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BAIL REFORM

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A Brief History of Bail

By Timothy R. Schnacke

Life can only be understood backwards; but it must be lived forwards.
—Soren Kierkegaard

The classically inspired bronze doors of the Supreme Court building illustrate significant events in the evolution of justice.

"The history of bail gives us all the answers." This somewhat pithy statement is one I frequently use to stress the importance of history to pretrial justice today. And, indeed, I am rarely proven wrong. When was the first recorded and recognized instance of a judge setting an unattainable cash bond in America? The answer is 1835, in a bond set for a defendant accused of attempting to kill President Andrew Jackson.[1] Are actuarial pretrial risk assessment instruments new? The answer is no, they merely represent the most recent iteration of roughly 100 years of assessing predictors of pretrial success using research.[2] Saying that the history of bail gives us all the answers may be somewhat hyperbolic, but even if it only gives us some of the answers, we can say with confidence that those answers are proving crucial to understanding pretrial release and detention in America today.[3] In short, the history of bail (release) and no bail (detention) in England and America is important, and knowing that history, as well as key themes from that history, is likely essential to understanding this generation of American bail reform.

David Crabtree, founder of Gutenberg College, defines history as "a story about the past that is significant and true."[4] Significance requires a historian to simplify the narrative of events to focus only on the most important. Simplicity, in turn, is shaped by questions a historian needs to answer. This is fully evident in the history of bail. For example, several histories of bail written before 2010 merely note the monumental change in America from using mostly unsecured financial conditions to mostly secured financial conditions. Today, however, people are questioning the use of secured money bonds, and so newer histories have tried to answer the question of why, exactly, America turned to that model of release and how that model has fared.

Historical truth should be a given, but Crabtree says that even factual omissions can lead to a very different historical narrative. This generation of bail reform is likely the most ideological generation to date and, thus, it is not immune to intentional omissions through "competing"

histories containing serious misstatements, mostly about money. In sum, a true historical account of bail must focus on money simply because money has existed at bail for more than 1,500 years. However, a true account also must explain the two historic types of money bail systems in America (personal surety and commercial surety), as leaving one out would distort the truth of the historical narrative.

The following brief history of bail strives to be both significant and true, with the goal of using the history to answer some of the important questions facing American pretrial justice today.[5]

Anglo Saxon/English Roots

Coming to Britain in the wake of Roman retreat, the Germanic Angles and Saxons brought with them "blood feuds" (family against family) to settle disputes among persons. This form of doing justice, however, was brutal and costly and so fairly quickly those tribes settled on a system of payments based on the "wergeld" (meaning "man price"), whereby persons and their property would be assigned a monetary worth based on social rank and wrongs between persons would be settled by compensation.[6] Historians note the existence of detailed tariffs assigning full wergeld amounts to be paid for killing persons of various ranks as well as partial payments for injuries such as loss of limbs or other wrongs.

With wergelds as a backdrop, historians agree on what was likely the prototypical process we now recognize as the ancestor to America's current system of bail. That process involved family members becoming sureties for the accused and offering pledges to pay the wergeld over time as trustees for the preexisting debt.[7] This is, essentially, the "ancient practice of securing the oaths" referred to by the Supreme Court in *Stack v. Boyle* in 1951,[8] and it has certain fundamental properties important to this generation of bail reform.

First, the surety (also known as the "pledge" or the "bail") was a person and, thus, the system of release became known as the "personal surety system." Second, the surety was responsible for making sure the accused paid the wergeld and did so by agreeing in early years to stand in completely for the accused upon default ("body for body," meaning that the surety might suffer the same punishment for nonpayment), and in later years to pay the wergeld in the event of default. Third, the surety was not allowed to be repaid or otherwise profit from this arrangement, a prohibition that lasted until about 1900 in America.[9] And fourth, the rationale behind this original bail setting made sense because the amount of the payment upon default was identical to the amount of the punishment or wergeld, and thus for centuries there were never debates over whether the amount was arbitrary or otherwise unfair.

The Norman Invasion

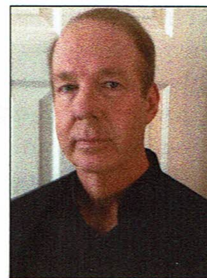
This overall system of payments as penalties came to an end when the Normans invaded Britain in 1066 and gradually established a criminal justice system resembling the one we see today.[10] The Normans began by replacing wergeld payments with corporal punishment and prison. This had a profound impact on the rationality of the system simply because assigning a monetary amount as a condition of release that is "equivalent" to either prison or corporal punishment often can be arbitrary.[11] Moreover, once a private process, justice slowly became public, most notably through the crown's initiation of crimes against the state by designating certain felonies "crimes of royal concern" and by placing persons accused of those crimes under the control and jurisdiction of itinerant royal justices.[12]

The creation of jails in addition to traveling justices inevitably led to delay from arrest to trial and, thus, there arose the need for some system of pretrial release. According to bail historian William Duker, "The writ *de homine replegiando*, which commanded the sheriff to release the individual detained unless he were held for particular reasons, probably dates from this point [and] although the writ is famous for being the first 'writ of liberty,' it actually established the first written list of nonbailable offenses."[13] This began a further "code of custom" (akin to common law) in the 1100s that established bailable and nonbailable offenses.[14]

By the 1270s, however, King Edward I began to scrutinize this customary "bail/no bail" dichotomy and quickly found areas of abuse. As a result of the Hundred Inquests of 1274, Edward became aware that sheriffs (bail setters at that time) were committing two primary abuses: (1) they were detaining otherwise bailable defendants unless those defendants paid money, and (2) they were releasing otherwise unbailable defendants for large amounts of money.[15] At the time, both Edward and Parliament considered these abuses equally egregious.

Accordingly, Parliament enacted the Statute of Westminster in 1275 to establish criteria governing bailability, largely based on a prediction of the outcome of the trial by examining the nature of the charge, the weight of the evidence, and the character of the accused.[16] In doing so, the Statute expressly categorized certain bailable and unbailable offenses, creating the first legislative articulation of a "bail/no bail" scheme. More importantly, however, the Statute also made it clear that bailable defendants were to be released and unbailable defendants were to be detained. In other words, "bail" meant release and the bail process was not allowed to be used to intentionally detain. "No bail," in turn, meant detention; once determined to be unbailable, the accused had to be detained. Sheriffs who disobeyed or abused this aspect of the dichotomy faced imprisonment.[17]

"Bail" as release and "no bail" as detention became a common theme running through English history over the next 500 years, a period in which various reforms were enacted to address abuses manifested in the detention of bailable defendants and the release of unbailable ones. While occasional



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reforms addressed the release of unbailable defendants—for example, the Statute of 1483 is believed, at least in part, to have been an attempt to curtail unlawful releases[18]—the vast majority of reforms were meant to curtail the detention of bailable defendants. And, indeed, throughout history the detention of otherwise bailable defendants has led to reforms creating several significant legal rules and processes, such as habeas corpus, the preliminary hearing, the rule requiring prosecutors to charge defendants, and, of course, excessive bail.[19] Indeed, these reforms were frequent enough in the fourteenth century alone to lead to a gradual transfer of bail-setting duties from sheriffs to justices of the peace.[20]

To this day, the tradition of "bail" equaling release and "no bail" equaling detention has been a marker of bail reform such that the following historical statement has been proven consistently true: Whenever one sees bailable defendants (or those whom society believes should be bailable) in jail, or unbailable defendants (or those whom society believes should be unbailable) out of jail, history demands correction and bail reform happens.[21] Because we currently see bailable defendants in jail as well as some defendants whom we believe should be unbailable out of jail, this bail/no bail tradition goes far in explaining the inevitability of bail reform today.

Bail in America

The American Colonies initially embraced virtually all of England's bail rules and administered the process in nearly identical ways. Nevertheless, because there is substantial confusion (if not purposeful misrepresentation) over our English bail heritage, there are two historical threads concerning the "American overlay" to English bail practices that require emphasis.

The first historical thread responds to the unfounded claim that our system of secured money bail today—requiring upfront payments to be released from jail—has existed throughout history. As noted above, the system created in England involved personal sureties. These persons were unpaid and unreimbursed, and administered what we would call today "unsecured bonds," that is, with only promises to pay an amount of money in the event of default. When America was founded, it fully embraced the system of using personal sureties and promises to pay, which was known historically as a system of "recognizances."[22] As correctly noted by author F. E. Devine, "[t]he form of bail in criminal cases, all of the common law commentators agree, was by recognizance."[23] Thus, when explaining bail, Blackstone,[24] Pollock and Maitland,[25] Chitty,[26] Petersdorff,[27] Hawkins,[28] and others use the language of recognizances, which includes sureties, promises, pledges, and preexisting debts paid only upon forfeiture through default.

Lermack, writing about bail in colonial Pennsylvania, explained that even when a defendant was required to "post security in advance," this meant only finding sureties who would be obligated for some amount of money due upon default.[29] Thus, even when historical language appears to suggest upfront payments, the suggestion is nearly always false. Personal sureties and promises to pay were the cornerstone of the system adopted in the American Colonies, which served the purpose of virtually guaranteeing the release of bailable defendants. Under this system, excessiveness appears to have come into play only rarely, when the amount was so high that no person wanted even to promise it or when the amount was set above the defendant's and his collective sureties' sworn worth. Likewise, raising an amount to attain "sufficient" surety was tolerated only to the point of detention.[30]

The second historical thread responds to the equally unfounded claim that declaring a defendant to be bailable should not automatically lead to his or her release when, historically speaking, bail *meant* release. Indeed, the American Colonies embraced and advanced bail as release, largely by rejecting England's highly discretionary later bail laws and by settling on more simplified and liberal rules that granted a broad, nondiscretionary right to bail to all but those charged with the gravest offenses.[31]

The American overlay in this sense meant that persons were declared "bailable" prior to assessing any "risk" beyond that solely associated with the charge, but it reflected the American desire to liberally allow for release before trial. It declared a broad right to bail to nearly every defendant with few exceptions (initially capital defendants, and even then, the list of capital crimes was gradually decreased) and it used personal sureties and promises to pay upon forfeiture to ensure the release of bailable defendants. This tradition of bail as release was reflected not only in practice[32] but also in Supreme Court opinions dating from 1891 to 1951, when the U.S. Supreme Court equated the "right to bail" with the "right to release before trial" and the "right to freedom before conviction."[33]

Generations of Bail Reform

Nearly 1,500 years of history culminated in a broad American right to bail, which was meant to release virtually all bailable defendants by following the rule that the detention of bailable defendants was mostly forbidden. How, then, did America come to find itself in a time when defendants are "held on bail," when bail does not equal release, and when the problems historically leading to reform have been masked? The answer is found in the history of bail from only the last 180 years, when the American system borrowed from England began to change in two fundamental ways.

First, release relied on personal sureties, but for a number of reasons in the 1800s, America began running out of those people who were willing to take responsibility over defendants for no money. Throughout the 1800s, American judges wrestled with the problem and began placing secured money conditions on defendants hoping they could "self-pay." When they could not, those defendants claimed the amounts were excessive, and it was precisely at this moment that American courts could have read the various excessive bail clauses to mean that any amount beyond the reach of a defendant was unconstitutional. Instead, however, those courts came to the opposite conclusion—that is, they declared that an amount was not excessive simply because it was unattainable.[34]

Importantly, however, these declarations ultimately only dealt with so-called *unintentional detention*. Accordingly, so long as the judge did not make a record to

intentionally detain using money, the fact of detention was considered merely an unfortunate byproduct of a conditional process of release. *Intentional detention* of a bailable defendant, on the other hand, was still considered unlawful, as it has been throughout the history of bail.

The distinction between intentional and unintentional detention, however, created a perplexing problem still facing America today. Under this new line of cases, so long as judges made no record to purposefully detain, those judges, in fact, could detain on purpose. Thus, the historically unlawful practice of intentionally detaining bailable defendants was masked by this excessive bail loophole. This has led to countless bailable defendants being detained, to the paradoxical practice of "holding" someone on bail, and to America's inability to clearly see and fix a problem that has traditionally led to bail reform for nearly 750 years.[35]

Other countries found other solutions to the problem of losing personal sureties—for example, England passed a law allowing courts to release defendants without sureties—but America acted alone among common law countries when, in roughly 1900, it began allowing commercial sureties by gradually discarding the longstanding rules against profit and indemnification at bail.[36]

Commercial sureties were adopted primarily to help get bailable defendants out of jail, but the new model also led to a significant unforeseen consequence: In short, it changed the very nature of the financial condition at bail. Specifically, throughout the history of bail, financial conditions in the bail process always had been what we call today "unsecured" financial conditions in the form of promises to pay. The move toward using cash and commercial sureties in America, however, now meant that most financial conditions would be what we call today "secured" financial conditions. Secured conditions—typically in the form of cash or surety bonds—require most defendants to pay something prior to being released from jail.

This increased use of secured financial conditions began a decades-long reform movement in America designed again to find ways to release otherwise bailable defendants. This first generation of bail reform in America began in the 1920s and culminated in the 1960s with the federal Bail Reform Act of 1966.[37] Hallmarks of this generation included significant social science research to assess risk of flight, creation of pretrial services agencies to help courts with the release and detention decision, and increased use of nonfinancial conditions as well as personal recognizance bonds.[38]

Second, the American system began to change when courts began seeing defendants in the 1960s and 1970s who, although "bailable" and thus released, were nonetheless fleeing or occasionally committing new

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Knowledge Bank (2006), http://okb.oregon.gov/portfolio-item/court-notification.

30. Brice Cook et al., Univ. of Chi. Crime Lab & ideas42, Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court at 4 (2018), http://urbanlabs.uchicago.edu/attachments/store/f0f9210ecb1a295be0af54cee2c7364564c570a857a33d758a162d6faafd/I42-954_NYCSummonsPaper_final.pdf.

31. *Silicon Valley De-Bug Leads the Charge on Criminal Justice Reform*, Rosenberg Found.: News (Feb. 7, 2018), https://rosenbergfound.org/silicon-valley-de-bug-leads-the-charge-on-criminal-justice-reform; Cnty. of Santa Clara Bail & Release Work Grp., Final Consensus Report on Optimal Pretrial Justice 63–64 (2016), http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=153959&MeetingID=7200.

32. *See generally* Kristin Bechtel et al., *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 Am. Crim. Just. 443 (2017).

33. Grant, *supra* note 17, at 4.

34. *Id.*

35. Megan Crepeau, *Cook County Jail Drops Below 6,000 Inmates to Lowest Level in Decades*, Chi. Trib. (Dec. 22, 2017), http://www.chicagotribune.com/news/local/breaking/ct-met-cook-county-jail-under-6000-inmates-20171221-story.html.

36. Ct. Servs. & Offender Supervision Agency for the Dist. of Columbia, FY 2016 Agency Financial Report 28 (Nov. 15, 2016).

37. *Id.*

38. Cnty. of Santa Clara Bail & Release Work Grp., *supra* note 31, at 46.

39. Jon Schuppe, *Post Bail*, NBC News (Aug. 22, 2017), https://www.nbcnews.com/specials/bail-reform.

History of Bail

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crimes while on bail. Unfortunately, however, America's laws were not set up to intentionally detain noncapital defendants and public safety was not even considered a constitutionally valid reason for limiting pretrial freedom. Accordingly, this, too, began a decades-long second generation of bail reform that focused on boundaries and processes of intentional detention for flight and on whether public safety should be a valid consideration at bail.

The second generation culminated in what I have called America's "Big Fix," which was manifested in the D.C. Court Reform and Criminal Procedure Act of 1970 and the Federal Bail Reform Act of 1984.[39] Both laws provided comprehensive federal solutions to both "bail" and "no bail" by (1) determining up front who should be purposefully released and potentially detained through a detention eligibility net, (2) making sure intentional detention was further narrowed through a limiting process also capable of dealing with extreme cases of risk ultimately for both flight and public safety, and (3) attempting to eliminate "unintentional" detention altogether through significant limits on the use of money.[40]

Both laws also provided for a rational and transparent in-or-out system, with extensive limitations on intentional detention along with processes designed to immediately effectuate the release decision without money. The second generation reached its apex with the U.S. Supreme Court's opinion in *United States v. Salerno*,[41] which upheld the 1984 Act and which still provides crucial guidance for states attempting to implement detention or "no bail" today. Interestingly, in 1984 Congress explained that it had replaced the word "bail" with the more historically accurate term "release" throughout the Bail Reform Act to avoid apparent confusion associated with equating the word "bail" solely with money.[42]

Unfortunately, however, the primarily federal reforms from these two generations were not fully embraced by the states. Accordingly, we are in the beginning stages of a third generation of bail reform in America. This generation is being driven primarily by (1) pretrial research, which illuminates flaws in our assumptions of defendant risk underlying current American bail laws, and (2) lawsuits, which are avoiding excessive bail claims and are relying on equal protection and due process jurisprudence to fight for the elimination of secured money bonds and to force states to justify and limit preventive detention. Unlike previous generations, this generation is focused on the states and is concerned with both release and detention together, likely for the first time since 1275. Moreover, unlike previous generations, judges in this generation are actively involved.

Current bail reform efforts represent a historic third generation of bail reform in America. The work on both bail (release) and no bail (detention) is timely and necessary, but also historically inevitable. Indeed, throughout this third generation—which itself is likely to last decades—we must remain mindful of the history of bail. After all, the history of bail answers not only why bail reform happens, but also what must be done to keep it from happening again. Even if the history of bail does not give us all the answers, those two answers should be enough. ■

Endnotes

1. *See* Timothy R. Schnacke, Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial at n.74 & accompanying text (Nat'l Inst. of Corrections 2014) [hereinafter Schnacke, Money].

2. *See* Am. Bar Ass'n, Standards for Criminal Justice: Pretrial Release (3d ed. 2007), Std. 10-1.10 (commentary) at n.22.

3. *See, e.g.*, State v. Brown, 338 P.3d 1276, 1278 (N.M. 2014) (summarizing history).

4. David Crabtree, *The Importance of History*, Gutenberg Coll. (Nov. 1993), http://msc.gutenberg.edu/2001/02/the-importance-of-history.

5. For a linear history of bail, see Timothy R. Schnacke, Michael R. Jones & Claire M. B. Brooker, The History of Bail and Pretrial Release (Pretrial Just. Inst. 2010). For more thematic histories, see Timothy R. Schnacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform (Nat'l Inst. of Corrections 2014) [hereinafter Schnacke, Fundamentals]; Schnacke, Money, *supra* note 1.

For applying history to changes to the law, see TIMOTHY R. SCHNACKE, "MODEL" BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION (Ctr. for Legal and Evidence-Based Practices 2017) [hereinafter SCHNACKE, MODEL BAIL LAWS].

6. *See* 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); ELSA DE HAAS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275, at 3–16 (AMS Press, 1966); William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34–36 (1977–78); FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (Cambridge Univ. Press, 1895).

7. Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1139, 1146 (1971–72).

8. 342 U.S. 1, 5 (1951).

9. *See generally* James V. Hayes, *Contracts to Indemnify Bail in Criminal Cases*, 6 FORDHAM L. REV. 387 (1937).

10. Carbone, *supra* note 6, at 521–22; Duker, *supra* note 6, at 43–45.

11. Carbone, *supra* note 6, at 520.

12. *See* DE HAAS, *supra* note 6, at 24–25, 60–63; Carbone, *supra* note 6, at 521.

13. Duker, *supra* note 6, at 44 (internal footnotes omitted).

14. *Id.* at 45; *see also* Meyer, *supra* note 7, at 1154.

15. DE HAAS, *supra* note 6, at 91–97.

16. Carbone, *supra* note 6, at 521–27; Statute of Westminster, 3 Edw., ch. 15 (1275).

17. *See* DE HAAS, *supra* note 6, at 95–96.

18. Duker, *supra* note 6, at 55.

19. Carbone, *supra* note 6, at 527–29.

20. Duker, *supra* note 6, at 50–54.

21. In SCHNACKE, MODEL BAIL LAWS, *supra* note 5, I describe that part of the historical tradition saying that bailable defendants must be released as "The Big Rule" in English bail.

22. *See, generally*, Paul Lermack, *The Law of Recognizances in Colonial Pennsylvania*, 50 TEMP. L.Q. 475 (1976–1977).

23. F. E. DEVINE, COMMERCIAL BAIL BONDING: A COMPARISON OF COMMON LAW ALTERNATIVES 5 (Praeger 1991).

24. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *34 (1765–1769); *see also* DEVINE, *supra* note 23 (summarizing BLACKSTONE).

25. POLLOCK & MAITLAND, *supra* note 6, at 545, 554–55.

26. JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW (William Brown 1819).

27. CHARLES PETERSDORFF, A PRACTICAL TREATISE ON THE LAW OF BAIL, IN CIVIL AND CRIMINAL CASES, *passim* (Jos. Butterworth & Son 1824). Petersdorff also describes how courts could raise the amount for "sufficiency" but not "to such amount as is the equivalent to the absolute refusal of bail." *Id.* at 512.

28. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, Book 2, at 187–229 (7th ed. 1795).

29. Lermack, *supra* note 22, at 488.

30. *See* PETERSDORFF, *supra* note 27, at 512 (noting that courts could raise the amount for "sufficiency," but not "to such amount as is the equivalent to the absolute refusal of bail"); CHITTY, *supra* note 26, at 88–89 ("[S]uch bail is only to be required as the party is able to procure, for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge."). The phrase "party is able to procure" must be read in the context of the recognizances and personal sureties, which he explains in the section on bail for witnesses.

31. *See* Meyer, *supra* note 7, at 1162.

32. Lermack, *supra* note 22.

33. Stack v. Boyle, 342 U.S. 1, 4 (1951).

34. SCHNACKE, MONEY, *supra* note 1, at n.73 and accompanying text.

35. *See* SCHNACKE, MODEL BAIL LAWS, *supra* note 5, at 48–51.

36. DEVINE, *supra* note 23.

37. Bail Reform Act of 1966, PUB. L. No. 89-465, 80 Stat. 214.

38. SCHNACKE, FUNDAMENTALS, *supra* note 5.

39. District of Columbia Court Reform and Criminal Procedure Act of 1970, PUB. L. No. 91-358, 84 Stat. 473 (codified at D.C. CODE ANN. §§ 23-1321 to -1332); Bail Reform Act of 1984, PUB. L. No. 98-473, 98 Stat. 1976.

40. SCHNACKE, MODEL BAIL LAWS, *supra* note 5, at 66–85.

41. 481 U.S. 739 (1987).

42. S. REP. No. 98-225, at 4 (1984).

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