



AMERICAN CIVIL LIBERTIES UNION

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To: Joint Standing Committee on Judiciary, 129th Legislature
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Subject: Brief history of bail, submitted in support of LD 1421

Below is a brief summary of the history of money bail from the 11th Century through today, submitted to the Joint Standing Committee on Judiciary in connection with my testimony in support of LD 1421, An Act to Amend the Maine Bail Code.

The Origins and History of Bail

Many people mistakenly believe that the purpose of bail is to keep people in jail. But pretrial detention actually represents a fundamental distortion of the meaning and purpose of bail. The origins of our bail system lie in 11th century England, when the public justice system was first established.ⁱ Itinerant justices traveled from village to village to try cases. But it took them a long time to complete their circuit of villages, and it could be months before the judge came to town. It was impractical to keep people in jail for long periods between these judges' visits, so defendants were released, and bail was developed as a monetary amount paid by defendants if they didn't show up when the itinerant justice came to town. In this system, no one was detained pretrial, and no money was ever paid up front. Bail was only forfeited if the defendant didn't show up for their trial. Bail essentially acted as a promise to show up for court.

In this system, bail meant freedom.

The right to bail meant the right to be released before trial, not the right to have a cash price assigned to one's freedom. As a report by the Criminal Justice Policy Program at Harvard Law School explains, "Bail is historically a tool meant to allow courts to minimize the intrusion on a defendant's liberty while helping to assure appearance at trial."ⁱⁱ Bail was intended to make sure people were not punished until they were actually convicted, epitomizing the maxim "innocent until proven guilty."

As the system developed over the following centuries, a central principle that emerged was the bail/no bail dichotomy, based on the offense a person was charged with.ⁱⁱⁱ This was meant to safeguard equal treatment by preventing corrupt local sheriffs from releasing people who could pay them a fee and detaining those who could not. Instead, people charged with most offenses were simply released before trial. Those charged with certain more serious offenses were jailed.

The basic tenets of this system lasted for several centuries, and were enshrined in the American legal system. As early as 1641, Massachusetts created the unequivocal right to bail except for people charged with capital offenses.^{iv} Pennsylvania granted bail even for some capital defendants. This widespread right to bail, in which bail meant the right to freedom before trial, became the model for nearly every American jurisdiction.

As bail expert Tim Schnacke explains, “The notion that bailability should lead to release was foundational in early American law.”^v In fact, keeping someone in jail who was eligible for bail was itself a crime.^{vi} The only accepted reason to limit this absolute pretrial freedom for non-capital offenses was in order to ensure defendants’ appearance at trial, and “the only means for doing so remained setting financial conditions or amounts of money to be forfeited if a defendant missed court.”^{vii}

Defendants never paid money up front in order to be released from jail. As a result, pretrial incarceration remained the exception in American history until the 20th century. The U.S. Supreme Court continued to adamantly protect the right to bail through the 20th century. In *United States v. Barber* (1891) the court declared, “It is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial if the government can be assured of his presence at that time.”^{viii} In *Stack v. Boyle* (1951) the court was even more emphatic:

From the passage of the Judiciary Act of 1789, to the present Federal Rules of Criminal Procedure, Rule 46 (a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.^{ix}

But there were two important changes that had major impacts on how bail worked in the U.S. The first change was the shift from paying money only if you did not show up (known as an unsecured money bail system), to paying money upfront to get out of jail (a secured money bail system), which happened around 1900.^x The unsecured money bail system relied on sureties — people who vouched for defendants and were responsible for paying their bail if they did not come to court.

Throughout the 1800s, however, the expanding frontier and growing cities diluted the personal relationships necessary for this surety system to function. Some bailable defendants were kept in jail unnecessarily because they could not find sureties. In order to release more bailable defendants a commercial system was developed, allowing defendants to pay bondsmen to act as their sureties. Although the shift to the commercial surety system was supposed to help release more defendants, it had the effect of transforming the unsecured bail system into a secured bail system — one in which defendants had to pay money upfront to get out of jail. As Schnacke

notes, “The result has been an increase in the detention ofailable defendants over the last 100 years.”^{xi}

The second crucial change to the bail system, which led to a massive increase in pretrial detention, took place in the last 50 years. This was the shift to “public safety” as a consideration in setting bail. Throughout most of American history, cash bail was intended to ensure a defendant’s appearance in court.^{xii} However, in 1970, Washington, D.C., passed legislation allowing “public safety” to be considered in bail determinations. Many states followed their example, and the public safety purpose of bail was enshrined in the Bail Reform Act of 1984.

This shift was a response to the Great Migration, in which millions of African Americans migrated from the rural south to cities, especially in the north, and to the civil rights movement — both of which produced anxiety among White people about Black people. A report by the Southern Poverty Law Center on the history of bail explains, “linking civil rights demonstrations, student protests, and the ‘long, hot summers’ of urban uprisings into a general pattern of lawlessness, conservative politicians argued that America was coming apart at the seams.”^{xiii} Considering public safety in setting bail gave judges discretion to set high cash bail amounts in order to detain young African American men, who were generally stereotyped as dangerous. The result was a dramatic increase in pretrial detention, with a disproportionate effect on African Americans.

This recent erosion of the traditional right to pretrial release threatens the fundamental tenets of our justice system. Schnacke summarizes the contradictions that cash bail poses:

A country founded upon liberty, America leads the world in pretrial detention at three times the world average. A country premised on equal justice, America tolerates its judges often conditioning pretrial freedom based on defendant wealth – or at least on the ability to raise money – versus important and constitutionally valid factors such as the risk to public and victim safety. A country bound by the notion that liberty not be denied without due process of law, America tolerates its judges often ordering de-facto pretrial detention through brief and perfunctory bail hearings culminating with the casual utterance of an arbitrary and often irrational amount of money. A country in which the presumption of innocence is “axiomatic and elementary” to its administration of criminal justice and foundational to the right to bail, America, instead, often projects a presumption of guilt.^{xiv}

As a result of these changes in the bail system, what was once conceived as a way to keep people out of jail while awaiting trial has morphed into a system in which people are locked up before trial unless they can afford to buy their freedom. Today, more than two thirds of people held in Maine’s jails are awaiting their trials. We are a far distance away from the original purpose of money bail.

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- ⁱ Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (National Institute of Corrections, U.S. Department of Justice 2014); 38, http://www.clebp.org/images/2014-09-04_Fundamentals_of_Bail.pdf
- ⁱⁱ Criminal Justice Policy Program, Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform* (2016), 4, <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> (accessed December 18, 2018).
- ⁱⁱⁱ Schnacke, *Fundamentals of Bail*, 40.
- ^{iv} Schnacke, *Fundamentals of Bail*, 40.
- ^v *Ibid.*
- ^{vi} *Ibid.*, 42.
- ^{vii} *Ibid.*, 58.
- ^{viii} *United States v. Barber*, 140 U.S. 164 (1891).
- ^{ix} *Stack v. Boyle*, 342 U.S. 1 (1951)
- ^x Schnacke, *Fundamentals of Bail*, 41.
- ^{xi} Schnacke, *Fundamentals of Bail*, 41.
- ^{xii} *Ibid.*, 39.
- ^{xiii} Cassie Miller, *The Two-Tiered Justice System: Money Bail in Historical Perspective* (Southern Poverty Law Center, 2017), <https://www.splcenter.org/20170606/two-tiered-justice-system-money-bail-historical-perspective>.
- ^{xiv} Schnacke, *Fundamentals of Bail*, 15.