel) have the potential to indicate that this movement requires recognition of the importance of counsel at bail hearings so that there is no option but to recognize a right to legal counsel as a fundamental human right preserved in the Canadian Charter.[148]

ii. Open Questions of Law

The Canadian right to publicly appointed counsel is still in its infancy, so the question of when and where these attorneys for the indigent should be provided is still unclear, leaving the space for legal advocacy wide open. In shaping this discussion, the Canadian provinces will over time articulate clearer distinctions of providing or rejecting public counsel at certain stages, which will allow the seriousness of a bail hearing to take superiority in the necessity of presence of counsel for the poor, just as the United States has done through its critical-stage inquiry doctrine.

C. Commonalities

Canada and the United States have significant similarities in terms of judicial philosophy, movements in this area of criminal justice reform, and

---

[143] *Id.*
[144] *Id.* at 354.
[145] *Id.* at 348.
[146] Prosper, [1994] 3 S.C.R. 236, 256 (Can.).
[147] *Id.*; R. v. Hill, [1996] O.J. No. 677; Charter at §10(b).
[148] Charter at §10(b).

specific legal analysis techniques. Studying these commonalities provides a strong basis when considering how the movements of one country can help shape the future of this issue in the other.

First, and perhaps the most esoteric of the North American nations' likenesses, both Canada and the United States have at their cores a recognition of the value of fundamental human rights. Looking at the constitutional language of both nations demonstrates a vested governmental interest in ensuring the protection of the most democratic and important rights of mankind:

> "We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."[149]

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[150]

Beyond mirrored language and common democratic purposes, these documents demonstrate an underlying dedication to certain principles which shape the judiciary in each country. While this might seem like a somewhat insignificant and mysterious likeness to draw upon in making discrete legal arguments, such as that for mandatory presence of counsel for the indigent at bail hearings, it is from these texts which all legal arguments in Canada and the U.S. find their deepest, most impenetrable roots. It is from these texts, written by framers with near identical missions of heart and ideals despite over a hundred- year difference in authorship, from which small, incremental steps in the law derive. It is from these texts and this recognition of fundamental human rights that the right to publicly appointed counsel in certain circumstances was discovered in each nation. "Publicly-subsidized legal services for indigent citizens are considered a critical element of modern Democratic legal systems," and, as both constitutional texts purport through augmented legal reasoning, "[s]ubsidized legal assistance is predicated on notions of fundamental fairness and on the principle that equality of justice is meaningless without access to justice."[151] It is from this belief, these documents, and these continually shaped legal theories that the extension to representation for the poor will be expanded to encompass representation at bail hearings in both countries.

---

[149] U.S. CONST. pmbl.

[150] Charter at c 7.

[151] Giobbe, *supra* note 134, at 205.

Next, decisions already made by courts from both countries indicate an increased willingness to provide broader publicly appointed defense for the indigent. Like the United States, where case law has expanded the role of a public defender throughout the process of a criminal prosecution, Canada has made strides toward implementing greater protections for poor defendants, despite the lack of constitutional basis.[152] Although the constitutional right to a public defender-like system was turned down in *Crown v. Prosper*, protections ensuring the presence of duty counselors, if made available by a particular jurisdiction, were upheld by the Supreme Court of Canada.[153] This holding shows a willingness to broaden, however slightly, defendants' rights in conjunction with publicly appointed legal aid.[154] Additionally, the federal government in Canada provided $112 million to the provinces and territories in 2013 in order to support their provincially run Legal Aid programs, contributing to the more than $823 million spent each year for these structures, 92% of which comes from direct government funding.[155] Although funding in the United States far surpasses this amount at an estimated $5.3 billion in 2008, the amount of criminal cases prosecuted in the U.S. versus Canada demonstrates that Canadian governments are possibly spending more money per capita on indigent defense than the United States, given the population disparity between the two nations.[156] This demonstrated fiscal commitment suggests that Canada takes the value of Legal Aid seriously in the same way that the United States does. Should Canadian advocates for representation at bail begin to fail in the courts, there is possibility for them to succeed legislatively.

Perhaps the most overt commonality between the two nations' jurisprudence on this matter is the prospective arch of the analysis in determining the

---

[152] *See id.* at 223 ("*Rowbotham* and its progeny present a helpful course for a Charter-based challenge to the current legal aid restrictions. Where indigent citizens are unable to obtain assistance from legal aid, forcing them to proceed to trial without counsel or to represent themselves will, in many cases, be violative of the Charter according to the *Rowbotham* analysis. Although no court in Ontario (or anywhere in Canada) has ventured so far as to state that the right to counsel for indigent defendants is absolute, where the charges are serious and complex, and an unfair trial would result if counsel were not appointed, the Charter-based right to a stay of proceeding until funded counsel is appointed, articulated in *Rowbotham* and successive cases, is built on a strong foundation.") (citing Rowbotham v. Regina, [1988] O.A.C. 321, para. 183).

[153] Prosper, [1994] 3 S.C.R. 236, 256 (Can.).

[154] *Id.*

[155] MANON DIANE DUPUIS, LEGAL AID IN CANADA, 2013/2014 3 (2015).

[156] *Id.*; *Crime Statistics for 2013 Released*, FBI (Nov. 10, 2014), https://www.fbi.gov/news/stories/crime-statistics-for-2013-released. In 2013, there were 360,640 cases completed in adult criminal court in Canada with almost 1.1 million charges brought. Meanwhile, that same year in the United States, 11,302,102 arrests were made. While not every arrest leads to prosecution, and it can take years between the bringing of charges and the completion of a case, nevertheless, the disparity by the millions in these two figures suggest that Canadian spending is equivalent, if not superior, to United States indigent defense spending.

appropriateness of representation by publicly appointed counsel. The courts of Canada and the United States alike focus not on the pre-trial proceeding in front of them in making such decisions, but instead they each consider the ultimate ramifications this particular moment could have on the ultimate trial outcome. In the United States, both the *Ash* and *Wade* methodologies developed by the Supreme Court turn on whether the stage at hand, without representation, could result in a negative impact at the eventual criminal trial for the defendant.[157] Similarly, as demonstrated in *Hill* and *Prosper*, a subjective inquiry into the defendants' ability to represent themselves with a sufficient understanding of the legal complexities at a trial, coupled with a consideration of the non-confinement repercussions of a guilty conviction, exemplifies Canada's concern for the future hardships that could result from the disposition of a criminal case.[158]

While these standards allow for incremental steps of cautious judicial expansion, as mentioned above, they both seem to miss the mark. These doctrines appear to enable a narrow vision of the issue at times, confining the only negative repercussions of a prosecution to the ultimate outcome. By these courts' logic, a guilty verdict results in a defendant becoming shackled with the enormities and burdens of the criminal justice system, and a finding of not guilty means you walk away. However, the stories of any person who has found themselves an accused in a criminal case, including Mr. Rothgery, Mr. Prosper, and Mr. Hill, inform us that the financial, social, emotional, and mental fallout began long before any verdict was announced by the court.[159]

Canada and the U.S. are two countries which have endowed their citizens with enumerated rights through documents forged in iron pen.[160] As two of the most sophisticated, developed, and fair criminal justice systems in the world, it is necessary for these legal communities to call upon their respective nations' courts to ensure the tests used are truly just methodologies that protect the freedoms and liberties granted to each country's citizens.[161] Bail hearings seem to be a natural next step for mandating representation, in both the

---

[157] United States v. Ash, 413 U.S. 300 (1973); United States v. Wade, 388 U.S. 218 (1967).

[158] R. v. Prosper, [1994] 3 S.C.R. 236 (Can.); R. v. Hill, [1996] O.J. No. 677.

[159] Rothgery v. Gillespie County, Tex., 554 U.S. 191 (2008); Prosper, [1994] 3 S.C.R. at 236; Hill, [1996] O.J. No. 677.

[160] *See* NATIONAL TREASURE (Walt Disney Pictures 2004); Walter S. Tarnopolsky, *The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms*, 44 L. & CONTEMP. PROBS. 170 (1981); GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 522 (1854), *available at* http://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/History-of-Constitution_Vol-II.pdf.

[161] *Rule of Law Index 2017-2018: United States*, WORLD JUST. PROJECT, http://data.worldju sticeproject.org/#/groups/USA (last visited Oct. 29, 2018); *Rule of Law Index 2017-2018: Canada*, WORLD JUST. PROJECT, http://data.worldjusticeproject.org/#/groups/USA (last visited Oct. 29, 2018).

U.S. and also in Canada, when considering the embodying principles of the Constitution and the Charter, coupled with the temperament encompassed within the courts' current jurisprudence in determining whether the presence of appointed counsel is necessary.

D. Distinctions

The largest distinction between Canada and the U.S.'s potential for mandated counsel for the indigent at bail hearings is the lack of a basis in Canada's Charter for the right to an attorney if you are too poor to afford one.[162] This, admittedly, puts American proponents at a huge persuasive advantage in their advocacy. Even the most conservative courts in the U.S. will lend an ear to arguments that seem reasonably grounded within Sixth Amendment jurisprudence, since it is their duty to do so. Engaging in the critical stage analysis and persuading courts to find bail hearings encompassed within the category leads to the finding that there is a legally binding force extending the constitutional right to a public defender to the bail hearing stage. At this time in Canada, the law does not appear ready to make such a transition with the same ease.

Nevertheless, factors like the continued expenditures dedicated to Legal Aid, expansions of duty counsel programs, and shifts in the scope of the right to publicly appointed counsel demonstrate reasonable grounds for Canadian courts to continue making small incremental shifts toward the end goal. Additionally:

> Although no court in Ontario (or anywhere in Canada) has ventured so far as to state that the right to counsel for indigent defendants is absolute, where the charges are serious and complex, and an unfair trial would result if counsel were not appointed, the Charter-based right to a stay of proceeding until funded counsel is appointed, articulated in *Rowbotham* and successive cases, is built on a strong foundation.[163]

This strong foundation shows a promise, despite the lack of constitutional backing, to continue to support expansions of the rights of the poor to publicly appointed counsel, including at the bail hearing stage in a criminal prosecution.

A huge persuasive help for the Canadian judiciary would be for the Supreme Court of the United States to make a solidified standing on this issue. Just as bail reform in Canada was inspired by the Manhattan Bail Project, a

---

[162] *See* Rowbotham v. Regina, [1988] O.A.C. 321, para. 183.

[163] Giobbe, *supra* note 134, at 223.

pronounced judicial stand on this issue, coupled with similar policy concerns, could serve as a stepping stone to Canadian holdings as well.[164]

E. Policy and What We Can Learn from Each Other

Today in America, millions of indigent defendants engage in bail hearings each year, and most do so without the presence of counsel.[165] Of the 700,000 people in jail every day in America, those awaiting trial account for 60% of the inmate population.[166] Additionally, despite the decline of crime rates in Canada for decades, greater numbers of people than ever before are being detained without bail, and these cases are taking longer to process.[167] In other words, "less people are being released on bail, less quickly, and with more conditions, during a time of historically low and still-declining crime rates."[168] While at a superficial level these proceedings can be seen as standardized and not a space where zealous advocacy is necessary, "a bad outcome at a bail hearing can force an indigent defendant to plead guilty," in order to avoid sitting in jail when they cannot afford to post bail.[169] This delay, which can last a handful of days or even months, irreparably affects a potentially innocent defendant's ability "to investigate, speak to witnesses, evaluate the charges in a timely manner, and prepare a defense."[170] This harm is not just speculative; there is empirical data suggesting that the absence of counsel has a definitive negative effect on pre-trial detainees.[171] In fact, there is evidence showing that effective advocacy by a lawyer at a bail hearing is the single-

---

[164] *See*, *e.g.*, Frank N. Williams, *The Toronto Bail Project*, 6 OSGOODE HALL L. J. 316 (1968).

[165] *See*, *e.g.*, Gerstein, *supra* note 10, at 1513.

[166] Sloan, *supra* note 63.

[167] THE CTR. OF RESEARCH, POLICY & PROGRAM DEV. AT THE JOHN HOWARD SOC'Y OF ONT., REASONABLE BAIL? 3 (2013), http://johnhoward.on.ca/wp-content/uploads/2014/07/JHSO-Reasonable-Bail-report-final.pdf.

[168] *Id.*

[169] *See*, *e.g.*, Gerstein, *supra* note 10, at 1515.

[170] THE CONSTITUTION PROJECT NAT'L RIGHT TO COUNSEL COMM., DON'T I NEED A LAWYER?: PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 5 (2015), https://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf.

[171] *See*, *e.g.*, Gerstein, *supra* note 10, at 1516 ("[A]ccording to a study in Baltimore, defendants with counsel are more than twice as likely to be released on their own recognizance. And, when represented defendants are granted bail, it is on average around six hundred dollars less than what is set for unrepresented defendants. Appointing counsel at bail hearings, then, will substantially reduce the amount of time a substantial number of indigent defendants spend in jail awaiting their trials. And that will cut down on the number of plea deals those defendants have to take just to get out of jail—regardless of their guilt or innocence.").

most critical factor for a criminal defendant, particularly the indigent.[172] In terms of proper judicial decision-making relating to pre-trial release, defendants charged with misdemeanors and non-violent crimes are two and a half times as likely to be released on recognizance when represented by an attorney at their bail hearings. [173] This is likely because a lawyer will be able to "emphasize that a client's limited financial resources impair his ability to pay an ordered bail amount, and instead point to factors that demonstrate sufficient trust to be supervised by a pretrial agent or receive an unsecured financial bond," an argument many indigent defendants are unable to articulate on their own behalf, within the intimidating formalities of the courtroom.[174] Those subjected to pretrial detainment suffer from a dramatically increased "likelihood of a jail or prison sentence, increases potential recidivism, and decreases the chance for dismissed charges, an acquittal, or a noncustodial sentence."[175]

Additionally, in Canada, those who are poor or suffering from addiction and mental health issues struggle to obtain bail, given that they are usually required to find a "surety" with great financial assets, and these individuals are typically those who do not have the network of such associates who would qualify for this purpose.[176] By both the legal analysis standards of the U.S. and Canada, this is proof that pre-trial bail hearings have a measurable impact on the overall trial outcome, and as such should require the presence of publicly appointed counsel.

These negative repercussions are felt beyond even the individual defendants themselves; there is a greater societal and pecuniary impact as well. Despite Canada's lower-than-ever crime rate, "significant expenditures on criminal justice processes" fall "on the taxpayers' dime," including "hundreds of millions of dollars [spent] detaining legally innocent people every year."[177] American studies have also acknowledged how unnecessary incarceration of individuals posing no safety threat to the public, but who "simply [are] unable to effectively advocate for themselves," results in needless spending of American taxpayer dollars.[178] In addition to pre-trial incarceration spending

---

[172] THE CTR. OF RESEARCH, POLICY & PROGRAM DEVELOPMENT AT THE JOHN HOWARD SOCIETY OF ONTARIO, *supra* note 167, at 11.

[173] *Id.*

[174] *Id.* at 12.

[175] Bunin, *supra* note 2, at 26.

[176] THE CTR. OF RESEARCH, POLICY & PROGRAM DEV. AT THE JOHN HOWARD SOC'Y OF ONT., *supra* note 167, at 12.

[177] *Id.*

[178] THE CONSTITUTION PROJECT NAT'L RIGHT TO COUNSEL COMM., *supra* note 170, at 1. For more on increasing political support from both sides of the aisle for the public defender system, see Alysia Santo, *How Conservatives Learned to Love Free Lawyers for the Poor,* POLITICO MAG. (Sept. 24, 2017), https://www.politico.com/magazine/story/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the-poor-215635; *The State of Justice Reform 2017: As Public Defense Faces Crises, Supportive Bipartisan Coalitions Emerge*,

savings, the availability of lawyers at pre-trial bail hearings would also result in effective advocacy for alternative resolution programs, such as deferred sentencing, drug courts, or veterans courts, earlier in the prosecution of indigent defendants.[179]

The value of publicly appointed lawyers at bail hearings goes beyond numbers: In pilot programs implemented in America and Canada, success has been found, and continued use of these systems is encouraged within the jurisdictions. In April 2018, the Alberta government made Legal Aid lawyers available at all bail hearings.[180] Through these efforts, the Alberta government expressed a desire for their citizens to understand their rights and to reduce backlogs holding up their court system.[181] In an extension from previous duty counsel, who in some jurisdictions are already provided to talk through legal issues and proceedings with defendants, including at the bail hearing stage, these lawyers will now be able to represent the clients during their actual hearing on the record.[182]

As seen in certain Candadian jurisdictions, the presence of duty counsel might serve as a low-cost utilitarian solution that American courts could consider implementing a version of. Duty counsel, as mentioned earlier, are available in certain jurisdictions and provide free limited basic legal consultation at certain proceedings, including bail hearings.[183] Although full representation is not guaranteed, this system allows trained attorneys to talk through implications of certain proceedings with clients so they have a greater understanding of their criminal prosecutions, and it gives lawyers the chance to emphasize facts that defendants should try to raise when they present their cases.[184]

Ottawa has also made steps toward practical bail reform initiatives, including hiring a full-time duty counsel who serves as a bail coordinator in the courthouse, assigning a lawyer to detention centers for the purposes of readily answering questions, as well as helping facilitate the application for legal aid, and adding "bail beds," which provides housing for low-risk offenders within the community while they await their trial.[185]

VERA INST., https://www.vera.org/state-of-justice-reform/2017/the-state-of-public-defense (last visited Sept. 28, 2019).

[179] *See* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE Standard 10-1.2 (2007) ("Release under least restrictive conditions; diversion and other alternative release options.").

[180] *Alberta Government Makes Legal Aid Lawyers Available at Bail Hearings*, *supra* note 120.

[181] Lauren Krugel, *Albertans to Have Access to Legal Aid Lawyers at 1st Appearance Bail Hearings*, GLOBAL NEWS (Apr. 18, 2018), https://globalnews.ca/news/4153427/alberta-legal-aid-lawyers-bail-hearing/.

[182] *Id.*

[183] Melanie Webb, *38-4-F7 – Making the Case for Bail Reform*, 38 FOR DEF. 41, 47 (2017).

[184] *Id.*

[185] *Id.*

In the U.S., pilot programs have shown that implementation of mandated counsel for the indigent at bail hearings is not only possible, but it is also effective. In the mid-1980s, an experiment in Baltimore assigned student lawyers to certain defendants at bail hearings.[186] Those criminal defendants who had the advocacy of a law student had an increased chance for a personal recognizance bond and reduced time ultimately spent in jail.[187]

The passage of twenty-some years has only shown an increasing proclivity to recognize the value of representation by lawyers at bail hearings in certain jurisdictions. In 2016, Harris County, Texas, as part of a proposal to the MacArthur foundation, sought to make lawyers available at probable cause hearings for the mentally ill so that the accused could be diverted to treatment programs rather than prison.[188]

Multiple counties in Michigan have also taken steps toward providing publicly appointed counsel at bail hearings.[189] In Ingham county, data showed that "providing counsel at first appearance proceedings is possible and practical, so long as adjustments are made to accommodate attorney scheduling conflicts."[190] Through the implementation of its First Appearance Project, which scheduled public attorneys on shifts so they would be available for all bail hearings on a particular day instead of running between courtrooms for different clients they are assigned, major positive breakthroughs were recorded.[191] These included reductions in failures to appear, hypothesized to be as a result of defendants being less intimidated by the court and therefore more likely to come back, as well as a decrease in pre-trial guilty and nolo pleas when defendants were represented by counsel.[192]

Another version of a bail reform program providing counsel to indigent defendants also calls for the setting to change to a more public, community-oriented venue.[193] This suggestion encompasses the traditional role of a lawyer and the benefits that follow suit while also encouraging including the

---

[186] Heaton et al., *supra* note 8, at 777; *see* Douglas L. Colbert et al., *Do Attorneys Really Matter?: The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1772 (2002).

[187] Bunin, *supra* note 2, at 25.

[188] Meagan Flynn, *Bail Hearings: Where Prosecutors and Magistrates Ensure Defenseless People Stay in Jail*, HOUSTON PRESS (Jan. 11, 2016), https://www.houstonpress.com/news/bail-hearings-where-prosecutors-and-magistrates-ensure-defenseless-people-stay-in-jail-8058308 (Note: The proposal was subsequently granted; *see* Andrew Kragie, *Harris County's Rollout of New Bail System Faces Delay*, HOUSTON CHRONICLE (July 3, 2017), https://www.houstonchronicle.com/news/houston-texas/houston/article/Start-up-delays-hit-Harris-County-bail-system-11264545.php.).

[189] THE MICH. INDIGENT DEF. COMM'N, COUNSEL AT FIRST APPEARANCE AND OTHER CRITICAL STAGES 8 (2017).

[190] *Id.*

[191] *Id.* at 8-9.

[192] *Id.* at 9.

[193] Sloan, *supra* note 63.

presentations of mitigating factors by neighborhood members and family in these proceedings. This system precludes impositions of financial constraints on economically disadvantaged defendants and increases the data collection of the disposition of cases amongst other factors, including whether a court-appointed lawyer was made available or not, and study the correlated effects in order to present to Congress for the purposes of scientific, educated legislative reform.[194]

F. Counter-Arguments Regarding the Practicality of Implementation

In the pilot programs that have been implemented in jurisdictions in both countries, there have been growing concerns about the increasingly slow pace of dockets, the overburdened case load of publicly appointed counsel (particularly in rural communities where travel to some court appearances can be a four-hour round trip for an attorney), and the lack of a significant impact on final case disposition in comparison to extended pre-hearing detention time.[195] Further, there is well-founded fear that beyond stretching the already strained public defender system too thin, the mandated presence of counsel at a bail hearing would be fiscally impractical since most state budgets need to make cut backs, rather than engaging in further expenditures.[196]

Beyond logistical and economic concerns of implementing such programs, there remains a more deeply-rooted social issue: not everyone believes these pre-trial detainees should be released. "Some prosecutors, judges and even defenders take the position that detainees are in jail for good reason," which begs consideration of whether the increased burden on the system is worth it, and, if such a movement toward increased pre-trial release of potentially violent and dangerous defendants should be a question of policy left up to taxpayers funding the system through referendum votes or candidate selection at the polls.[197] This, perhaps, could be an implicit basis for the United States Supreme Court's constitutional question avoidance.

Nevertheless, there has been proof in some rural counties implementing these programs that pretrial incarceration has at least remained the status quo, and for the programs currently developing, there is hope for the creation of holistic "compliance plans" that "will be created after thorough coordination with the local funding unit, judges, court administrators, and local attorneys to determine a model to meet everyone's needs while working to protect the rights of all defendants."[198]

---

194 *Id.*

195 THE MICH. INDIGENT DEF. COMM'N, *supra* note 189, at 8-15; Flynn, *supra* note 188.

196 SAPIA, *supra* note 106, at 2.

197 THE CONSTITUTION PROJECT NAT'L RIGHT TO COUNSEL COMM., *supra* note 170, at 36.

198 THE MICH. INDIGENT DEF. COMM'N, *supra* note 189, at 15.

IV. CONCLUSION

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[199]

In comporting with constitutionally required rights and traditionally revered values, both the United States and Canada should find that mandated counsel for the indigent at a bail hearing is essential to protecting defendants and reshaping broken criminal justice systems. The presence of a lawyer makes an empirically dramatic difference since "[e]ven one day in custody can cause a person to lose a job, miss school, or be unable to care for dependents."[200] These are definitive harms that cannot be solved through an attorney's retroactive arguments for lower bail once they are eventually appointed; the damage has already been done. Both American and Canadian jurisdictions have taken the necessary steps toward this system through pilot programs and incrementally liberalized opinions resulting from related litigation. Our nation's unique relationship and shared border with Canada provide an ideal incubator for criminal justice reform experimentation, and so in considering American movement, the success of our sister nation to the North should be thoughtfully considered as well. Therefore, to protect the underlying rights constitutionally afforded to criminal defendants in America, and repercussive results of rights granted to defendants around the world, the Supreme Court of the United States should side with those states whose highest courts have affirmed the necessity of counsel presence for the indigent at bail hearings and hold that this standard applies in all federal and state courts as well.

---

[199] United States v. Salerno, 481 U.S. 739, 755 (1987).

[200] Bunin, *supra* note 2, at 26.