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## BAIL IN THE UNITED STATES: A BRIEF REVIEW OF THE LITERATURE

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### Introduction

Since the country's founding, the United States has included a right to bail for defendants awaiting trial. The right to bail in the United States was inherited from common law and statutes of England (Hegreiness, 2013). Bail laws have taken many forms throughout U.S. history causing a great deal of debate over practices both in the federal system and among states. Current research is conflicting, showing benefits for both the detention of defendants by not offering bail and the freedom of defendants by giving them the possibility of bail. Holding a defendant pre-trial can put stress on the individual as well as the criminal justice system. At the same time, there are risks associated with releasing defendants on bail. Current research includes information on the history of bail laws, reform, and significant Supreme Court rulings in the United States. Other topics that have been explored are the right to counsel at bail hearings, pre-trial supervision, and the various effects of pre-trial detention. There are national guidelines and models, however, states have the discretion to implement their own bail laws and practices. More information and research is needed on bail laws and practices, as well as their outcomes, in individual states.

### History

Throughout most of United States history, releasing defendants awaiting trial or sentencing was preferred and almost guaranteed. The historical purpose of bail was to allow potentially innocent defendants to go free, but to provide monetary incentives for them to appear at trial (Abrams and Rohlf, 2011). In his research, Matthew Hegreiness discusses, what he calls, the "Consensus Right to Bail Clause". Hegreiness took the findings from a survey of all constitutions, from the founding of the United States to the present, as well as all constitutional amendments related to bail to formulate this clause. The Consensus Right to Bail Clause states, "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great" (Hegreiness, 2013, p. 916). In addition, the Supreme Court stated in its decision of *Stack v. Boyle* in 1951 that, "The traditional right to freedom before conviction permits the unhampered preparation of 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" (Hegreiness, 2013, p. 934 & Kazemain, McCoy, Sacks, 2013). Despite the long-standing history of a right to bail, judges across the U.S. began to take into

account dangerousness to the community and risk of fleeing in their decisions, causing the detention of an increasing number of defendants.

The Federal Bail Reform Act of 1966 introduced the idea of holding a suspect without bail based off of the risk to the community and the likelihood of fleeing. This law specified that non-capital defendants should have the option of bail; however, the changes based off of dangerousness were to be applied to judge's decisions to grant bail to capital defendants. Historically, capital offenses were offenses punishable by death such as the "quintessential capital crimes" of murder and treason (Hegreness, 2013). The 1966 Act also introduced the opportunity for defendants to be granted nonfinancial release on a promise to return for trial, a practice widely known as release on personal recognizance (ROR) (Kazemian, McCoy, Sacks, 2013). It was not until the 1970's that political culture began to favor the detention of all defendants, capital or not. The District of Columbia Crime Act of 1970 allowed for the detention of non-capital defendants without bail and instructed courts to consider a defendant's dangerousness when making bail decisions. The Supreme Court case *U.S. v. Edwards*, upheld the constitutionality of this Act (Hegreness, 2013).

### **Pre-Trial Release**

As federal bail laws began to change, states began to follow suit. These changes led to rising rates of pre-trial detention across the country. After arrest, a defendant is subject to a bail hearing by a judicial officer. Bail hearings decide whether to grant bail, determine the appropriate amount, and set conditions of release (Gerstein, 2013). As a result of a bail hearing, a defendant could be held without bail, released on personal recognizance (ROR), or given bail in the form of a secured bond, an unsecured bond, or cash. Money bail became the primary method of releasing or detaining defendants which weighed heavily on individuals with little financial resources (Rose, 2007). In 1982, the federal government passed the Pre-Trial Services Act with the goal of reducing unnecessary detention. This Act sought to expand pre-trial service agencies to meet its goals. These agencies function to gather and present information to judges when making bail decisions, supervise defendants under conditions of their release, and ensure that defendants appear for scheduled court appearances. Research shows that this Act was not successful at addressing this issue; the detention rate arrest through disposition in federal cases was 22% in 1984 compared to 49% in 2007 (Cadigan, 2007 & Rose, 2007).

The Human Rights Watch, a nonprofit, nongovernmental human rights organization, did a study of non-felony, misdemeanor cases in New York City in 2008 and found that cash bail or secured bonds are the most commonly given options for defendants and unsecured bonds are not part of conventional practice. The authors infer that judges may ignore alternative forms of bail because they are uncommon and forgotten from disuse (Fellner, 2010). It is unclear from current literature if this is happening in more states and more research is needed to address this issue.

A common theme in the literature about bail is an emphasis on the negative aspects of detaining defendants and potential discrimination in the process. Lawyers usually spend less time with their detained defendants than with those released on bail in the community (Sacks and Ackerman, 2014). VanNostrand discusses the long-standing belief of "due process" within the justice system as it applies to pre-trial defendants. "Due process" in a pre-trial situation requires, at a minimum: (1) the opportunity for a fair hearing before an impartial judicial officer, (2) the decision to restrict

liberty is supported by evidence and (3) the presumption of innocence is honored (VanNostrand, 2007). The outcome of a bail hearing can prejudice the defendant in plea bargaining and can force the defendant to plead guilty. Despite the sensitivity of a bail decision, offenders do not have an automatic right to counsel at the hearings despite evidence that, “Many bail hearings may have reached a different and more defendant-friendly result if the defendant had counsel” (Gerstein, 2013). Defendants awaiting trial in jail are more likely to accept a prosecutor’s plea bargains and admit guilt to avoid spending more time incarcerated (Gerstein, 2013). Research shows that defendants who are detained pending trial have increased odds of conviction, the probability of incarceration, and the length of imprisonment. This remains true even when other factors are controlled for including: current charge, prior criminal history, family ties, and type of counsel (VanNostrand, 2007, Sullivan, 2010, Gerstein, 2013, & Sacks and Ackerman, 2014).

Support for pre-trial detention can be found in the 1979 Supreme Court decision of *Bell v. Wolfish* where pre-trial detention was found to not violate the defendant’s constitutional right to the presumption of innocence (Laudan, 2005). The Supreme Court justices found that presumption of innocence has, “no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun” and that presumption of innocence is unique to the jurors at the trial (Laudan, 2005).

There is an overwhelming amount of literature discussing the negative aspects of detaining pre-trial defendants, while there is comparatively little research that explores the risks associated with releasing an offender pre-trial. The research that does exist supporting pre-trial detention argues that defendants are more likely than not to be granted bail, even violent ones and more than half of the people accused of a violent crime will be able to raise bail and be free awaiting trial. They will have an average of 4.3 months (126 days) before the end of their trial compared to the average 45 days it would take if they were awaiting trial in jail. During those four months, eleven percent will be arrested for a new felony they commit while out on bail. “The typical felony bailee, during the time of release, is 100 times more likely to commit a homicide than an ordinary citizen” (Laudan and Allen, 2010). The statistics, while limited, are important to consider when examining the issue of pre-trial detention or release.

## **Conclusion**

There have been many changes to bail laws and practices in the United States since its founding, most notably between the 1960s and 1980s. Since that time, the criminal justice system, society, and media have shifted to favor the detention of an increasing number of pre-trial offenders. The literature thus far is unclear as to whether this is necessary or not, or if the benefits for society outweigh the consequences for defendants. One study was done in New York City and found that judges most commonly give cash bail and secured bonds for pre-trial release, despite other options available to them that may allow more defendants to be free awaiting trial. More research like this is needed across the United States to understand more about specific bail practices and their outcomes. Without this research, it is a challenge to make recommendations for improvement and it is likely pre-trial detention rates will continue to rise.

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