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The Lack of Money is the Root of All Evil: Louisiana's Ban on Bail Without Surety

INTRODUCTION

Two brothers are arrested for the same crime—possession of marijuana with the intent to distribute.¹ They are in all respects the same man: they have the same education, the same criminal record, and the same ties to the community. They differ in only one respect: one brother has money, while the other has none. Nevertheless, Louisiana law does not treat these brothers the same. In fact, the brother with money will quickly be out of jail, while the indigent brother will stay incarcerated for the entire pretrial duration. The two brothers will experience vastly different pretrial outcomes, solely because of their respective wealth.

Louisiana Code of Criminal Procedure article 334.4 imposes a ban on judges releasing defendants on their own recognizance when they are charged with certain crimes.² This ban might violate an indigent defendant's right to procedural due process, right to equal protection under the law, and right to be free from excessive bail. Execution of the article carries with it a host of deleterious effects.³ Litigation on the issue, however, is rare. Because Article 334.4 exclusively governs bail, it applies only to pretrial detention. Any challenge to the law therefore faces issues of mootness and ripeness. There exists only one federal case in which a petitioner challenged the law. In 2014, an arrestee challenged Article 334.4 in *Faulkner v. Gusman*, arguing that it violated his right to procedural due process and his right to be free from excessive bail.⁴ Although the challenge was unsuccessful, many of the concerns raised by the petitioner remain.

Article 334.4 should be repealed. The article violates equal protection rights by imposing pretrial detention on the extremely indigent solely because of their inability to pay. This pretrial detention is statistically linked to increased recidivism and poor trial outcomes. Article 334.4 violates due process by denying defendants the chance to show that they are not a flight risk and that pretrial detention is not needed. Finally, the

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1. LA. REV. STAT. ANN. § 40:966 (2016).
2. LA. CODE CRIM. PROC. art. 334.4 (2016). Releasing a defendant on his own recognizance means releasing him for no monetary fee. Some jurisdictions refer to this as “bail without surety.”
3. See *infra* Part IV.
4. *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 (E.D. La. May 9, 2014).

article violates the constitutional prohibition on excessive bail by mandating bail even in cases where none is needed to ensure that the accused attends trial.

Part I of this Comment provides a historical overview of bail, due process, and Article 334.4. Part II discusses the challenge put forth in *Faulkner v. Gusman*, including the state's responses to the petition and the ultimate judgment of the court. In Part III, newly released data on Louisiana bond amounts is used to dispute several claims of the *Faulkner* court and analyze the constitutionality of Article 334.4, concluding that the article potentially violates procedural due process, equal protection, and the excessive bail clauses of the Louisiana and the United States constitutions. Finally, Part IV provides reasons for the repeal of Article 334.4 and explores policy considerations pursuant to such an action, including the effects of pretrial detention on conviction rates and sentencing.

I. BAIL, ARTICLE 334.4, AND POTENTIAL CONSTITUTIONAL CHALLENGES: A BRIEF PRIMER

Understanding the history of bail, due process, and equal protection is necessary to understand the constitutional issues of Article 334.4. Bail originated as an early Anglo-Saxon practice designed to manage a lack of prisons. Over the centuries, it developed into a protection for citizens from their government.⁵ Bail determinations in the United States are intimately related to due process, which is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.⁶ The Constitution's guarantee of equal protection under the law also serves to protect indigent citizens from unjust outcomes in criminal trials.⁷ Louisiana's passage of Article 334.4 implicates issues of excessive bail, due process, and equal protection.

5. TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUDICIAL INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 3 (2010), <http://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf> [<https://perma.cc/8UGP-HS7G>] (“[Over 500 years, the English] Parliament focused on adding safeguards to the bail process to protect persons from political abuse and local corruption.”).

6. See generally *United States v. Salerno*, 481 U.S. 739 (1987).

7. See generally Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197 (2013).

A. A Brief History of Bail

The practice of bail has a history extending back millennia to the early Roman Republic.⁸ Bail originally existed as a practical solution to the rarity of prisons in the Anglo-Saxon period; in modern times, it has developed into a required aspect of due process and the presumption of innocence. In Anglo-Saxon England, an accused man would be released before trial if a surety “would guarantee both the appearance of the accused at trial *and* payment of [monetary fines] upon conviction.”⁹ Were the accused to flee before trial, he would be presumed guilty, and the surety would be required to pay the monetary fines of his conviction.¹⁰ Bail, therefore, was set at the amount that would be paid should the accused be found guilty.

1. Bail in England

In 1275, the English Parliament passed the Statute of Westminster, which modified the bail practices of the earlier Anglo-Saxon period.¹¹ The Statute required that sheriffs deny bail to three groups: (1) prisoners who committed certain offenses; (2) those who self-incriminated, were caught in the act, or were excommunicated; and (3) those who had attempted escape or “those of ill fame or bad character.”¹² For such a statute to be passed, it would seem necessary that bail be granted frequently to the accused, if not by default. Magna Carta’s requirement that no man be divested of liberty or property without due process clearly shows that the English celebrated a basic presumption of innocence.¹³ This presumption, codified in 1215, could not have been forgotten by the passing of the Statute of Westminster 60

8. SCHNACKE, *supra* note 5, at 1. See also Andrew Lyons, *Ancient Roman Precedent for the Taking of Bail*, HEARSAY, http://www.hearsay.org.au/index.php?option=com_content&task=view&id=127&Itemid=48 [<https://perma.cc/PD64-NHCA>] (last visited Sept. 4, 2016) (“There is a record of bail being taken as far back as about 461 BC.”).

9. June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 519–20 (1983).

10. *Id.* at 520.

11. *Id.* at 523.

12. *Id.* at 520 n.38.

13. MAGNA CARTA *39 (*Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruetur . . . nisi per legale iudicium parium suorum vel per legem terre*. Literally, “No free man may be taken, or imprisoned, or deprived of property, or outlawed, or exiled, or by any other mode brought to ruin . . . except by the legal judgment of his equals or by the law of the land.”).

years later; the Statute served to temper Magna Carta's liberal bail rules. By the time of the American Declaration of Independence, bail in the United Kingdom had become a strong shield of liberty against the Crown.¹⁴

2. *Bail in the United States*

Bail practices in the United States originated from this long history of bail in the United Kingdom. In the 17th century, Parliament passed multiple bills of legislation granting subjects of the Crown increased rights of bail.¹⁵ Among these were (1) the Petition of Right, which forbade courts to detain subjects without charging them; (2) the Habeas Corpus Act of 1679, which created procedural safeguards to prevent lengthy pretrial delays; and (3) the English Bill of Rights of 1689, which stated that "excessive bail ought not be required."¹⁶ The United States Constitution, mirroring this latter convention, established that "[e]xcessive bail shall not be required."¹⁷ The United States Supreme Court has held that "[u]nless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."¹⁸ In *United States v. Salerno*, the Court held constitutional the Bail Reform Act, which permits federal courts to deny bail to certain dangerous arrestees;¹⁹ however, it stipulated that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."²⁰

The federal system of bail follows this guideline. Federal law prohibits a judicial officer from "impos[ing] a financial condition that results in the pretrial detention of the person."²¹ The U.S. Fifth Circuit Court of Appeals, however, has repeatedly held that a defendant's inability to post bail does not by itself render a bail setting unconstitutionally excessive.²² The court

14. Carbone, *supra* note 9, at 528.

15. *Id.*

16. SCHNACKE, *supra* note 5, at 3–4.

17. U.S. CONST. amend. VIII.

18. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (holding that bail had been assigned in excess when the district court had assigned \$50,000 bail to members of the Communist Party solely on the basis that former arrestees charged with violating the same law had forfeited bail).

19. *See United States v. Salerno*, 481 U.S. 739 (1987) (holding that the Bail Reform Act, which permits federal courts to deny bail to certain dangerous arrestees, was constitutional).

20. *Id.* at 755.

21. 18 U.S.C. § 3142(c)(2) (2012).

22. *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988) (holding that a \$750,000 bail was not excessive, because "only a substantial financial component" would reasonably assure the court of the defendant's appearance)

has also held that the interpretation of federal bail law claiming that district courts were barred from setting a level of bail that the defendant could not afford to post was “inconsistent with the total fabric of the Bail Reform Act of 1984, as amended in 1986, inconsistent with apparent congressional purpose, and not supported by the legislative history.”²³ Rather, the court has held that the Bail Reform Act merely “proscrib[es] the setting of a high bail as a *de facto* automatic detention practice.”²⁴

The states are free to pursue other systems of bail within the constraints of the Eighth Amendment. Louisiana’s Constitution of 1978, mirroring the United States Constitution, prohibits excessive bail but does not grant a right to bail.²⁵ Louisiana law requires that bail be assessed under ten factors and

(citing *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (holding that the constitutionality of a Florida bail law was moot because the Supreme Court of Florida had promulgated a new law superseding it)); *United States v. James*, 674 F.2d 886 (11th Cir. 1982) (holding that under 18 U.S.C. § 3146, a trial judge may amend conditions of release set by a magistrate); *United States v. Beaman*, 631 F.2d 85 (6th Cir. 1980) (holding that a local federal rule requiring defendant to post real property within the jurisdiction of the district court with twice the value of the bond to obtain release was in conflict with 18 U.S.C. § 3146); *Williams v. Farrior*, 626 F. Supp. 983 (S.D. Miss. 1986) (holding that a plaintiff failed to adequately assert a cause of action under 42 U.S.C. § 1983 when a sheriff refused to approve a bond, because the plaintiff did not possess an absolute right to bail).

23. *McConnell*, 842 F.2d at 108.

24. *Id.* at 109. It should be noted that for the purposes of this analysis, a “high bail” is “a financial condition that results in the pretrial detention of the person,” as proscribed by 18 U.S.C. § 3142(c)(2).

25. LA. CONST. art. I, § 18 reads:

A. Excessive bail shall not be required. — Before and during a trial, a person shall be bailable by sufficient surety, except when he is charged with a capital offense and the proof is evident and the presumption of guilt is great. After conviction and before sentencing, a person shall be bailable if the maximum sentence which may be imposed is imprisonment for five years or less; and the judge may grant bail if the maximum sentence which may be imposed is imprisonment exceeding five years. After sentencing and until final judgment, a person shall be bailable if the sentence actually imposed is five years or less; and the judge may grant bail if the sentence actually imposed exceeds imprisonment for five years.

B. However, a person charged with a crime of violence as defined by law or with production, manufacture, distribution, or dispensing or possession with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance as defined by the Louisiana Controlled Dangerous Substances Law, and the proof is evident and the presumption of guilt is great, shall not be bailable if, after a contradictory hearing, the judge or

“insure the presence of the defendant, as required, and the safety of any other person and the community.”²⁶ Louisiana’s Code of Criminal Procedure explicitly defines bail as “the security given by a person to assure his appearance before the proper court whenever required.”²⁷ In 2012, the Louisiana legislature enacted Louisiana Code of Criminal Procedure article 334.4, which provides:

Notwithstanding any other provision of law to the contrary, any defendant who has been arrested . . . shall not be released by the court on the defendant’s own recognizance or on the signature of any other person [when arrested for] . . . the production, manufacturing, distribution, or dispensing or the possession with the intent to produce, manufacture, distribute or dispense a controlled dangerous substance in violation of R.S. 40:966(B), 967(B), 968(B), 969(B), or 970(B) of the Uniform Controlled Dangerous Substances Law.²⁸

magistrate finds by clear and convincing evidence that there is a substantial risk that the person may flee or poses an imminent danger to any other person or the community.

26. LA. CODE CRIM. PROC. art. 334 (2016). The ten factors are:

- (1) The seriousness of the offense charged, including but not limited to whether the offense is a crime of violence or involves a controlled dangerous substance.
- (2) The weight of the evidence against the defendant.
- (3) The previous criminal record of the defendant.
- (4) The ability of the defendant to give bail.
- (5) The nature and seriousness of the danger to any other person or the community that would be posed by the defendant’s release.
- (6) The defendant’s voluntary participation in a pretrial drug testing program.
- (7) The absence or presence of any controlled dangerous substance in the defendant’s blood at the time of arrest.
- (8) Whether the defendant is currently out on bond on a previous felony arrest for which he is awaiting institution of prosecution, arraignment, trial, or sentencing.
- (9) Any other circumstances affecting the probability of defendant’s appearance.
- (10) The type or form of bail.

27. LA. CODE CRIM. PROC. art. 311 (2016).

28. LA. CODE CRIM. PROC. art. 334.4 (2016). This law also prohibits release on the arrestee’s recognizance when accused of: vehicular homicide, cyberstalking with two prior convictions for the same offense, aggravated kidnapping of a child, killing a child during delivery, human experimentation, cruelty to persons with infirmities with a prior conviction for the same offense,

This law implicates issues of due process and equal protection. By forbidding bail hearings in cases of possession of controlled substances with the intent to distribute, Article 334.4 denies arrestees the right to be heard in a meaningful manner during a critical phase of detention.

*B. Facial Challenges to Due Process*²⁹

The United States Constitution guarantees a right to due process in state criminal proceedings.³⁰ The U.S. Supreme Court has defined “[t]he fundamental requisite of due process of law [as] the opportunity to be heard . . . at a meaningful time and in a meaningful manner.”³¹ This “opportunity to be heard” is the procedural component of due process. Due process also contains a substantive component that protects a small set of rights “implicit in the concept of ordered liberty,”³² regardless of procedure, unless the government interference serves a compelling state interest.³³ Louisiana’s constitution and jurisprudence generally mirror that of the federal law.³⁴

operating a vehicle while intoxicated with a prior conviction for the same offense, aggravated cruelty to animals, and the injury or killing of a police animal. *Id.*

29. A facial challenge is a challenge in which a petitioner seeks to show that “no set of circumstances exists under which the [law] would be [constitutionally] valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

30. U.S. CONST. amend. XIV, § 1 (“[No] State [shall] deprive any person of life, liberty, or property, without due process of law . . .”).

31. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citations omitted) (holding that due process required a hearing before the termination of welfare).

32. *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937).

33. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (holding that a law generally requiring that minors detained before deportation may only be released to parents, relatives, or guardians does not violate due process) (“[T]he Fifth and Fourteenth Amendments’ guarantee of ‘due process of law’ . . . include[s] a substantive component, which forbids the government to infringe certain ‘fundamental’ liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”); *see also* *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (holding that a law banning euthanasia served a legitimate government interest and therefore did not violate due process) (“The Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes more than the absence of physical restraint.”).

34. *See* LA. CONST. art. I, § 2 (“No person shall be deprived of life, liberty, or property, except by due process of law.”). *See also* *In re Adoption of B.G.S.*, 556 So. 2d 545, 549 (La. 1990) (holding that statutes allowing a mother to surrender children for adoption without putting the name of the unwed father on the birth certificate violated the father’s right to due process) (“The central meaning of procedural due process is well settled: Persons whose rights may be affected by State action are entitled to be heard, and in order that they may enjoy

The guiding jurisprudence for procedural due process challenges³⁵ is derived from *Mathews v. Eldridge*, in which the U.S. Supreme Court established a test that weighs three factors.³⁶ First, a court must examine whether the challenged procedure affects a “private interest.”³⁷ Second, the court must determine the risk that the challenged procedure will “erroneous[ly] depriv[e]” a person of that interest and the “probable value, if any, of additional procedural safeguards.”³⁸ Finally, the court must decide whether the government has a sufficient interest to justify the procedure in light of the prior two factors.³⁹ Substantive due process analysis is therefore incorporated into the *Mathews* test; if a challenged procedure violates a liberty protected by substantive due process, only a sufficiently compelling government interest will rescue the procedure from being declared unconstitutional.⁴⁰ A law that is procedurally sound, however, may still discriminate against different members of the citizenry.⁴¹ Such a law is vulnerable to a challenge under the Equal Protection Clause.

that right, they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.”); *Babineaux v. Judiciary Commission*, 341 So. 2d 396, 400 (La. 1976) (holding that a canon of the code of judicial conduct “prohibiting judges from serving on the board of directors of financial institutions” does not violate judges’ rights to due process) (“Substantive due process may be broadly defined as the constitutional guaranty that no person shall be arbitrarily deprived of his life, liberty, or property. The essence of substantive due process is protection from arbitrary and unreasonable action.”).

35. Strictly speaking, the *Mathews* test is more properly applied as the third stage of a due process analysis, after the questions “Is there a liberty deprivation?” and “Is the deprivation of life, liberty or property?” See Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871 (2000) (discussing the steps of procedural due process questions).

36. *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (holding that evidentiary hearings were not required by due process before the termination of disability).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the Court must evaluate statutes infringing on substantive due process by means of strict scrutiny).

41. See, e.g., *Brown v. Bd. of Edu. of Topeka*, 347 U.S. 483 (holding that segregation of educational facilities violated equal protection).

C. Facial Challenges to Equal Protection

The Constitution requires that states grant equal protection under the law to all persons within their jurisdictions.⁴² The U.S. Supreme Court has interpreted this requirement to mean that poverty cannot be the sole cause of incarceration.⁴³ For this reason, many statutory bail schemes risk running afoul of the Fourteenth Amendment.

The Fifth Circuit has a long history of cases involving criminal prosecutions, indigence, and equal protection. It has defined “equal protection of the laws” to mean, *inter alia*, “the right to be tried and punished in the same manner as others accused of crime are tried and punished,”⁴⁴ and the Fifth Circuit has further held that “[t]o imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws.”⁴⁵

Varden v. City of Clanton, a case from early 2015, is illustrative. In *Varden*, an indigent woman was imprisoned because of her inability to pay an amount of money required by the City of Clanton’s bail schedule and filed suit against the city.⁴⁶ In the suit, she alleged a violation of her

42. U.S. CONST. amend. XIV, § 1. (“[No] State [shall] . . . deny to any person within its jurisdiction the equal protection of the laws.”).

43. See *Tate v. Short*, 401 U.S. 395 (1971) (holding that a defendant was unconstitutionally sentenced to prison solely because he could not pay fines); *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970) (holding that an inmate could not be kept beyond the duration of his incarceration if he were unable to pay fines) (“We conclude that when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay.”); *Smith v. Bennett*, 365 U.S. 708, 709 (1961) (holding that a state’s refusal to docket a petition for a writ of habeas corpus because the petitioner was unable to pay a \$4 fee) (“[T]o interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.”); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that a state’s refusal to furnish prisoners with copies of their trial records for their appeal because they were unable to pay constituted discrimination in violation of the Fourteenth Amendment) (“[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”).

44. *Lynch v. U.S.*, 189 F.2d 476, 479 (5th Cir. 1951).

45. *Barnett v. Hopper*, 548 F.2d 550, 554 (5th Cir. 1977), *vacated as moot*, 439 U.S. 1041 (1978).

46. First Amended Class Action Complaint, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (N.D. Ala. filed Jan. 15, 2015).

Fourteenth Amendment right to equal protection.⁴⁷ The United States filed a statement of interest in support of the petitioner.⁴⁸ In this statement of interest, the United States claimed that incarcerating arrestees solely on the grounds that they could not pay for release, regardless of the nature of the required payment, is a violation of equal protection.⁴⁹

In terms of reviewing the constitutionality of bail schemes, an equal protection analysis may apply varying levels of scrutiny. Strict scrutiny is appropriate when a law prevents the free exercise of a fundamental right or discriminates against a suspect class of individuals.⁵⁰ The indigent might be specified as a suspect class under the Equal Protection Clause.⁵¹ For a law to pass strict scrutiny, it must be “narrowly tailored to further compelling governmental interests.”⁵² Due process and equal protection, however, do not provide the only potential challenges to bail laws. Arrestees have a constitutional protection against excessive bail.

47. *Id.*

48. Statement of Interest of the United States at 2, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (N.D. Ala. filed Jan. 15, 2015) (“The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a federal court. The United States can enforce the rights of the incarcerated pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997.”).

49. *Id.* at 1.

50. *Mass. Bd. Of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (holding that strict scrutiny was an improper test to use in analyzing a statute mandating retirement at 50 for state police).

51. *See San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (holding that a system of school funding based on local taxation passed rational basis scrutiny and therefore did not violate the Fourteenth Amendment) (“[T]here are other classifications that, at least in some settings, are also ‘suspect’—for example, those based upon national origin, alienage, indigency, or illegitimacy.”); *but see Henry Rose, The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407 (2010) (claiming that the status of the poor under the Equal Protection Clause remains an open question).

52. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (holding that diversity standards for Michigan law schools passed strict scrutiny and did not violate the Fourteenth Amendment).

D. Excessive Bail

The United States Constitution prohibits excessive bail.⁵³ The United States Supreme Court has not determined, however, whether the Eighth Amendment grants citizens a fundamental right to bail.⁵⁴ The Court has suggested that because the Eighth Amendment originates from the English Bill of Rights Act, from which English courts have not found a right to bail, no such right stems from the Eighth Amendment.⁵⁵ Still, the United States District Court for the Eastern District of Louisiana has held that a “limited fundamental right to bail” exists.⁵⁶ This limited fundamental right grants “fair access to the bail system for those who, after an individualized judicial determination, qualify for pretrial release.”⁵⁷ The Fifth Circuit has since held that “there is no absolute constitutional right to bail.”⁵⁸

E. Challenges to Article 334.4

Despite these constitutional concerns, challenges to Article 334.4 are rare. Because Article 334.4 is applicable only to arrestees before their trial, challenges face issues of mootness and ripeness. If arrestees challenge their pretrial detention after they post bond or receive a trial, their claims are mooted.⁵⁹ If citizens challenge Article 334.4 before their arrest, their

53. U.S. CONST. amend. VIII.

54. *See* Schilb v. Kuebel, 404 U.S. 357, 365 (1971) (holding that an Illinois bail scheme did not violate equal protection or due process) (“But we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness.”).

55. *Carlson v. Landon*, 342 U.S. 524, 545-46 (1952) (holding that the denial of bail to aliens did not violate the eighth amendment) (“The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. . . . Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.”).

56. *Augustus v. Roemer*, 771 F. Supp. 1458, 1465 (E.D. La. 1991).

57. *Id.*

58. *Broussard v. Parish of Orleans*, 318 F.3d 644 (5th Cir. 2003).

59. *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (finding that the majority of claims regarding pretrial detention must be “capable of repetition yet evading review” in order to avoid mootness).

claims are not ripe.⁶⁰ The window to make a successful challenge against Article 334.4 is therefore very small; however, in 2014, an arrestee made a timely challenge to the law on several grounds.⁶¹ This suit provides an excellent lens into the current state of opinion on Article 334.4.

II. *FAULKNER V. GUSMAN*: THE CURRENT STATE OF JURISPRUDENCE ON ARTICLE 334.4

In 2013, Milton Faulkner challenged Article 334.4 in the United States District Court for the Eastern District of Louisiana, claiming that the law violated both his right to be free from excessive bail and his right to due process.⁶² Faulkner had been arrested for possession with intent to distribute and was denied release on his own recognizance under Article 334.4, even though he posed virtually no risk for flight or recidivism.⁶³ Faulkner filed for habeas corpus relief in the Eastern District of Louisiana, alleging that his due process rights were being violated.⁶⁴ After a series of filings by Faulkner and the state, the court denied Faulkner's petition, holding that Article 334.4 served a legitimate public interest and that Faulkner's facial challenge to the article's constitutionality failed to prove that the law was unconstitutional in every application.⁶⁵

A. Background of the Case

In September 2013, Milton Faulkner was arrested for possession of cocaine with intent to distribute and was booked in Orleans Parish Prison.⁶⁶ The next day, New Orleans Pretrial Services screened Faulkner and determined that he had no prior convictions and was in the lowest risk category for reoffending or fleeing.⁶⁷ Following his screening, Faulkner appeared in magistrate court for a "first appearance," which combines the

60. See *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

61. Petition for Writ of Habeas Corpus, *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 (E.D. La. May 9, 2014).

62. *Id.* at *3.

63. *Id.* at *5.

64. *Id.* at *3.

65. *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 (E.D. La. May 9, 2014).

66. Petition for Writ of Habeas Corpus, *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 at *2 (E.D. La. May 9, 2014).

67. *Id.* at *5.

probable cause hearing and bond determination required by law.⁶⁸ Under Article 334.4, the court was unable to consider the option of releasing Faulkner on his own recognizance.⁶⁹ The court set Faulkner's bond at \$30,000.⁷⁰

B. Initial Complaint

Faulkner filed a motion with the state district court alleging that his bond had been unconstitutionally set, in violation of his right to due process and freedom from excessive bail.⁷¹ The court denied his motion, and the Louisiana First Circuit Court of Appeal and Louisiana Supreme Court denied review.⁷² On January 15, 2014, Faulkner filed a petition in federal district court for habeas corpus relief under 28 U.S.C. § 2241.⁷³ Faulkner argued that Article 334.4 was unconstitutional "because it deprive[d] [him] of an individualized hearing where a judge may determine the appropriateness of a recognizance bond and results in excessive bail for indigents who cannot post monetary bond."⁷⁴

Faulkner analogized Article 334.4 to a hypothetical bond restriction analyzed in *Pugh v. Rainwater*.⁷⁵ In *Pugh*, the Fifth Circuit analyzed a Florida law on bail that created a presumption against release on one's own recognizance.⁷⁶ The court held that although the Florida law was not facially violative of the Equal Protection Clause,⁷⁷ a situation in which "an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, [was subject to] pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint."⁷⁸ Faulkner argued that Article 334.4 went "much further" than the hypothetical law determined to be unconstitutional in *Pugh*, because Article 334.4 is an outright ban on recognizance bonds when an arrestee is charged with a specific crime.⁷⁹

68. *Id.* (citing *State v. Wallace*, 25 So. 3d 720, 725 (2009)).

69. *Id.* at *2–3.

70. *Id.* at *3.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at *7.

75. *Id.* at *8.

76. *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978).

77. *Id.* at 1056.

78. *Id.* at 1058.

79. Petition for Writ of Habeas Corpus, *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 at *8 (E.D. La. May 9, 2014).

Faulkner claimed that Article 334.4 failed the three-factor *Mathews* test and therefore violated his procedural due process rights.⁸⁰ First, Faulkner argued that an arrestee's interest in pretrial release satisfied the first factor,⁸¹ because such an interest in release is a "private interest . . . affected by the official action."⁸² Second, he argued that prohibiting judges from considering the possibility of releasing an arrestee on his own recognizance satisfied the second factor⁸³ by increasing the risk of "erroneous deprivation" of his liberty interest in release.⁸⁴ Third, Faulkner claimed that prohibiting release on one's own recognizance satisfied no legitimate government interest because judges are required to hold bond hearings in every case, and either banning or permitting judges to release arrestees on their own recognizance would not add any "fiscal or administrative burden" to the state.⁸⁵ Last, Faulkner argued that other federal district courts have ruled similar provisions of law unconstitutional.⁸⁶ He analogized Article 334.4 to the Adam Walsh Amendments ("AWA"),⁸⁷ which require certain bond conditions for defendants arrested for certain sexual offenses.⁸⁸ Several federal courts have found these required conditions to violate procedural due process.⁸⁹

80. *Id.* at *10 ("Each of the three *Mathews* factors indicates that Article 334.4's per se rule violates procedural due process requirements.").

81. *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

82. *Id.* at 335.

83. Petition for Writ of Habeas Corpus, *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 at *10 (E.D. La. May 9, 2014).

84. *Mathews*, 424 U.S. at 335.

85. Petition for Writ of Habeas Corpus, *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 at *10–11 (E.D. La. May 9, 2014).

86. *Id.* at *12.

87. The Adam Walsh Amendments and the myriad bond conditions contained within them are codified in 18 U.S.C. § 3142(c)(1).

88. Petition for Writ of Habeas Corpus, *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 at *12 (E.D. La. May 9, 2014).

89. *Id.* at *12–13 (citing *United States v. Karper*, 847 F. Supp. 2d 350, 360 (N.D.N.Y. 2011) ("[The mandatory condition] universally forfeits an accused's opportunity to contest whether such conditions are necessary to ensure his return and to ameliorate any danger to the community."); *United States v. Torres*, 566 F. Supp. 2d 591, 596–99 (W.D. Tex. 2008) ("[The law] prevents the courts from evaluating and setting relevant conditions of pretrial release, and, instead, mandates conditions which implicate significant liberty interests.")).

C. State Response

In its response, Louisiana denied each of Faulkner's claims.⁹⁰ The state argued that Faulkner's claim that he had a right to an individualized bond hearing was a mischaracterization of federal law.⁹¹ It asserted that no defendant is entitled to considerations "beyond questions of the severity of the offense, the defendant's flight risk, and his risk of danger to the community."⁹² The state argued that arrestees have no "absolute right" to bail⁹³ and that to apply *Mathews* to an issue of bail determination would be inappropriate because *Mathews* is only properly applicable to issues where a "specific Due Process right . . . had been recognized and where the actions of the Government and the trial court defanged that right."⁹⁴ Louisiana further claimed that *Pugh* was distinguishable from the instant case.⁹⁵ The state argued that the Fifth Circuit in *Pugh* objected to a hypothetical bond schedule where money bail would be fixed per offense.⁹⁶ Because Article 334.4 is not a master bond schedule, but rather a ban on release on one's own recognizance, the state argued that *Pugh* did not apply.⁹⁷

90. Answer to 28 U.S.C. § 2241 Petition for Habeas Corpus Relief, *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 at *5 (E.D. La. May 9, 2014) ("Faulkner's claims, and the arguments in support thereof, lack merit and are based on a wholesale mischaracterization of controlling federal precedent as well as a fundamental misunderstanding of the rationale behind the Excessive Bail Clause.").

91. *Id.* at *6–7 (citing *United States v. Salerno*, 481 U.S. 739, 754–55 (1987)) ("The 'individualized inquiry' relevant to the decision whether, and on what conditions, to admit a defendant to bail is limited to whether he or she poses a risk of flight or danger to the community if released pending trial, in light of the seriousness of his or her alleged conduct.").

92. *Id.*

93. *Id.* at *8 (first citing *Broussard v. Parish of Orleans*, 318 F.3d 644, 650 (5th Cir. 2003) ("[T]here is no absolute constitutional right to bail."); then citing *Salerno*, 481 U.S. at 752 ("The Eighth Amendment . . . of course, says nothing about whether bail shall be available at all.")).

94. *Id.* at *7–8 (first citing *United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004); then citing *United States v. Torres*, 566 F. Supp. 2d 591, 597 (W.D. Tex. 2008) ("The [*Mathews*] inquiry involves a two step analysis. First, the court must identify the existence of a protected liberty or property interest.")).

95. *Id.*

96. *Id.* at *8.

97. *Id.* at *9 ("The *Pugh* court's concern about the constitutionality of setting a monetary bond based on a *master bond schedule* 'without meaningful consideration of other possible alternatives' simply does not bear upon the issue presently before this Court, let alone bolster Faulkner's argument.").

Furthermore, the state argued that Faulkner's reference to AWA jurisprudence was unavailing.⁹⁸ First, the state noted that federal district courts were not united in rejecting the statute's provisions as unconstitutional.⁹⁹ Second, it claimed that the AWA "created appreciably more onerous burdens" on the liberty of those whom it affected than Article 334.4.¹⁰⁰ It argued that Faulkner could be released by the payment of bond, at which point he would not experience liberty restrictions; Article 334.4 only "deprived Faulkner of . . . the *privilege* of being released on his own recognizance."¹⁰¹

Finally, the state disputed Faulkner's claim that his bond was unconstitutionally excessive.¹⁰² The state's central argument was that "prohibitions on the *type* of bonds available to a particular defendant have no bearing on the excessiveness of the defendant's bail because the question of excessiveness is one of *amount*."¹⁰³ It argued that the United States Supreme Court in *Salerno* prohibited only bail that is unreasonably high or bail that is denied without an explanation.¹⁰⁴ The state claimed that Article 334.4 does neither of these things and therefore cannot be in violation of the Eighth Amendment.¹⁰⁵

98. *Id.* at *11.

99. *Id.* (first citing *United States v. Frederick*, 10-30021, 2010 WL 2179102 (D.S.D. May 27, 2010); then citing *United States v. Pool*, 645 F. Supp. 2d 903 (E.D. Cal. 2009); then citing *United States v. Cossey*, 637 F. Supp. 2d 881 (D. Mont. 2009); then citing *United States v. Crites*, 09-262, 2009 WL 2982782 (D. Neb. Sept. 11, 2009); and then citing *United States v. Gardner*, 523 F. Supp. 2d 1025 (N.D. Cal. 2007)).

100. Answer to 28 U.S.C. § 2241 Petition for Habeas Corpus Relief, *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 at *5 (E.D. La. May 9, 2014) ("The *Torres* court identified the liberty interests at stake therein as the 'right to remove from one place to another according to inclination' and the 'decision to remain in a public place of [one's] choice.'").

101. *Id.* at *14-15.

102. *Id.* at *13.

103. *Id.*

104. *Id.* at *14-15.

105. *Id.* ("What art. 334.4 does *not* do is deny Faulkner bail altogether or establish prophylactically an excessive *amount* of bail due to his purported commission of an enumerated offense. Art. 334.4 likewise does not deny Faulkner a hearing at which the magistrate or district judge sets an amount of bail appropriate to assure his appearance at trial, based on his particular propensities for flight and danger to the community and in light of the seriousness of his offense.").

D. Petitioner Response to the State

Faulkner disputed the state's claim that *Mathews* was inapplicable.¹⁰⁶ He claimed that a *Mathews* analysis was relevant if Faulkner had an interest and not necessarily a right to release.¹⁰⁷ As such, he claimed that Article 334.4 implicated procedural due process.¹⁰⁸ Faulkner argued that because he had an interest in release, "the state must provide him with minimal procedural protections before denying him release."¹⁰⁹ Faulkner argued once more that *Pugh* was applicable.¹¹⁰ He interpreted the *Pugh* court's dicta that to deny an indigent arrestee pretrial release when that arrestee's appearance at court could "reasonably be assured by one of the alternate forms of release"¹¹¹ to mean that certain people have a right to be released on their own recognizance.¹¹² Faulkner emphasized that the rarity of statutes like Article 334.4 in other states is responsible for a dearth of case law on the topic¹¹³ and

106. Reply to the State's Answer to the Petition for Habeas Corpus, *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 at *1 (E.D. La. May 9, 2014).

107. *Id.* ("The state's argument is based on the faulty assumption that the due process protections recognized in *Mathews v. Eldridge* do not apply in this case because Mr. Faulkner has no right to be released on his own recognizance. But the state's argument misses the point because the issue in a *Mathews* analysis is not whether Mr. Faulkner has a right to release—it is whether he has an interest in being released. And the Supreme Court has recognized that criminal defendants have a liberty interest—if not a right—in being released pending trial.")

108. *Id.*

109. *Id.* at *2. ("The Court, in fact, has specifically rejected the state's suggestion that *Mathews* applies only when an individual has a right to a certain type of relief. See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (applying due process protections to parole revocation hearings).")

110. *Id.*

111. *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978).

112. Reply to the State's Answer to the Petition for Habeas Corpus, *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213 at *3 (E.D. La. May 9, 2014) ("A Fifth Circuit panel overturned the Florida statute because it failed to codify a presumption in favor of recognizance bonds. The *en banc* court reversed, but only because the court wanted to give Florida judges the opportunity to adopt a preference for recognizance bonds. And *Pugh*'s reasoning leaves little doubt that the court disapproved of recognizance restrictions.")

113. *Id.* at 4 ("[T]he state is left only with the argument that *Abuhamra* is not directly on point. True. But this is likely because Article 334.4 is such an uncommon statute.")

claimed that all statutes that ban release on one's own recognizance have been overturned by state courts.¹¹⁴

E. The Court's Ruling

The federal district court, siding with the state on every issue, denied Faulkner's petition.¹¹⁵ The court found that to sustain a facial challenge to Article 334.4, Faulkner needed to prove that the law is "unconstitutional in all of its applications."¹¹⁶ To prove this unconstitutionality, Faulkner needed to show that Article 334.4 had no "plainly legitimate sweep," or that the article did not rationally further any government interest.¹¹⁷ The court noted that facial challenges are "disfavored," because "they raise the risk of 'premature interpretation of statutes on the basis of factually barebones records.'"¹¹⁸

The court held that Article 334.4 did not violate procedural due process.¹¹⁹ It ruled that to sustain a procedural due process challenge, Faulkner needed to prove that "Article 334.4 [was] procedurally inadequate in all, or nearly all, of its applications, not as applied to a particular set of defendants."¹²⁰ The court found that Article 334.4 did not deprive arrestees of a liberty interest, because it neither mandated pretrial detention nor sets a minimum bond amount.¹²¹ Central to the court's reasoning was the claim that even if Article 334.4 bars judges from releasing pretrial detainees on their own recognizance, those judges may set "very low, even nominal, money bonds."¹²² The court quoted a state judge as saying "the DA's office is right in their argument that we can set the bond as low as we want. . . . [I can] give him a bond of . . . \$1,000, \$500 or . . . \$10."¹²³

114. *Id.* at 9 (first citing *State v. Blake*, 642 So. 2d 959 (Ala. 1994); then citing *State v. Raymond*, 906 So. 2d 1045 (Fla. 2005); and then citing *Clark v. Hall*, 53 P.3d 416 (Okla. Crim. App. 2002)).

115. *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213, at *1 (E.D. La. May 9, 2014).

116. *Id.* at *2 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

117. *Id.*

118. *Id.* (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004)).

119. *Id.*

120. *Id.* at *3.

121. *Id.*

122. *Id.* at *9.

123. *Id.* at *2 ("A defendant charged with one of Article 334.4's enumerated offenses may argue that the statutory factors favor a low or nominal money bond in his case. If the judge agrees, she may set bond in an amount the defendant can satisfy, be it a hundred dollars or ten dollars or even ten cents. If the judge does not agree, and concludes that the defendant poses a flight risk or a danger to the

The Eastern District found that the state's procedures were constitutionally sufficient and asserted that even if Article 334.4 affected a liberty interest, the risk of that interest being erroneously deprived would be so low that it would not implicate procedural due process.¹²⁴ The court noted that the Code of Criminal Procedure instructs judges to consider ten separate factors when assigning bail¹²⁵ and reiterated that judges were still free to set nominal bail amounts, because Article 334.4 prohibits only release on the arrestee's recognizance.¹²⁶ Because Faulkner mounted a facial challenge to the law, the court interpreted the law in the most lenient manner.¹²⁷ Although the court recognized that situations might arise in which poverty led to unconstitutional discrimination, Faulkner's facial challenge meant that the court was unable to entertain hypothetical cases¹²⁸: "The only circumstance in which this might plausibly occur is when the defendant is unable to post even a *de minimis* money bond. In ruling on Faulkner's facial challenge, however, the Court may not 'speculate about "hypothetical" or "imaginary" cases.'"¹²⁹

Finally, the court found that Article 334.4 serves a legitimate state interest by protecting the public.¹³⁰ The court found that the state legislature intended to "signal[] to judges . . . [the importance of the] potential flight risk or threat to public safety," but, nonetheless, it accepted that it only "serves the State's interest in public safety to a slight degree."¹³¹

community, then Article 334.4 is unlikely to have any effect, as the judge would likely set a money bond even in the absence of Article 334.4.").

124. *Id.* at *3.

125. LA. CODE CRIM. PROC. art. 311 (2016).

126. *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213, at *4 (E.D. La. May 9, 2014).

127. *Id.* at *2 ("For purposes of Faulkner's facial challenge, the Court must assume that judges will apply the statutorily mandated factors in good faith when setting bail for defendants charged with one of Article 334.4's enumerated offenses.").

128. For example, the possibility of an event being "capable of repetition, yet evading review," as in *Roe v. Wade*, 410 U.S. 113 (1973), or the hypothetical case central to the Fifth Circuit's decision in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978).

129. *Id.* at *2 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)).

130. *Id.* at *5 ("[T]he Louisiana legislature determined that these offenses are of sufficient gravity, and occasion a sufficient flight risk or risk of danger to the community, to warrant mandatory imposition of a money bond.").

131. *Id.* The court found that "the State has no evident fiscal or administrative interest in Article 334.4's *per se* bond restrictions, since judges could easily

Given the serious effects of pretrial detention, the court's acceptance of Article 334.4 is troubling. Additionally, the court's willingness to permit the continued existence of the article raises constitutional concerns.

III. THE CONSTITUTIONALITY OF ARTICLE 334.4

In spite of the *Faulkner* court's ruling, Article 334.4 implicates issues of due process and equal protection. Analysis of state data indicates that judges do not set nominal bonds.¹³² Additionally, because *Faulkner* made a facial challenge to Article 334.4, the court interpreted the article with the most leniency.¹³³ The article may still deny certain classes of arrestees, especially the homeless, their rights to equal protection and due process.

A. Louisiana Bond Data Shows That Judges Do Not Set Nominal Bonds

The argument accepted by the court in *Faulkner* that judges are capable of setting nominal bonds does not rescue Article 334.4's constitutionality. Although judges theoretically have discretion to set bail at very low amounts, the data does not show a history of judges setting low bails in cases such as these—their practice is to set bail that is out of reach for many indigent detainees, even when those detainees pose little safety or flight risks.¹³⁴ Second, even setting a very low bail assumes that an arrestee has some ability to pay. Given the frequency of homeless citizens being arrested,¹³⁵ this assumption is not reasonable, and it denies equal protection to defendants who are unable to pay even one cent to secure their release. The existence of limited judicial discretion cannot invalidate the equal protection concerns implicated by Article 334.4.

consider the appropriateness of non-money bonds at the hearings already being held.” *Id.*

132. See *infra* Part III.A.

133. *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213, at *3 (E.D. La. May 9, 2014) (“For purposes of *Faulkner*’s facial challenge, the Court must assume that judges will apply the statutorily mandated factors in good faith when setting bail for defendants charged with one of Article 334.4’s enumerated offenses.”).

134. *Faulkner*, whose case was discussed exhaustively in Part II, is such an example.

135. See generally Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 PSYCHIATRIC SVCS. 170 (2008).

1. Explanation of Statistical Analysis

An examination of bond data shows that judges do not set nominal bonds when assessing bonds for arrestees accused of possession with intent to distribute marijuana.¹³⁶ The Louisiana Public Defender Board maintains a database to track representation statistics.¹³⁷ Bond data is not a required field and therefore is frequently unreported; however, many attorneys in the 15th Judicial District—a district including the city of Lafayette—report this data.¹³⁸

A query to the Louisiana Public Defender Board's database seeking arrestees charged in the 15th Judicial District with possession with intent to distribute marijuana between September 1, 2013 and September 1, 2015 returns 52 results with bond data included.¹³⁹ Of these, one bond was set at zero dollars, in contravention of Article 334.4—this data point has been discounted in the analysis. Because the database query returned all persons accused of possession with intent to distribute marijuana, regardless of what other crimes they were charged with, the remaining 51 data points were divided into three groups for analysis. Group A consists of all 51 data points and includes every individual charged with possession with intent to distribute marijuana, regardless of other charges. Group B consists of all arrestees charged with possession with intent to distribute marijuana along with simple possession or possession with intent to distribute other drugs. This group consists of 18 data points.¹⁴⁰ Group C consists only of arrestees charged with possession with the intent to distribute marijuana

136. LA. REV. STAT. ANN. § 40:966 (2016) governs possession of marijuana with intent to distribute.

137. See Memorandum from Jean M. Faria, State Public Defender, to the Louisiana Public Defender Board (Nov. 30, 2009), <http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/SPD%20Report%20for%20December%202009.pdf> [<https://perma.cc/NT6J-J9A3>] (regarding, in part, the introduction of the database to the various district defender offices and the subsequent training in its use).

138. It is possible that other judicial districts function very differently from the 15th. Unfortunately, because bond data is not currently a required field, it is necessary to extrapolate from the 15th to obtain a picture of bond practices statewide. This lack of data underscores the need for state-wide mandated reporting of bond practices.

139. Access to the Louisiana Public Defender Board database is granted at the discretion of the State Public Defender. See Appendix, *infra*. All calculations used in this Comment involving the bond data are rounded to the nearest dollar.

140. One arrestee, who was arrested with a truly remarkable number and variety of controlled substances on his person, has been excluded from this group on the grounds that the group is intended to reflect typical drug-based arrests where an arrestee may have had more than one controlled substance on his person.

and consists of ten data points.¹⁴¹ The crime with which an arrestee is charged affects a judge's bond determination.¹⁴² This division allows for more accurate analysis by controlling for people charged with crimes other than possession with the intent to distribute marijuana.

2. Bond Data from the 15th Judicial District

The three groups vary significantly in their statistics. Group A has a minimum bail amount of \$1,500 and a maximum of \$170,000. The mean bail amount of Group A is \$26,725, and the standard deviation¹⁴³ is \$31,047. Group B has a minimum bail amount of \$1,500 and a maximum of \$75,000. The mean bail amount of Group B is \$22,778, and the standard deviation is \$21,325. Group C has a minimum bail amount of \$1,500 and a maximum of \$36,000. The mean bail amount of group C is \$14,350, and the standard deviation is \$14,083. As is evident from the standard deviation, all groups display extreme variance. Group C displays the least variance in its lower two quartiles¹⁴⁴—the range between Group C's minimum to its median is only \$4,750.

The analyzed data shows that a magistrate in the 15th JDC has not assigned a "nominal" bond for arrestees charged with possession with intent to distribute in the past two years; none of the analyzed data shows any bond set below \$1,500. Even bonds set on arrestees charged only with possession with intent to distribute marijuana were high; 70% of bonds set in Group C exceeded \$3,125, and half of the arrestees in Group C were assessed a bond of \$6,250 or greater. Bond amounts increased dramatically when other drug charges are added; 72% of bonds set in Group B exceeded \$5,250, and half of the arrestees in that group were assessed a bond of \$18,000 or greater.

141. Persons charged under LA. REV. STAT. ANN. § 40:1041, which prohibits the collection of money from sales of controlled substances, have not been excluded, because the collection of money from the sale of marijuana is a logical conclusion of the attempt to sell marijuana.

142. LA. CODE CRIM. PROC. art. 311 (2016).

143. Standard deviation is a measurement of variation among data. A low standard deviation indicates that data points are generally close to the mean. A higher standard deviation indicates that the data set has more variance. For further analysis of the data, including a box-and-whiskers plot of all datasets, see the information appended to this article.

144. A data set may be broken into four quartiles for purposes of analysis. Each quartile represents one fourth of the total data. The lower two quartiles of a data set comprise the bottom half of the data.

The *Faulkner* court assumed “that judges will apply the statutorily mandated factors in good faith when setting bail for defendants charged with one of Article 334.4’s enumerated offenses.”¹⁴⁵ The court also accepted the assertion of a state judge who claimed that judges may set nominal bonds.¹⁴⁶ The available data, however, does not support this assumption. Instead, the available data supports the claim that Article 334.4 influences judges to assess high bonds.

B. Article 334.4 Potentially Violates Procedural Due Process

Procedural due process is “the opportunity to be heard . . . at a meaningful time and in a meaningful manner.”¹⁴⁷ Article 334.4 denies certain classes of arrestees the ability to be heard “in a meaningful manner” during bail determinations. Rather than being afforded the opportunity to present a case for why they should be released on their own recognizance, arrestees are forced into surety bonds that leave them in prison, regardless of their individual circumstances. Their demonstration of ties to the community, indigence, and relative risk cannot be considered when determining the appropriateness of recognizance, because Article 334.4 flatly forbids release on recognizance. Therefore, their attempts to avoid lengthy incarceration are not “meaningful,” because judges have no discretion to release them on their own recognizance.

Because *Faulkner* did not prove that Article 334.4 was unconstitutional in every application and lacked any “plainly legitimate sweep,”¹⁴⁸ his facial challenge failed.¹⁴⁹ The fact that Article 334.4 is not unconstitutional in every application, however, does not logically lead to the claim that Article 334.4 cannot be unconstitutional in any application. There exists a class of people whose procedural due process rights may be imperiled by application of Article 334.4.

The extremely indigent, such as the homeless, might not be able to pay any amount of money, no matter how small. When such an arrestee is used as the basis for a *Mathews* test, significant doubts are cast on the constitutionality of Article 334.4. Although it is admittedly unlikely that a

145. *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213, at *3 (E.D. La. May 9, 2014).

146. *Id.*

147. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (citations omitted) (internal quotation marks omitted) (holding that due process required a hearing before the termination of welfare).

148. *Faulkner v. Gusman*, No. 13-6813, 2014 WL 1876213, at *2 (E.D. La. May 9, 2014).

149. *Id.* at *6.

homeless person would have the capital necessary to begin selling drugs, Article 334.4 bans release on one's own recognizance for several other crimes that require no money, such as aggravated cruelty to animals.¹⁵⁰ The *Faulkner* court's argument that Article 334.4 fails to deprive arrestees of a liberty interest collapses when an extremely indigent defendant cannot pay any amount of bond, because the article then mandates pretrial detention.¹⁵¹ Under the first *Mathews* factor, this scenario indicates a due process violation.

The second factor of *Mathews*—the risk of the arrestee being erroneously deprived of his liberty interest¹⁵²—becomes much greater when a person without any money—for instance, a person who is homeless—is arrested. Because Article 344.4 is a total ban on bail without surety, a judge in such a situation would be required to detain the arrestee until trial. The second half of the factor—the “probable value, if any, of additional procedural safeguards”¹⁵³—is simple. Additional procedural safeguards would simply be the ability of the court to use its own discretion to release an arrestee on his own recognizance. The value of such a safeguard is immediately apparent; the court would be able to prevent the pretrial detention of persons unable to pay any amount of bail. The court in *Faulkner* noted that such a possibility existed, but was by itself insufficient to sustain a facial challenge.¹⁵⁴ The second factor indicates the constitutional insufficiency of Article 334.4.

The third and final factor—the interest of the government¹⁵⁵—is unpersuasive. Even if one were to assume, in spite of the available data, that judges did frequently assign nominal bonds, Article 334.4 serves no particular use. Were judges to regularly use their discretion to assign nominal bonds in cases where they would otherwise grant release on one's own recognizance, the article would at best be ineffective. Article 334.4 is troubling, because the *Mathews* test indicates an unconstitutional application if a truly indigent person were subject to its ban on bail without surety.

In *Salerno*, the United States Supreme Court held that the Bail Reform Act of 1984 fell within a narrow range of exceptions to the standard that “liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”¹⁵⁶ The Court reasoned that the Act was

150. LA. REV. STAT. ANN. § 14:102.1 (2016); LA. CODE CRIM. PROC. art. 334.4 (2016).

151. LA. CODE CRIM. PROC. art. 334.4 (2016).

152. *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

153. *Id.*

154. *Faulkner*, 2014 WL 1876213, at *5–6.

155. *Mathews*, 424 U.S. at 321.

156. *United States v. Salerno*, 481 U.S. 739, 755 (1987).

attended by “numerous procedural safeguards,” which served to protect it from a facial challenge.¹⁵⁷ These safeguards included the analysis by the court of “statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community.”¹⁵⁸ The *Faulkner* court asserted that it was appropriate for the Louisiana legislature to determine that certain offenses are too dangerous to allow release on one’s own recognizance,¹⁵⁹ however, to issue such a blanket ban denies arrestees their due process rights to have ameliorating factors considered by the court.

C. Article 334.4 Potentially Violates Equal Protection

In addition to violating due process, Article 334.4 implicates issues of equal protection. The United States Supreme Court has interpreted the Equal Protection Clause to mean “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”¹⁶⁰ Yet, Article 334.4 would condemn the utterly indigent to a lengthy pretrial detention, while those with money would leave prison with ease. In recent years, bail schedules have been successfully challenged under the Equal Protection Clause.¹⁶¹ Challenges to Article 334.4 are analogous to these claims. When indigent detainees cannot be released on their own recognizance and cannot provide surety, they are subject to pretrial confinement despite the fact that bail without surety might well be appropriate.

In *Varden v. City of Clanton*, the United States filed a Statement of Interest arguing against the appropriateness of fixed bail schedules.¹⁶² The reasoning of the United States is highly applicable to Article 334.4. The United States argued that “the [Supreme] Court’s Fourteenth Amendment analysis applies in equal, if not greater, force to individuals who are detained until trial because of inability to pay fixed-sum bail amounts. Liberty is particularly salient for defendants awaiting trial, who have not

157. *Id.*

158. *Id.* at 751–52.

159. *Faulkner*, 2014 WL 1876213, at *15.

160. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

161. *See, e.g., Snow v. Lambert*, 2015 WL 5071981 (M.D. La. 2015) (holding that an Ascension Parish woman was impermissibly subjected to a fixed bail schedule because her indigence prevented her from paying).

162. Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (N.D. Ala. filed Jan. 15, 2015).

been found guilty of any crime.”¹⁶³ Although the United States admitted that certain situations require imprisonment before trial, it maintained that fixed-bail schedules do not permit judges to take into account the “individual circumstances of the accused” and require pretrial detention for arrestees too indigent to afford the demanded fee.¹⁶⁴ Similar to these schedules, Article 334.4 does not permit judges to take into account the poverty of a person who cannot pay even a nominal fee.

The Equal Protection Clause may protect the poor in criminal matters more than in other contexts. The United States Supreme Court has specifically ruled that “[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.”¹⁶⁵ Because pretrial detention statistically correlates to higher conviction rates,¹⁶⁶ keeping prisoners incarcerated before trial solely because they are incapable of paying contravenes the principle set forth in *Griffin* that “the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence and [can]not be used as an excuse to deprive a defendant of a fair trial.”¹⁶⁷ In addition to violating equal protection, Article 334.4 likely violates the constitutional prohibition on excessive bail.

D. Article 334.4 Potentially Violates the Eighth Amendment Prohibition on Excessive Bail

Salerno established that “when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more.”¹⁶⁸ Although Louisiana law specifies that public safety must be considered when setting bail, bail exists to ensure an arrestee’s presence at court.¹⁶⁹ If an individual’s circumstances were such that a judge would, but for Article 334.4, release that person on his or her own recognizance, the imposition of even a nominal bond would violate the *Salerno* principle.

Article 334.4 has several unconstitutional defects. First, because it does not allow arrestees to present their case for release on recognizance in a meaningful manner, the article violates the rights of the detained to procedural due process. Second, the vastly disproportionate pretrial

163. *Id.* at 8.

164. *Id.* at 8–9.

165. *Griffin*, 351 U.S. at 17.

166. *See infra* note 171.

167. *Griffin*, 351 U.S. at 17–18.

168. *United States v. Salerno*, 481 U.S. 739, 754 (1987).

169. LA. CODE CRIM. PROC. art. 334 (2016).

outcomes between the monied and the wholly indigent indicate a violation of the Equal Protection Clause. Third, the article may violate the Eighth Amendment prohibition on excessive bail. However, even if Article 334.4 were entirely constitutional, its significant negative effects would still require its repeal as a matter of prudent policy.

IV. THE CASE FOR REPEAL: ARTICLE 334.4 AND ITS DELETERIOUS EFFECTS

As shown by the *Faulkner* ruling, federal courts applying Louisiana law are unable to entertain facial challenges to Article 334.4 because not all applications of the rule are unconstitutional. The only viable option to overturn the Article would be to have a defendant so poor that he or she would be incapable of paying any bond. Additionally, mootness and ripeness issues make the challenge of even an ideal defendant difficult.¹⁷⁰ The proper solution to the problem of Article 334.4 is to have the Louisiana legislature repeal it. Article 334.4 is bad policy, and its enforcement leads to several unforeseen consequences.

A. Article 334.4 Affects the Outcomes of Trials by Mandating Expensive Pretrial Detention

The Arnold Foundation has published several studies on the effects of pretrial detention.¹⁷¹ Defendants who are detained until trial are significantly more likely to be sentenced to jail than those who are released before their trial.¹⁷² Additionally, those who are detained until trial receive

170. See *supra* Part I.E.

171. CHRISTOPHER T. LOWENKAMP ET AL., INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 4 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf [<https://perma.cc/CY5S-6U6H>] [hereinafter INVESTIGATING THE IMPACT]; CHRISTOPHER T. LOWENKAMP ET AL., THE HIDDEN COSTS OF PRETRIAL DETENTION 19 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf [<https://perma.cc/Q7UB-PUFL>] [hereinafter HIDDEN COSTS OF PRETRIAL DETENTION].

172. INVESTIGATING THE IMPACT, *supra* note 171 (“Defendants who are detained for the entire pretrial period are much more likely to be sentenced to jail and prison. Low-risk defendants who are detained for the entire pretrial period are 5.41 times more likely to be sentenced to jail and 3.76 times more likely to be sentenced to prison when compared to low-risk defendants who are released at some point before trial or case disposition. Moderate and high-risk defendants who are detained for the entire pretrial period are approximately 3 times more likely to be incarcerated than similar defendants who are released at some point.”).

longer sentences, with low-risk defendants experiencing the greatest disparity in sentences.¹⁷³ This difference in sentencing may be due to desperation on the part of the defendant who is confined, which causes the defendant to accept plea agreements that a non-incarcerated person would refuse.¹⁷⁴ This disparity is serious cause for concern, especially given that the United States Supreme Court has affirmed that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”¹⁷⁵

Heightened risk for conviction and sentencing is not the only damaging effect of the pretrial incarceration that Article 334.4 causes. There is a statistically significant link between pretrial incarceration and recidivism.¹⁷⁶ Additionally, recent research calls into question the effect of pretrial incarceration on rates of appearance in court.¹⁷⁷ Given the

173. *Id.* at 10 (“When other relevant statistical controls are considered, defendants detained until trial or case disposition are 4.44 times more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison than defendants who are released at some point pending trial. The jail sentence is 2.78 times longer for defendants who are detained for the entire pretrial period, and the prison sentence is 2.36 times longer.”).

174. RAM SUBRAMANIAN ET AL., INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 14 (2015), http://vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report_02.pdf [https://perma.cc/4ZLE-YHDG] (“Earlier research ha[s] noted that those held pretrial may be more likely to receive custodial as well as longer sentences because defendants already in jail receive and accept less favorable plea agreements and do not have the leverage to press for better ones.”).

175. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

176. HIDDEN COSTS OF PRETRIAL DETENTION, *supra* note 171 (“Being detained for the entire pretrial period is related to the likelihood of post-disposition recidivism. When other relevant statistical controls are considered, pretrial detention had a statistically significant and positive (meaning increasing) effect on 12-month [new criminal activity post-disposition] and 24-month [new criminal activity post-disposition]. Defendants detained pretrial were 1.3 times more likely to recidivate compared to defendants who were released at some point pending trial. This association could indicate that there are unknown factors that cause both detention and recidivism, but it is an association worthy of further exploration.”).

177. *Id.* at 10 (“Overall, when other relevant statistical controls are considered, defendants who are detained 2 to 3 days pretrial are slightly more likely to [fail to appear] than defendants who are detained 1 day (1.09 times more likely). Examining sub-populations of defendants revealed significant differences, however, in the impact of length of pretrial detention when considering defendant risk level. Specifically, low-risk defendants are more likely to [fail to appear] if they are detained 2 to 3 days (1.22 times more likely than low-risk defendants detained 1

current data, the government interest in having arrestees appear in court and in protecting the public actually appears to be thwarted, and not furthered, by pretrial detention.

Pretrial detention does not only affect the justice system; it affects the treasury as well. In 2015, the city of New Orleans estimated a daily cost of \$97 per prisoner in its parish prisons.¹⁷⁸ In the same year, East Baton Rouge Parish, which sends prisoners to other parishes as a result of jail overcrowding, estimated a cost daily of \$60–70 per prisoner.¹⁷⁹ With an inmate population in the thousands in both cities,¹⁸⁰ any change to pretrial detention rates will play a significant factor in municipal budgets.

B. Revisions of Article 334.4 Will Be Ineffective

Alternatives to the repeal of Article 334.4 would be ineffective. One alternative would be to rewrite the article to order that judges keep in mind the severity of the enumerated crimes currently contained within the article when assessing bond. However, the first factor of Louisiana Code of Criminal Procedure Article 334 requires judges to assess “[t]he seriousness of the offense charged, including but not limited to whether the offense is a crime of violence or involves a controlled dangerous substance.”¹⁸¹ Rewriting Article 334.4 in such a manner would prove redundant.

Another alternative would be to urge judges to assess more nominal bonds. Although preferable to the current state of affairs, this alternative seems a tortuous circumvention of a needless law. If judges were to assign more nominal bonds, and assuming *arguendo* that all arrestees were able

day or less), 4 to 7 days (1.22 times more likely), and 15 to 30 days (1.41 times more likely).”).

178. Paul Purpura, *Jackson Square Shooter’s Odyssey at Orleans Parish Prison Finally Ends*, TIMES PICAYUNE (Jul. 29, 2015, 9:19 PM), http://www.nola.com/crime/index.ssf/2015/07/jackson_square_shooters_orlean.html [<https://perma.cc/7EWE-ZQ6J>]. It should be noted that this estimation took place before the opening of a new multimillion dollar facility, which replaced several aging jails in the parish. For more information on the New Orleans Parish jail facility, see Jonathan Bullington, *First Inmates Arrive at Orleans Parish New Jail Facility*, TIMES PICAYUNE (Sept. 14, 2015, 12:41 PM), http://www.nola.com/crime/index.ssf/2015/09/orleans_parish_jail_opens.html [<https://perma.cc/AKN5-XQZD>].

179. *Prison Privatization Might Save Baton Rouge Money, But is There a Higher Cost?*, TIMES PICAYUNE (Feb. 1, 2015, 2:40 AM), http://www.nola.com/news/baton-rouge/index.ssf/2015/01/baton_rouge_private_prison_tax.html [<https://perma.cc/CM S2-NY2M>].

180. Purpura, *supra* note 178; see also *id.*

181. LA. CODE CRIM. PROC. art. 334 (2016).

to pay such bonds, the net effect would be identical to allowing judges to release arrestees on their own recognizance.

C. Article 334.4 Must be Repealed

Arguments in support of Article 334.4 are unavailing. Repealing the article will not prohibit judges from denying release on one's own recognizance; rather, repealing the article will allow judges to use their own discretion on the matter. The fact that homeless members of society can be more difficult to locate for trial than their more fortunate counterparts is indisputable, but repealing Article 334.4 would mean only that judges would consider this factor when determining whether to grant bail in such cases. Were Article 334.4 repealed, a judge would be free to deny release on recognizance—or indeed, even mandate pretrial detention—for a homeless arrestee who posed a risk of flight or recidivism. However, the same judge would be able to grant release on recognizance for a homeless arrestee found to be a negligible flight risk under such a regime. As to the potential argument that incarceration would somehow be preferable to being homeless, there exist multiple homeless shelters across the state that provide much healthier accommodations than parish prison facilities—many of which the U.S. Department of Justice has taken over via consent decrees, alleging inadequate protection from violence and sexual assault, inadequate suicide protection, inadequate medical and mental health care, and other severe constitutional deficiencies.¹⁸²

Article 334.4 is at best a meaningless legislative gesture. If under the current statute judges are assessing nominal bail at the same rate that they released arrestees on their own recognizance before Article 334.4, the only change is that extremely indigent arrestees are being needlessly denied freedom; otherwise, the court is currently releasing the same arrestees it would under the previous statutory scheme. If, however, the article is causing judges to assess bail at a higher rate than before its passage, it is causing needless, expensive, and unjust incarceration. Article 334.4 accomplishes nothing of value and should be repealed.

CONCLUSION

Article 334.4 allows for a situation in which the indigent may languish in jail while their peers, identical to them in all regards save wealth, are

182. Letter from the U.S. Department of Justice to Marlin N. Gusman, Orleans Parish Sheriff (Apr. 23, 2012), http://www.justice.gov/sites/default/files/crt/legacy/2012/04/23/parish_update_4-23-12.pdf [<https://perma.cc/WQU9-M4RH>].

freed pending trial. It implicates issues of due process, equal protection, and excessive bail. By establishing a prophylactic ban on bail without surety, Article 334.4 denies arrestees their due process right to a fair consideration of the statutory bail factors. It keeps the penniless in prison solely because they cannot afford to pay a bond amount, in violation of the principles of equal protection. It imposes excessive bail on defendants for whom, but for the existence of the article, judges would assess a nominal bond. Data shows that the resulting pretrial incarceration leads to deleterious outcomes, both for the imprisoned and for society at large, by affecting the conviction rates and sentence lengths of the accused. To do nothing in the face of such information is irresponsible. The Louisiana legislature should act to improve the equity of the state criminal justice system by repealing Article 334.4.

*Gabriel Loupe**

* J.D./D.C.L., 2017, Paul M. Hebert Law Center, Louisiana State University. Special thanks are owed to Orleans Public Defenders, whose efforts in managing the effects of Article 334.4 on their clients provided the seed for this Comment.

APPENDIX: LOUISIANA BOND DATA

Group A (All arrestees charged with possession with intent to distribute marijuana and any other offense)

Mean: \$26,725
Standard deviation: \$31,047
Minimum: \$1,500
1st Quartile: \$6,000
Median: \$19,250
3rd Quartile: \$36,000
Maximum: \$170,000

Group B (Arrestees charged with possession with intent to distribute marijuana and any other drug offense)

Mean: \$22,778
Standard deviation: \$21,325
Minimum: \$1,500
1st Quartile: \$5,250
Median: \$18,000
3rd Quartile: \$33,250
Maximum: \$75,000

Group C (Arrestees charged with possession with intent to distribute marijuana only)

Mean: \$14,350
Standard deviation: \$14,083
Minimum: \$1,500
1st Quartile: \$3,125
Median: \$6,250
3rd Quartile: \$24,375
Maximum: \$36,000



