



National Association
of Pretrial Services Agencies

History of Bail

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Fundamentals of Bail



A Resource Guide for Pretrial Practitioners and
a Framework for American Pretrial Reform



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NIC Fundamentals of Bail

Bail

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- ▶ Definition

 - The process of releasing a defendant from custody

- ▶ Purpose

 - To effectuate and maximize pretrial release

- ▶ Purpose of conditioning bail

 - Provide reasonable assurance of victim & public safety

 - Provide reasonable assurance of court appearance

Bond

- ▶ An obligation or promise
- ▶ Bail bond: the obligation by the defendant, or the defendant and some surety, to the court
- ▶ Financial (secured or unsecured), or non-financial

Right to Bail

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- ▶ Not a guarantee of release
- ▶ When granted by federal or state law, the right to be released from jail or other government custody through the bail process
- ▶ Not a federal constitutional right, but included in 41 state constitutions

Excessive Bail

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- ▶ The excessive bail clause was taken from the English Bill of Rights by James Madison and included in the 8th Amendment.
- ▶ Congressman Livermore stated excessive bail “seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary”.
- ▶ What is meant by the terms excessive bail?
Who are to be judges?



Least Restrictive

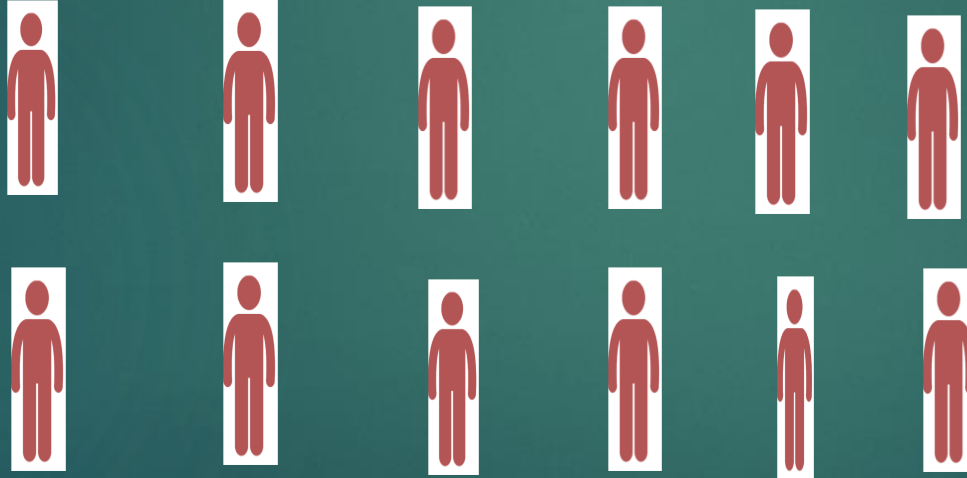
- ▶ If government restricts liberty to achieve a legitimate goal, it must employ the least restrictive means possible to achieve that goal
- ▶ Bail conditions → least restrictive needed to reasonably assure public safety and court appearance

Reasonable Assurance of Safety and Appearance

- ▶ “Assurance”: Something that inspires or tends to inspire confidence
- ▶ Modified by “reasonable”

Individualized Decision Making

- *Stack v. Boyle* (1951) – U.S. Supreme Court: bail must be set based on the characteristics of each individual defendant



Presumption of Innocence

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Public Safety Consideration

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- ▶ *United States v. Salerno* (1987) – U.S. Supreme Court: The Bail Reform Act of 1984 (Act) requires courts to detain prior to trial arrestees charged with certain serious ***felonies*** if the Government demonstrates by clear and convincing evidence, after an adversary hearing, that no release conditions "will reasonably assure . . . the safety of any other person and the community."



Preventive Detention

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- ▶ Holding a defendant without bail to prevent either flight or danger to the community
- ▶ Available under federal law and in about half the states – typically found in statute as capital crimes

Pretrial Diversion

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▶ Key Components:

Voluntary

Provides alternative case processing

When completed charges are dismissed

▶ Purpose:

Address root causes

Reduce stigma

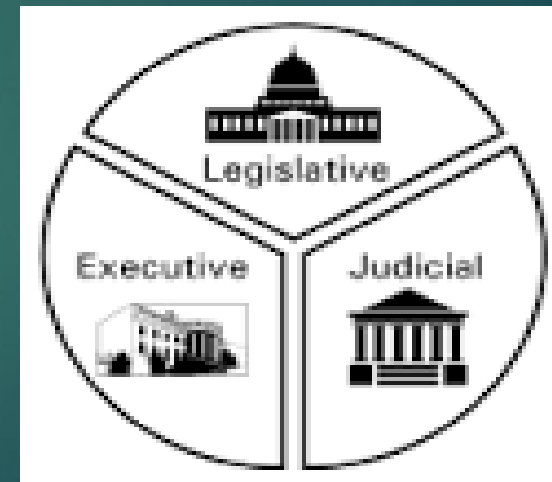
Restore victims

Preserve system resources

Separation of Powers

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- ▶ Legislative branch passes diversion laws
- ▶ Executive branch (prosecutors) decide who can be admitted to diversion
- ▶ Judicial branch checks against any prosecutorial discretion



Self-Incrimination

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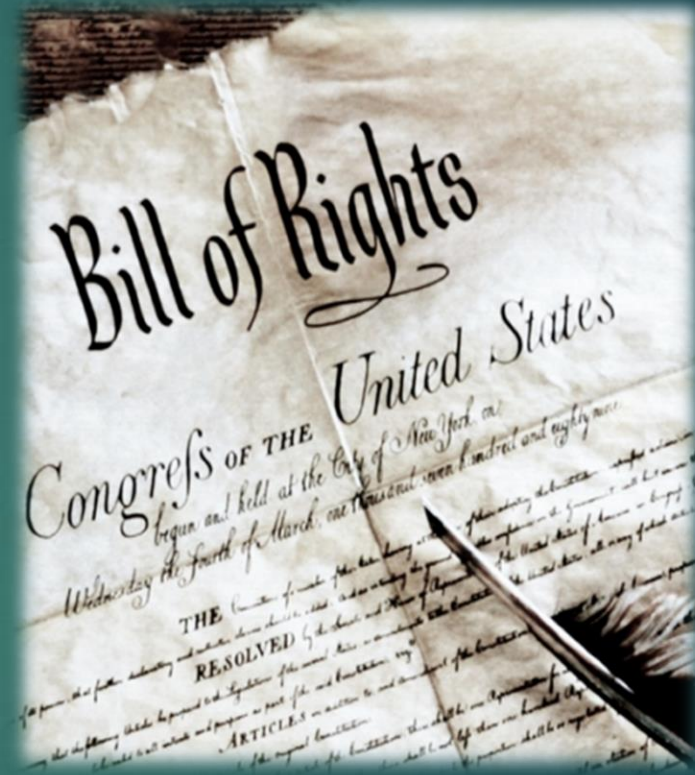
- ▶ 5th Amendment: no person “shall be compelled in any criminal case to be a witness against himself”



6th Amendment Rights

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- ▶ Speedy trial
- ▶ Trial by jury
- ▶ Confront witnesses
- ▶ Assistance of counsel



Due Process

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- ▶ 5th and 14th Amendments
- ▶ “No person shall...be deprived of life, liberty, or property without due process of law.”
- ▶ Fundamental fairness of laws (substantive due process) and legal proceedings (procedural due process)

Equal Protection

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- ▶ 14th Amendment
- ▶ Similarly situated individuals should be treated similarly



Criteria in Making Bail Decisions

- ▶ Start with presumption of ROR
- ▶ Presumption must be overcome to set any conditions
- ▶ Any conditions must be least restrictive needed to provide reasonable assurance
- ▶ Limits on use of financial conditions
- ▶ Detention for those with unmanageable risks, where allowed by law

Criteria for Pretrial Diversion Decisions

- ▶ Not based on race, gender, income, etc.
- ▶ Should be in writing
- ▶ Participation voluntary/consult with counsel
- ▶ No prior admission of guilt
- ▶ Least restrictive conditions to meet the plan's goals

Discussion Question

How do the concepts presented compare with how bail/pretrial diversion operates in your jurisdiction?



What's Wrong With This Picture?

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From the local newspaper on a defendant who had been arrested for drug distribution:

“The defendant is being held in the county jail on a \$1,500 bail.”

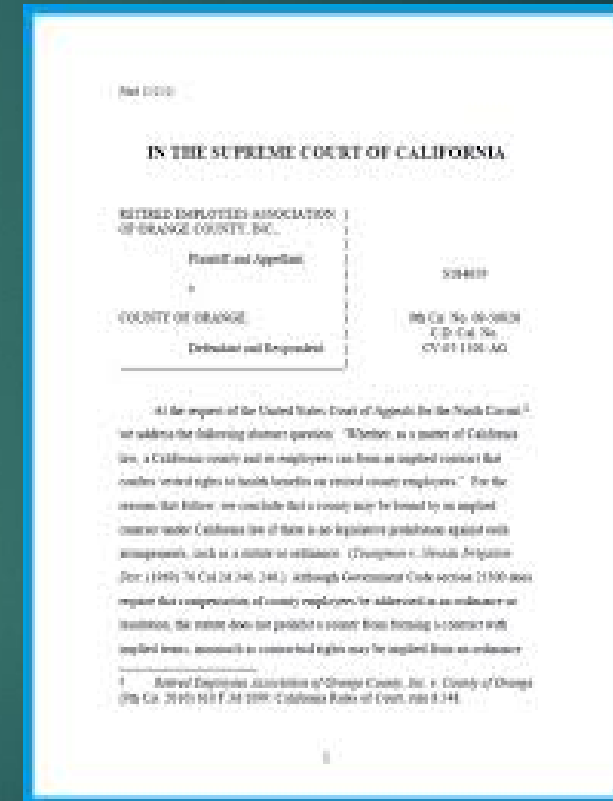


What's Wrong With This Picture?

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From a state appeals court opinion:

“The main purpose of bail is to guarantee to the State and to the Court that the defendant will appear for all court hearings when required and will not endanger the safety of the community.”



What's Wrong With This Picture?

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From a newspaper article citing what it calls an innovative practice:

“In a move that has angered local bail bondsmen, instead of setting money bonds on lower risk defendants, judges in _____ County are now ordering those defendants into a new electronic monitoring program.”

What's Wrong With This Picture?

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From a comment to an on-line local newspaper article in a right to bail state, on a judge who released a defendant pending trial:

“That judge should be kicked off the bench for releasing that defendant.”

What's Wrong With This Picture?

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After the judge set a \$50,000 bond on a defendant charged with sexual abuse of a child, the prosecutor tells the media:

“The judge did the right thing by making sure this child abuser stays where he belongs – behind bars.”



What's Wrong With This Picture?

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From a press release:

“The police chief and district attorney have announced plans for a new pretrial diversion effort whereby police officers in the field will have the discretion to offer pretrial diversion placement to persons with no prior convictions who would be facing non-violent misdemeanor offenses, provided that the person admit guilt to the police officer.”

What's Wrong With This Picture?

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From a newspaper article:

“Over the objections of the prosecutor, a circuit court judge has ordered a defendant into a pretrial diversion program. The prosecutor had declined to offer the defendant diversion, citing the defendant’s failure to meet the criteria, which includes no prior convictions.”

As our nation was being formed, from which European country did our laws, including laws relating to bail, come?

- A. France
- B. England
- C. Italy
- D. Germany



Which of the following established under US law that “excessive bail shall not be required?”

- A. Judiciary Act of 1789
- B. 4th Amendment to the U.S. Constitution
- C. 8th Amendment to the U.S. Constitution
- D. U.S. Supreme Court in *U.S. v. Salerno*



The definition of “bail” is:

- A. The dollar amount that the defendant must pay to be released from jail.
- B. The process of securing the release of a defendant from jail.
- C. The defendant’s promise to appear.
- D. None of the above.



What has the U.S. Supreme Court said about how bail decisions must be made?

- A. Individualized to each defendant.
- B. Based upon the charge.
- C. Reflect a defendant's ability to pay a financial bond amount.
- D. Reflect prevailing community standards about who should be released.



How has the US Supreme Court defined what is meant by “excessive bail?”

- A. If the defendant cannot meet it.
- B. If it is calculated to be just above what a defendant can meet.
- C. If it is grossly disproportionate to the bail practices in the jurisdiction.
- D. If it is in excess of what is required to reasonably assure a constitutionally valid goal.

According to Standards and most statutes, every bail decision should start with what presumption?

- A. For the setting of an ROR bond.
- B. For the setting of a financial bond.
- C. For the imposition of an electronic monitoring condition.
- D. For detention without bond.

Due process is a key legal concept in pretrial. What does due process mean?

- A. The fundamental fairness of laws and legal proceedings.
- B. The efficient processing of criminal cases.
- C. Giving due consideration to victims.
- D. The rights provided to the government in prosecuting criminal cases.



