The Second Circuit's Approach to Bail and the Civil Plaintiff in Landau v. Vallen: Attachment Uber Alles?

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COMMENT

THE SECOND CIRCUIT'S APPROACH TO BAIL AND THE CIVIL PLAINTIFF IN LANDAU v. VALLEN: ATTACHMENT ÜBER ALLES?

Although there is no express constitutional right to bail,¹ a "traditional right" has been recognized and enforced by the courts,² either through the Bail Reform Act of 1984³ or state bail

¹ See Carlson v. Landon, 342 U.S. 524, 546 (1952) ("the very language of the [Eighth] Amendment fails to say all arrests must be bailable"); see also Sellers v. United States, 89 S. Ct. 36, 38 (Black, Circuit Justice 1968) ("[t]he command of the Eighth Amendment . . . at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons").


The Court in Carlson, however, asserted that the reference to bail in the Constitution "has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country." See 342 U.S. at 545. The Court supported this statement by referring to the English Bill of Rights Act, the model statute for the eighth amendment. See id. The English Bill of Rights Act has always been thought to provide that "bail shall not be excessive in those cases where it is proper to grant bail." Id. The Court noted that when the eighth amendment was adopted, "nothing was said that indicated any different concept." Id. But cf. Griffin v. Illinois, 351 U.S. 12, 17 (1956). In Griffin, the Court made broad statements implying that the fourteenth amendment's due process and equal protection clauses extend to criminal trial procedure. See id. The Court stated that "[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" Id. (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)).

² See Stack v. Boyle, 342 U.S. 1, 4 (1951): In Stack, Chief Justice Vinson noted that "[t]his traditional right to freedom before conviction" has been in the American criminal justice system since the Judiciary Act of 1789, and that "federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail." Id. (em-

In discussing the right to bail, the Court in Stack cited Rule 46(a) of the Federal Rules of Criminal Procedure. See 342 U.S. at 4 (under Rule 46(a), "person arrested for a non-capital offense shall be admitted to bail"). Rule 46(a) has since been modified. See C. Wright, supra, § 762 (Supp. 1990) (securing appearance of defendant and protecting safety of community should be considered in determining bail). The right to bail continues to be a strong and important one. See Carbo v. United States, 82 S. Ct. 662, 665 (Douglas, Circuit Justice 1962) (bail is "important" part of criminal justice system). This right, however, is certainly not as automatic as Chief Justice Vinson urged in 1951. See id. at 668; see also United States v. Gilbert, 425 F.2d 490, 491 (D.C. Cir. 1969) (right to bail not absolute); Allen v. United States, 386 F.2d 634, 635 (D.C. Cir. 1967) ("no accused is automatically entitled to release"); United States v. Provenzano, 578 F. Supp. 119, 120 (E.D. La.) (right to bail in non-capital case "is not absolute"), aff'd, 747 F.2d 1462 (5th Cir. 1983).

The right to bail has been described as "discretionary." See Carbo, 82 S. Ct. at 667 (quoting Williamson v. United States, 184 F.2d 280, 283 (2d Cir. 1950)); United States v. Hudson, 65 F. 68, 73 (W.D. Ark. 1894). Similarly, at common law bail was not considered an absolute right. See United States v. Delaney, 8 F. Supp. 224, 225 (D.N.J. 1934) (according to common law, "bail should . . . never be a matter of right"). Nevertheless, bail should be denied only under the most compelling of circumstances. See Fernandez v. United States, 81 S. Ct. 642, 644 (Harlan, Circuit Justice 1961) (only when "appropriate to the orderly progress of the trial and the fair administration of justice"); Gilbert, 425 F.2d at 491 ("if necessary to insure orderly trial processes"); Provenzano, 578 F. Supp. at 121 (should be denied only under "extreme or unusual" circumstances (quoting Carbo, 82 S. Ct. at 668)).

The question of whether the defendant has a right to bail arises throughout the criminal process. See C. Whitebread, CONSTITUTIONAL CRIMINAL PROCEDURE § 14.3, at 223 (1978). The issue arises initially upon indictment, at which time there is a strong presumption in favor of release. See United States v. Bentvena, 288 F.2d 442, 444 (2d Cir. 1961) ("until trial commences, enlargement on bail is the rule"). During trial, "the right to bail is necessarily circumscribed by other pressing considerations." Id. After conviction, but pending appeal, the defendant has the burden of establishing that he "will not flee or pose a danger to any other person or to the community." Fed. R. Crim. P. 46(c).

The primary purpose of bail is to secure the appearance of the defendant at trial, and courts have held that any amount beyond that required to ensure the defendant's appearance is "excessive." The policy underlying the accused's right to
bail is premised on the presumption of that person's innocence. Historically, courts have considered the purpose of and policy behind bail to be so important that they generally have prohibited any external or even internal interference with bail by present or of the offense. See, e.g., United States v. Lawrence, 26 F. Cas. 887, 888 (D.C. Cir. 1835) (No. 15, 577). Other considerations include: likelihood of flight, see Carbo v. United States, 82 S. Ct. 662, 666 (Douglas, Circuit Justices 1962); danger to the community, see Provenzano, 578 F. Supp. at 121-22 (E.D. La.), aff'd, 747 F.2d 1462 (5th Cir. 1983); and, repetition of offenses, see Carbo, 82 S. Ct. at 666. In sum, the question of bail to be determined in "light of all the circumstances." Bobick v. Schaeffer, 366 F. Supp. 503, 506 (S.D.N.Y. 1973).

7 See Stack, 342 U.S. at 4. "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." Id.; see also Glynn v. Donnelly, 470 F.2d 95, 98 (1st Cir. 1972) (presumption of innocence exists prior to and during trial). But see Bell v. Wolfish, 441 U.S. 520, 533 (1979). In Bell, the Court stated, in dictum, that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun." Id.

The use of bail as a device for keeping persons in jail may have severe due process consequences. C. WHITEHEAD, supra note 2, § 14.5, at 226. A detained defendant “faces grave difficulties in preparing his defense, ranging from [an] inability to locate witnesses to difficulty in contacting his counsel.” Id. Indeed, statistics show that the conviction rate for pretrial detainees is significantly higher than for those released. See Rankin, The Effect of Pretrial Detention, 39 N.Y.U. L. Rev. 641, 643 (1964) (study “shows that defendants in jail were twenty percent more likely to receive convictions than were defendants on bail”).

8 See United States v. Widen, 38 F.2d 517, 518-19 (N.D. Ill. 1930) (“no theory upon which a stranger to the record may intervene” in federal criminal court to recover defendant’s bail bonds in equity action). The Widen court observed that the common law did not recognize this interference. Id. at 518. Further, the court was unable to find a federal law in derogation of the rule at common law, and thus held that the common law governed. Id. at 519; cf. Bucher v. Vance, 36 F.2d 774, 775 (7th Cir. 1929) (trend in federal decisions is to deny attachment of court-held funds by another court).

Even the government has been forbidden from interfering with a defendant’s bail for the satisfaction of a judgment in its favor in a civil suit. See, e.g., United States v. Badger, 711 F. Supp. 1008, 1009 (C.D. Cal. 1989) (IRS unsuccessful in attempt to levy upon defendant’s bail). The Badger court stated that “the IRS levy ‘impermissibly threatens the institutional integrity of the Judicial Branch.’” Id. (quoting Mistretta v. United States, 488 U.S. 361, 383 (1989)).

9 See, e.g., Corporation Co. v. Mikelis, 467 F. Supp. 826, 828 (S.D. Fla. 1979) (bail bond attachment by civil plaintiff denied due to “important judicial and governmental interests to be served by the retention of a cost bond and an appearance bond”); Reed Mktg. Corp. v. Diversified Mktg., Inc., 419 F. Supp. 125, 126 (N.D. Ill. 1976) (bail attachment by plaintiff refused). The Reed court believed “the transformation of the federal courts into collection courts for judgment creditors would impede the judicial function.” Id. But see Bankers’ Mortgage Co. v. McCombs, 60 F.2d 218, 220-21 (10th Cir. 1932) (attorneys permitted to attach bail for fees); Bank of Hawaii v. Benchwick, 249 F. Supp. 74, 83 (D. Haw. 1966) (attachment permitted where defendant admitted bail “was at all times the property” of plaintiff).

Traditionally, absent a statute to the contrary, not even fines have been permitted to be satisfied from bail funds. See United States v. Neely, 178 F. 748, 749 (C.C.S.D.N.Y. 1910). In the past, however, federal bail statutes authorized courts to satisfy a fine by taking cash paid by the defendant in lieu of bail. See, e.g., Widen, 38 F.2d at 518-19 (former 18 U.S.C.A.
potential creditors, whether the bail was provided by the defendant or a third party surety. Recently, however, in *Landau v. Vallen*, the United States Court of Appeals for the Second Circuit held that the alleged victim of a criminal defendant’s conduct may, in a related civil proceeding, attach the defendant’s assets posted as bail if the plaintiff can demonstrate “a reasonable nexus between [his] losses and the crimes alleged.”

In *Landau*, the defendant, Frank Shannon, was indicted, admitted to bail, tried, and convicted of federal securities fraud violations. He was later sued civilly in the United States District

§ 591 interpreted to include cash deposits for bail as well as common law bail of security bonds; *People ex rel. Gilbert v. Laidlaw*, 102 N.Y. 588, 591-92, 7 N.E. 910, 912-13 (1886) (former 18 U.S.C.A. §§ 588, 586-590 explained); see also infra notes 63-64 and accompanying text (discussion of distinction between bail and cash paid in lieu of bail).

Currently, however, using bail money to satisfy criminal fines is considered improper by nearly all courts which have addressed the issue. See *Cohen v. United States*, 82 S. Ct. 526, 528 (Douglas, Circuit Justice 1962) (purpose of bail is not for fines, and its use for such unintended purpose would render bail “excessive” in the sense of the Eighth Amendment’’); *United States v. Rose*, 791 F.2d 1477, 1480 (11th Cir. 1986) (to use bail money for fine payment “is for a purpose other than that for which bail is required to be given under the Eighth Amendment” and “contrary to the provisions of the Bail Reform Act”); *United States v. Powell*, 639 F.2d 224, 225 (5th Cir. Unit A Mar. 1981) (criminal fines assessed in criminal action not to be taken from defendant’s bail because satisfaction of fines is beyond bail’s purpose); *United States v. Davis*, 47 F. Supp. 176, 179 (S.D.N.Y. 1942) (bail not available for fines from same action because obligation of surety fulfilled), aff’d, 135 F.2d 1013 (2d Cir. 1943). But see *Ward v. United States*, 845 F.2d 1459, 1461 (7th Cir. 1988). In *Ward*, a valid statute authorized fines to be taken from a defendant’s cash bail. *Id.* The *Ward* court stated that the “dual purpose” of a bail bond is “to increase the cost to the defendant of failing to appear for trial, and to provide security for the payment of costs and fines in the event of conviction.” *Id.*

10 See 6 L. ORFIELD, supra note 3, at 152. Bail, under the common law, required that some third party, such as a friend, relative, or bondman deposit a bond with the court with which he would assure the defendant’s presence at trial. See *id.* The “bail,” the one who has promised to pay the court in the event of the defendant’s nonappearance, was responsible for the defendant’s compliance with the bail bond. See *id.* The former Code of Criminal Procedure allowed a defendant to deposit cash in lieu of bail, thereby enabling the defendant to be responsible for himself. See, e.g., *Gilbert*, 102 N.Y. at 591, 7 N.E. at 912 (former federal bail statute permitted defendant to have cash deposited with court, rather than bail bond). It has since been held that “cash bail” may be deposited by the defendant. See *Widen*, 38 F.2d at 518 (since bail “not limited to common-law bail,” court may not “refuse a deposit by the accused in cash of the amount of bail required”). Hence, the “bail” aspect of a release on bail technically has lost its meaning. See M. TOBIAS & R. PETERSON, PRE-TRIAL CRIMINAL PROCEDURE 319-20 (1972).

11 895 F.2d 888 (2d Cir. 1990).

12 *Id.* at 897.

Court for the Southern District of New York by the plaintiff, Solange Landau, for related conduct.\textsuperscript{14} The defendant, an English domiciliary,\textsuperscript{15} pled guilty to the criminal charges\textsuperscript{16} and received a suspended sentence and a $10,000 fine.\textsuperscript{17} Bail originally had been set at $10 million, of which Shannon paid $3.5 million in cash out of his own funds.\textsuperscript{18} The court subsequently reduced bail to $350,000.\textsuperscript{19} While the criminal action against Shannon was still pending, Landau added Shannon to a civil suit against Haas Securities Corporation and others, for, \textit{inter alia}, securities fraud and violations of the Racketeer Influenced and Corrupt Organizations Act.\textsuperscript{20} Subsequent to Shannon's conviction but prior to his sentencing, Landau moved in district court for an order to attach Shannon's posted bail of $350,000.\textsuperscript{21} The district court granted Landau an \textit{ex parte} temporary restraining order prohibiting the return of Shannon's bail pending the court's decision on the motion.\textsuperscript{22} Shannon had already been sentenced by the time the district court reached the merits of Landau's motion and, accordingly, Shannon would have been entitled to a release of his bail but for the temporary restraining order.\textsuperscript{23} The district court denied plaintiff's motion,\textsuperscript{24} concluding that a civil plaintiff could not attach a criminal defendant's bail in a related proceeding because to do so would undermine the purpose of bail.\textsuperscript{25}

\textsuperscript{14} Landau, 895 F.2d at 890. The Southern District of New York was also the situs of the criminal action. \textit{Id.}

\textsuperscript{15} See Attachment of Bail, supra note 13. The defendant, originally from England, was granted permission to return to his native land notwithstanding his suspended sentence. \textit{Id.}

\textsuperscript{16} Landau, 895 F.2d at 890.

\textsuperscript{17} Landau, 723 F. Supp. at 218. Shannon was charged of securities fraud for filing a false and fraudulent form 13D with the Securities and Exchange Commission. \textit{Id.}

\textsuperscript{18} Landau, 895 F.2d at 890.

\textsuperscript{19} \textit{Id.} The $350,000 was the only asset Shannon had in the United States. \textit{Id.}

\textsuperscript{20} Landau, 723 F. Supp. at 218. In her complaint, Landau asserted that "Shannon and others conspired to defraud her of millions of dollars." \textit{Landau,} 895 F.2d at 890. It was also alleged by Landau that Shannon pled guilty as part of the conspiracy. \textit{Id.}

\textsuperscript{21} Landau, 723 F. Supp. at 218.

\textsuperscript{22} \textit{Id.} at 219.

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.} at 220. The district court, upon denying Landau's motion, stayed release of Shannon's funds for 10 days to permit appeal. \textit{Id.}

\textsuperscript{25} \textit{Id.} The district court, acknowledging that the purpose of bail for this defendant had been fulfilled, stated that the troublesome aspect of such a rule would be its effect on future defendants. \textit{Id.} Under such a rule, the district court predicted a reduction of a defendant's incentive to return to trial and an increased difficulty in obtaining bail bonds. \textit{Id.} The district court believed that, on the whole, bail attachment would be "unwise." \textit{Id.} Moreover, the court asserted that any other decision would be contrary to the "general rule" against
On appeal, the Second Circuit reversed, rejecting the district court's per se rule against bail attachment. Writing for the court, Justice Tenney, sitting by designation, explained that the need to assist a civil plaintiff by permitting attachment of a criminal defendant's bail outweighed the government's obligation to return the defendant's posted funds once the purpose for bail no longer existed. Notwithstanding the effects such a rule might have on future defendants, the Second Circuit reasoned that to proscribe attachment would be to provide criminal defendants with a "'safe harbor' while bail funds were in the custody of the court, [and] also 'safe passage' in and out of the court's jurisdiction." Although it recognized that New York law permits "prejudgment attachment of a foreign defendant's assets," the court nonetheless concluded that attachment of a criminal defendant's bail was only available to civil plaintiffs who purportedly were victims of the defendant's criminal conduct. Relying on *Jacobson v. Hahn*, the
court espoused an omnipotent view of attachment. 35 In an attempt to make its rule appear less severe, the Landau court set forth several other instances in which a defendant's bail could be forfeited. 36 The court also maintained that the doctrine of custodia legis 37 did not bar the attachment of bail when a court, in its discretion, deems it proper to do so. 38

The Landau decision will be met with great approval by civil plaintiffs seeking an easy route for attachment. 39 It is submitted,
however, that the Landau court has seriously undermined the fundamental purpose of bail, which is to secure a defendant's presence at trial. 40 If bail is subject to prejudgment attachment, it is suggested that bail's effectiveness as an incentive for the defendant to appear is lost, because posted funds could be forfeited regardless of the defendant's presence at trial. Furthermore, it is asserted that the Landau court's position smacks of punishment, since the increased risk of forfeiture will undoubtedly result in an increase in the amount of bail required to ensure the defendant's appearance. Thus, in its noble effort to aid a civil plaintiff, it is suggested that the Landau court denigrated the fundamental objective of bail and the defendant's right to its return upon satisfaction of the bail agreement's conditions.

This Comment will examine the Landau decision in light of the conflicting policies of bail and attachment, and suggest that the Landau court has departed from a general regard for the sanctity of bail. In addition, it will be submitted that the court's decision overlooked the contractual nature of bail. Further, it will be asserted that the court relied on cases whose fact patterns are clearly distinguishable from the facts and circumstances presented in Landau, and as a result, misinterpreted the custodia legis doctrine. Finally, this Comment will discuss the ramifications of the Second Circuit's extension of New York's attachment statutes to federally prescribed bail and conclude that this extension is both erroneous and destructive to the criminal justice system, and interferes with the protection an accused person's right to bail provides.

I. THE PURPOSE OF BAIL VS. THE RIGHT OF ATTACHMENT

No matter how damning the evidence against an accused may appear, 41 there remains in the American criminal justice system the presumption of the accused's innocence. 42 Until proven guilty,
the accused's liberty is traditionally, if not constitutionally, guaranteed.\textsuperscript{43} Bail in the form of money, property, or the secured promise of another is geared toward ensuring the defendant’s presence at trial.\textsuperscript{44} Stating that “other societal objectives” outweighed the theoretical purpose and policy behind bail,\textsuperscript{45} the Landau court sidestepped an important right of a criminal defendant by allowing civil plaintiffs to attach a defendant’s bail funds.\textsuperscript{46} It is asserted that any such attachment, permitted after the defendant has complied with the conditions of bail, would eliminate the defendant’s incentive to appear at trial.\textsuperscript{47}

Permitting forfeiture of posted bail regardless of whether or not the defendant appears at trial dramatically alters the function of bail.\textsuperscript{48} Instead of being an inducement for the defendant, bail is

\textsuperscript{43} See supra notes 1-4 and accompanying text (discussion of traditional recognition of right to bail).

\textsuperscript{44} See supra note 5 (discussion of bail’s purpose); see also United States v. Melville, 309 F. Supp. 824, 826-27 (S.D.N.Y. 1970) (bail is “catalyst” for and “guarantee” of defendant’s appearance); M. Tobias & R. Petersen, supra note 10, at 345 (sole standard of whether or not to grant bail is likelihood of defendant’s flight).

\textsuperscript{45} See Landau, 895 F.2d at 892. Contra L. Weinreb, supra note 3, at 53 (“burden of the societal objectives served by the criminal process should be shared instead of imposed largely on the persons who are accused”) (emphasis added).

The Landau court was particularly concerned about crime victims. See Landau, 895 F.2d at 891-92. The court noted that it had “no doubt” that the district court sympathized with the plight of crime victims, but criticized the district court’s finding that “the purposes . . . outweighed even victims’ rights.” Id. The Second Circuit’s criticism of the district court seems misplaced, however, when viewed in light of the Tenth Circuit’s decision in United States v. Jones, 567 F.2d 965 (10th Cir. 1977). The Jones court noted that “[a]n action to enforce a bond forfeiture, even if considered civil in nature, is a case arising under the criminal laws and is governed by the rules of criminal procedure.” Id. at 967. The reason for this rule is that the bond came into existence as part of the criminal proceeding and hence must be governed accordingly. See id.

\textsuperscript{46} See supra notes 7-8.

\textsuperscript{47} While the district court predicted a reduction in incentive, see Landau, 723 F. Supp. at 220 (“[a]ny rule which makes it less likely that the defendant will recover bail reduces this incentive and undermines the purpose of bail”), it is suggested that since the rule will affect only those likely to flee (i.e., the guilty), the incentive has effectively been removed in its entirety. See United States v. Badger, 711 F. Supp. 1008, 1009 (C.D. Cal. 1989). The Badger court questioned, “what incentive remains for the defendant to appear for trial,” if such a levy were permitted. Id.; see also supra note 5 (discussion of purpose of bail).

\textsuperscript{48} See Badger, 711 F. Supp. at 1009 (“[s]upervision over the bail system lies within the inherent power of a court to call an accused to answer a criminal complaint and stand trial”). Expressing its fierce distaste for a rule permitting a levy on bail, the Badger court stated that to permit the IRS’s levy would “impermissibly threaten[ ] the institutional integrity of the Judicial Branch.” Id. (quoting Mistretta v. United States, 488 U.S. 361, 383 (1989)). To permit a levy by the IRS, the Badger court further urged, would be inequitable, since the court has “condition[ed] [defendant’s] release on the deposit of a refundable bail bond, only to turn the money over to the IRS upon his surrender.” Id.; see also Reed Mktg.
relegated to the role of a collection device,\textsuperscript{49} as well as an unintended, but powerful prosecutorial weapon. For example, if bail funds are subject to attachment, a defendant may be pressured into accepting a disfavored plea bargain in exchange for reduced bail.\textsuperscript{50} Thus, the defendant may possibly forego trial and the opportunity to clear his name in return for a reduction in the amount of his funds left vulnerable to attachment.

Under Landau, a “[civil] plaintiff’s right to seek a provisional remedy granted by state law” supersedes the federally prescribed right to pre-trial release on bail.\textsuperscript{51} The right to attach a defendant’s assets under New York law,\textsuperscript{52} however, is considered a “harsh”\textsuperscript{53}

\textsuperscript{49} See Badger, 711 F. Supp. at 1009 (IRS may not use court and its powers over bail as “quasi-collection agency”); American Exch. Life Ins. Co. v. Putnicki, 510 F. Supp. 19, 21 (W.D. Tex. 1980) (“the law” forbids use of court as “collection agency”); Reed, 419 F. Supp. at 126. The Reed court warned “that the transformation of the federal courts into collection agencies for judgment creditors would impede the judicial function.” Id.

\textsuperscript{50} See generally STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.11, at 103-04 (American Bar Ass’n, Spec’l Comm. on Prosecution and Defense Functions 1971) (quoting ABA STANDARDS, PLEAS OF GUILTY § 3.1) (discussing when plea bargaining is proper). Plea bargaining is only sanctioned “[i]n cases in which it appears that the interest of the public in the effective administration of criminal justice . . . would thereby be served.” Id. However, plea discussions generally are encouraged under the proper circumstances by penologists who contend that disposing of a case through plea bargaining can aid chances for rehabilitation and limit the burden on society. Id. at 102.

\textsuperscript{51} See Landau, 895 F.2d at 892 n.3. The Landau court did not believe that “the possible added risk of flight could ever outweigh” a civil plaintiff’s right to a state law remedy. Id. In United States v. Jones, 667 F.2d 965, 967 (10th Cir. 1977), overruled in, United States v. Brouillet, 736 F.2d 1414 (10th Cir. 1984), however, it was held that the provisional remedy of bond forfeiture, “even if considered civil in nature, is . . . governed by the rules of criminal procedure.” Id. It is submitted that the view presented by the Jones court, which distinguished bail as a criminal law creation from attachment as a civil law creation, thereby rejecting the Landau court’s preference for civil plaintiffs, is the better view.

\textsuperscript{52} See N.Y. Civ. Prac. L. & R. 6202 (McKinney 1978 & Supp. 1990). Under New York law, the debt or property against which an attachment may be sought includes any debt or property “against which a money judgment may be enforced.” Id. More specifically, this includes “any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested, unless it is exempt from
and “extraordinary remedy.” The right to a prejudgment attachment of a defendant’s assets is entirely statutory, wholly discretionary, and without a counterpart in the common law.

Attachment is generally regarded as a “last resort,” provisional remedy to be “strictly construed in favor of those against whom it may be applied,” and should not be employed where alternatives exist. Bail bond forfeiture, by the same token, is en-

application to the satisfaction of the judgment.” Id. 5201(a). See generally Note, Attachment in New York—A Cumbersome Legal Tool?, 6 SYRACUSE L. REV. 308, 308-12 (1955) (noting New York’s particularly stern approach to this “drastic” remedy). Section 5205 of New York’s CPLR, which sets forth those items that are non-attachable, fails to include bail deposits. See N.Y. CIV. PROAC. L. & R. 5205 (McKinney 1978 & Supp. 1990). The list, however, is not exhaustive and the fact that items such as one’s television set and food for a week are included, illustrates the rather “bare bones” nature of the list, and indicates that the drafters did not intend to cover such complex situations as court-held funds. Id.


See Reading & Bates, 478 F. Supp. at 726 (attachment within trial court’s discretion). Attachment has been held to be so harsh that even when a plaintiff complies with the letter of the statute, courts may refuse to grant the remedy. See Merrill Lynch, 585 F. Supp. at 1259.

See In re Dukes, 276 F. 724, 725 (D. Del. 1921) (no attachment of debt at common law). Attachment originated “in the customs of London.” Id. In one of its forms, the process of attachment can be traced to merchant and admiralty law. See Property Research Fin. Corp. v. Superior Ct., 23 Cal. App. 3d 413, 419, 100 Cal. Rptr. 233, 237 (2d Dist. 1972).

See Harland, Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts, 30 UCLA L. Rev. 52, 64-77 (1982). Alternatives exist for the plaintiff in Landau and other plaintiffs similarly situated, such as federally-supported crime victims’ funds and privately-run crime victims’ organizations. See id. In addition, the defendant’s court-held funds are not forever immune; the plaintiff can wait until the defendant has had his bail returned and then properly seek attachment. See Landau, 723 F. Supp. at 219-20; cf. In re Catton, 86 Bankr. 561, 563 (Bankr. D. Ill. 1988) (once court-held property is
tirely statutory and is to be strictly construed in favor of the de-
positor.89 It is suggested that in light of the fact that both the
attachment and bail statutes are to be strictly construed in favor of
the one who potentially could be forced to part with bail, the Lan-
dau court has misconstrued these statutes to reach a desired
result.

Relying on its decision in Jacobson v. Hahn,61 the Landau
court insisted that "the door to attachment of bail has always been
open."82 The statutes in question in Jacobson, however, provided
that a defendant's cash, paid in lieu of bail, could be used to sat-
sify fines.63 The Jacobson court, then, considered the defendant's
cash bond as an available asset, rather than bail qua bail.64 It is
asserted, therefore, that the rationale of Jacobson is wholly inap-
licable to the facts of Landau, as that is no longer the law. It is
further submitted that the Landau court erroneously blended the
civil remedy of attachment with the criminal defendant's right to
bail to achieve its aim of aiding civil plaintiffs, even at the expense
of rendering bail's existence in our criminal justice system
meaningless.

II. THE NATURE OF BAIL

A. The Contractual Nature of Bail

The arrangement whereby a criminal defendant posts bail as a
condition for his release is, in essence, a contract between the de-

"awarded to the [debtor] [it] is then treated like any other property").

89 See State v. Fish, 747 P.2d 956, 959 (Okla. 1987) (forfeiture only granted "when re-
quired by clear statutory language"); see also FED. R. CRIM. P. 46(a)(6)(II).

61 88 F.2d 433 (2d Cir. 1937).

Landau, 895 F.2d at 897. Contra Interpetrol Bermuda Ltd. v. Trinidad and Tobago
Oil Co., 135 Misc. 2d 160, 168, 513 N.Y.S.2d 598, 604 (Sup. Ct. N.Y. County 1987) (attach-
ment must not be granted freely since "it 'runs counter to the fundamental common-law
concept that before depriving a party of his property, opportunity for hearing should be
offered' " (quoting Reich v. Spiegel, 208 Misc. 225, 230, 140 N.Y.S.2d 722, 726 (Sup. Ct. N.Y.
County 1955))).

63 See Jacobson v. Hahn, 14 F. Supp. 339, 343 (N.D.N.Y. 1936) (application of bonds in
lieu of bail for fines proper because they are "conclusively presumed to belong to the de-
fendant"), modified on appeal, 88 F.2d 433 (2d Cir. 1937).

64 Id. In Jacobson, the question was whether the defendant actually had owned the
cash bonds deposited in lieu of bail. See id. The IRS sought to levy on the bonds but was
denied recovery by the Second Circuit, which resolved the ownership issue in favor of the
defendant's friends who had loaned him the money. See Jacobson, 88 F.2d at 435. In Jacob-
son, the Second Circuit never raised the issue of the court's authority because its decision
was governed entirely by statute. See id. at 435 ("section 15, title 6, U.S.C.A.").
fendant and the government. In exchange for the defendant’s appearance in court, it follows that this contractual arrangement should provide for a guaranteed return of his posted funds. It is suggested, however, that the Landau court overlooked the contractual nature of bail.

The defendant’s obligation under the bail contract is to appear in court, while the government’s obligation is to release the bail funds to the defendant upon the performance of his obligation. The defendant would violate this arrangement, for example, if he failed to appear at trial, or where he obtained bail fraudulently or illegally. Bail statutes provide for forfeiture in such cases because the defendant has not satisfied his obligation under the contract. The Landau court, it would appear, viewed the defendant’s very characterization as a criminal as being tantamount to a breach of the bail contract. The court stated that because the plaintiff “allegedly suffered her losses in a scheme serious enough to warrant criminal prosecution,” attachment is proper regardless of the defendant’s compliance with all of his obligations under the bail contract. It is suggested that the court, which was aware of the “full

64 See, e.g., United States v. Jones, 607 F.2d 687, 688 (5th Cir. 1979) (“clerk of court holds the cash bail under the terms of a specific agreement”); United States v. Miller, 539 F.2d 445, 447 (5th Cir. 1976) (bail bond “is nothing more than a contract between the government . . . and a principal and his surety”); Heine v. United States, 135 F.2d 914, 917 (6th Cir. 1943) (bail arrangement is contractual); United States v. Powell, 492 F. Supp. 1030, 1031 (W.D. Tex. 1980) (bail is held under terms of contract), aff’d, 639 F.2d 224 (5th Cir. Unit A Mar. 1981).

65 See Fed. R. Crim. P. 46(f). Rule 46(f) provides that “[w]hen the condition of the bond has been satisfied . . . the court shall . . . release any bail.” Id.; see Powell, 492 F. Supp. at 1032 (once defendant has appeared “the contract has been fulfilled, so the funds should be returned to the defendant”); Heine, 135 F.2d at 917 (bonds deposited in connection with bail must be returned upon fulfillment of bond’s obligation); see also Chancer v. Chancer, 308 N.Y. 204, 209, 124 N.E.2d 283, 285 (1954) (“[t]here could be no violation of condition maturing payment of bail, provided that defendant rendered himself amenable to proceedings”). The Powell court went so far as to declare the right of return upon compliance with the bond’s conditions to be within the “mandatory” language of Rule 46(f). Powell, 639 F.2d at 225.

66 See supra notes 64-66.

67 See supra note 35.

68 See Fed. R. Crim. P. 46(a)(II), (e)(1); see also United States v. Jones, 607 F.2d 687, 688 (5th Cir. 1979) (“only purpose to be served in requiring a cash deposit is to make it available to satisfy a forfeiture in the event of a willful default of the principal”); United States v. Lujan, 589 F.2d 436, 438 (9th Cir. 1978) (court may only require forfeiture of bail upon breach of bail contract), cert. denied, 442 U.S. 919 (1979).

69 See Landau, 895 F.2d at 892.

70 See id. at 892-93.
range of provisional remedies” available for civil plaintiffs, re
gated the contract of bail to a mere deposit of money.

B. The Doctrine of Custodia Legis

The United States Supreme Court’s decision in The Lottawanna is often cited to support the court’s refusal to allow attach-
mendment of court-held funds under the custodia legis doctrine. In The Lottawanna, a libel suit involving the proceeds from a
court-ordered sale of a vessel, the Court held that funds in cus-
todia legis were immune from attachment. The Court maintained
that funds deposited with the court were to be held strictly for the
purposes for which they had been deposited and disposed of “to whom [the funds] . . . may belong.”

The New York courts depart slightly from a “wholly immune”
approach to the attachment of funds in custodia legis. Nevertheless, as the Second Circuit stated in Clarkson v. Shaheen, this

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72 See id. at 892.
73 See United States v. Nebbia, 357 F.2d 303, 304 (2d Cir. 1966) (“Rule [46 of the Federal Rules of Criminal Procedure] as interpreted in this Circuit requires more than the mere deposit of cash”); see also supra note 5 (discussing purpose of bail).
74 87 U.S. (20 Wall.) 201 (1873).
75 See, e.g., In re Casco Chem. Co., 335 F.2d 645, 649 (5th Cir. 1964) (court found “ab-
solute stranglehold of the Clerk on funds in the Registry,” based on The Lottawanna); Corporation Co. v. Mikulis, 467 F. Supp. 826, 827 (S.D. Fla. 1979) (The Lottawanna decision mandates denial of attachment of court-held funds).

Sovereign immunity is another ground for denial of bail attachment that courts have

The Landau court disregarded sovereign immunity as a basis for denial of bail attach-
ment because the government has no interest in the money. See Landau, 895 F.2d at 893. It is
submitted that the court’s rejection of the sovereign immunity argument was well-
found. In The Lottawanna, it was stated that funds deposited in the Court’s registry were
neither “in the hands of the clerk nor of the judge.” The Lottawanna, 87 U.S. at 224. It has
also been held that there is an important distinction to be made between payment into
court and a deposit into court. See Schmidt v. Chamberlain of New York, 286 N.Y. 225, 230,
194 N.E. 685, 686 (1935) (treasurer not permitted to act with court-held funds, since depos-
ited with, and not paid to, court); In re Johnson’s Estate, 186 Misc. 469, 471-72, 57 N.Y.S.2d 71, 72 (Sur. Ct. New York County 1945) (deposit different from payment because court merely has custody of deposit).
76 See The Lottawanna, 87 U.S. at 224-25.
77 See id. at 224.
78 See Clarkson Co. v. Shaheen, 716 F.2d 126, 129 (2d Cir. 1983). The Clarkson court
warned that “the right under New York law to attach property in the custody of the court is
limited.” Id.
79 Id.
departure from the general rule should be permitted sparingly and only “to an extent not inconsistent with the purpose for which the fund was created.” Clearly, bail was not created to satisfy the potential claims of civil plaintiffs. It is asserted, therefore, that the Landau court misinterpreted Clarkson and The Lottawanna decisions to support the proposition that a court is free to release court-held funds for any purpose when, in fact, those decisions recognized that a court’s power to release those funds is limited by the purpose for which they were deposited with the court in the first place.

The Second Circuit’s unusual approach to bail as expressed in Landau is echoed in the United States District Court of Hawaii’s decision in Bank of Hawaii v. Benchwick. In Bank of Hawaii, the

See id. at 130 (construing In re Leikind, 22 N.Y.2d 346, 239 N.E.2d 550, 292 N.Y.S.2d 681 (1968)). In Clarkson, judgment creditors attempted to levy stock of a judgment debtor after the district court took the stock into its custody for the benefit of another judgment creditor. See id. at 127. “[O]nce the shares came into the custody of the court for [plaintiff’s] benefit, no subsequent activity could give third parties a superior claim.” Id. at 129.

Cf. Chancer v. Chancer, 308 N.Y. 204, 210, 124 N.E.2d 283, 285 (1954) (bail for defendant’s appearance at trial not alimony). The Chancer court stated that the “giving of bail... could not be upon terms which would enable the application of the bail to purposes other than those [statutorily] contemplated.” Id. The Chancer court further noted that the discretionary authority of a court to dispose of funds deposited with it “does not invest the court with an arbitrary or unlimited discretion concerning what shall be done with such funds.” Id. at 207, 124 N.E.2d at 284. The court also stressed that the purpose of bail is to “render [defendant]... amenable to [proceedings].” Id. at 211, 124 N.E.2d at 285.

Landau, 895 F.2d at 895. The Landau court, relying on dictum in The Lottawanna, stated:

[The admiralty court could not have considered the state-court attachment “[b]ecause the fund, from its very nature, is not subject to attachment either by the process of foreign attachment or of garnishment.” [citing The Lottawanna, 87 U.S. at 224]... It acknowledged elsewhere in its opinion, however, that “[s]upplemental suits in the nature of a suit in rem may unquestionably be entertained in favor of parties having an interest in the proceeds...” Therefore, the Court did not identify a general rule precluding actions against funds held in the registry.

Id. (citations omitted). It is suggested that the Landau court’s discussion regarding the plaintiff’s interest in the proceeds is, as the court itself suggested, too remote for application of the Lottawanna dictum on which it relied. See id. at 895-96; cf. Bank of Hawaii v. Benchwick, 249 F. Supp. 74, 83-84 (D. Haw. 1966) (bank worker embezzled funds from bank which he used for bail and bank allowed to attach because of its “interest” in bail funds).
court allowed a civil plaintiff to attach a criminal defendant’s bail where the defendant’s admission and the evidence produced at his trial established that the funds the defendant posted for bail had been embezzled from the plaintiff.\textsuperscript{84} In Bank of Hawaii, then, “the claim asserted [was] ownership of the very funds posted as collateral,”\textsuperscript{85} not whether a criminal defendant’s right to bail should be disturbed by a civil plaintiff’s alleged monetary injury.\textsuperscript{86} In Landau, the propriety of the funds posted as bail was not at issue.\textsuperscript{87}

The Bank of Hawaii court focused on a court’s discretionary power to release its funds and bend the custodia legis doctrine as justice requires.\textsuperscript{88} It is suggested, however, that the impropriety of the funds posted as bail should have been the sole factor upon which the Bank of Hawaii decision turned. Accordingly, it is submitted that the Landau court erroneously relied on Bank of Hawaii—a decision whose outcome the Second Circuit may have desired, but a decision which nonetheless is factually distinguishable from Landau and wrongly premised on the discretion of a court to abandon the custodia legis doctrine for justice’s sake.

\section*{III. The Ramifications of Bail Attachment}

In the event a defendant is able to raise bail, the Landau rule will discourage him from appearing at trial or complying with

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220 (rejecting); Corporation Co. v. Mikelis, 467 F. Supp. 826, 828 (S.D. Fla. 1979) (criticizing).
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\item \textsuperscript{84} See Bank of Hawaii, 249 F. Supp. at 83-84.
\item \textsuperscript{85} See Landau, 723 F. Supp. at 219.
\item \textsuperscript{86} See id. The Bank of Hawaii court granted attachment of the defendant’s bail to the plaintiff bank, “notwithstanding the paucity of specific precedent, [because] the power of this [c]ourt to render more effective justice must surely not be lacking.” See Bank of Hawaii, 249 F. Supp. at 80 (court agreeing with plaintiff Bank of Hawaii’s argument). The court granted this relief because the defendant admitted that the money posted was the plaintiff’s property. See id. at 83.
\item \textsuperscript{87} See Landau, 723 F. Supp. at 219. The Second Circuit, however, implied that there was some impropriety as to the source of the funds. See Landau, 895 F.2d at 891, 893. The court stated that it was “not ‘comfortable with the notion of indicted defendants using funds that may be the fruits of their crimes as bail.’” Id. at 891. Expressing concern that a thief should not be allowed to post bail with that which he stole, the court declared that “[n]o criminal defendant should be able to post property as bail without its owner’s consent.” Id. at 893. The court then hypothesized that “[i]f plaintiff’s allegations are true, then defendant’s net worth increased, in part, by the amount of her losses.” Id. This argument, however, departs from the findings of the district court. See Landau, 723 F. Supp. at 219. The district court stated in its findings of fact that the plaintiff had not asserted an interest in the actual bail. Id. It is suggested that the Second Circuit’s argument has stretched the concept of “interest” to the point of absurdity.
\item \textsuperscript{88} See Bank of Hawaii, 249 F. Supp. at 77.
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other conditions of his bail. The Landau court realized that its decision diminishes the incentive ordinarily associated with bail, but maintained that the defendant may lose his bail on other grounds, and that sufficient incentives still remains for the defendant to appear at trial, such as to avoid contempt or bail-jumping charges. These contentions, however, are only consequentially related to a defendant's potential loss of his bail and are, therefore, irrelevant to the defendant's right to a return of his bail funds when he has not acted improperly. It is suggested that the Second Circuit's reasoning in this area is flawed because nowhere has it been suggested that the primary reason a defendant returns to court following his pretrial release is to recover the posted funds. The only reason, however, for requiring the defendant to post bail is to secure his appearance at court—the reverse of this argument does not an argument make.

Courts have recognized that a rule permitting bail attachment undoubtedly would decrease a defendant's ability to obtain bail.

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See Landau, 895 F.2d at 890 (it “may reduce the incentive to return to trial”); Landau, 723 F. Supp. at 220 (“decreased likelihood” of getting bail back will make it “less likely” that defendant will appear at trial); Reed Mktg. Corp. v. Diversified Mktg., Inc., 419 F. Supp. 125, 126 (N.D. Ill. 1976) (goal of bail, to have defendant return, undermined by attachment); cf. United States v. Badger, 711 F. Supp. 1008, 1009 (C.D. Cal. 1989) (court refused to allow IRS to levy cash bail bond of defendant even after defendant appeared for trial because to do otherwise would remove incentive of defendant to appear at trial).

See Landau, 895 F.2d at 893. See id. The court noted, for example, that bail could be forfeited due to the impropriety of the posted assets. Id; see supra note 36. The Landau court's illustrations of how a defendant might lose his bail involve either illegality as to the source of the funds or a statutory mandate as a sanction for wrongful acts of the defendant. See id. Landau, therefore, is factually distinguishable from these decisions, because the plaintiff in Landau merely complained of fraud and did not allege impropriety with regard to the actual bail funds themselves, nor was there a question raised by the district court as to the legality of the bail posted. See Landau, 723 F. Supp. at 219; see also supra note 87 and accompanying text (discussion of inconsistent conclusions of district court and Second Circuit on source of funds and Second Circuit's interpretation of term “interest”).

See Landau, 895 F.2d at 892. The Landau court argued that denying attachment "presumes that every criminal defendant would react similarly to a diminished expectation in the return of bail." Id. The district court, which was not concerned that every defendant would respond negatively to the rule, but rather that it would happen at all, stated that the very awareness of the rule would make it “that much less likely [for the defendant] to appear at the criminal proceeding.” See Landau, 723 F. Supp. at 220.

For a similar view, see Reed, 419 F. Supp. at 126. The Reed court believed that the additional sanctions a court may impose on a bail-jumping defendant “would not eliminate the adverse impact [of bail attachment] on the effectiveness of this bond system.” Id.

See Landau, 895 F.2d at 890; Landau, 723 F. Supp. at 220; Reed, 419 F. Supp. at 126; cf. United States v. Davis, 135 F.2d 1013, 1014 (2d Cir. 1943) (court recognized that allowing interference with bail to satisfy fine “may hinder accused in their search to procure
Where a defendant is unable to raise bail independently and thus must seek the assistance of a friend, relative, or loan institution, the third party aware of this attachment rule may refuse to help the defendant because of the profoundly diminished likelihood of the return of its funds. This increased difficulty in obtaining bail could lead to further crowding of the already overpopulated jails.

The Landau court recognized these possibilities and proposed that the judge who sets bail could consider the amount of damages a criminal defendant might face in a related civil suit. It is submitted, however, that such a practice would be too speculative to have any real effect and that a court’s damages estimate would subsequently rise to a level beyond which a defendant could afford or be willing to forfeit. Should the Landau approach be adopted even to a limited degree, the attachment rule will eat away at the fundamental nature and purpose of bail. It is suggested that the Second Circuit’s decision to permit bail attachment is unsound from a legal and philosophical perspective, and that the criminal justice system will suffer as a result.

cash bail,” but that statute in effect at that time permitted such interference).

See Landau, 723 F. Supp. at 220. Many criminal defendants are indigent and must seek help from a third party. See U.S. Task Force, supra note 2. To make it more difficult for defendants to obtain bail could amount to a denial of equal protection. See J. Goldkamp & M. Gottfredson, Policy Guidelines for Bail 16 (1985). The district court in Landau was well aware of a criminal defendant’s rights and looked to the effect on future defendants’ attempts to secure bail when it declined to permit bail attachment. See Landau, 723 F. Supp. at 220. It is submitted that the Second Circuit was over-consumed with the needs of the civil plaintiff and overlooked the ramifications of its decision on future criminal defendants.

See Landau, 895 F.2d at 892 n.3. See Landau, 723 F. Supp. at 220. The bail system is not unassailable, and, in fact, questions as to its effectiveness and utility are plentiful. See J. Goldkamp & M. Gottfredson, supra note 95, at 12-14. Bail nonetheless remains a stronghold in our criminal justice system, undergoing occasional reforms in the hope of making it more effective. See id. On the other hand, one commentator predicts the demise of bail in the not too distant future. See W. Thomas, Bail Reform in America 254 (1976).
CONCLUSION

In an attempt to aid the often arduous plight of the civil plaintiff seeking prejudgment attachment of a defendant's assets, the Second Circuit has blindly permitted an unwarranted interference with a criminal defendant's right to bail. As a result, the primary purpose of bail has been undermined to help an individual for whom alternatives exist and to whom the present solution adopted by the Landau court, traditionally has been denied. While the Landau court's intentions in undermining the bail system may have been well meaning, the fact remains that bail is a crucial component of our criminal justice system. The courts have a duty to uphold that system and further its aims, notwithstanding the perceived needs of plaintiffs in related civil proceedings.

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