AMERICAN
BAIL COALITION

The Future of Bail:

The Fourth Generation of Bail Reform in America

American Bail Coalition

"Protecting the Right to Bail in the United States of America"

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I. Introduction

Over the last 60 years, the United States has gone through two generations of bail reform, and for the last fifteen years we have been in a period described by some as the "third generation" of bail reform.

The third generation of bail reform, like the second generation, has been a complete failure. Reliance on preventative detention and electronic monitoring policies has brought a sledgehammer to the bill of rights, including the federal and state constitutional rights to bail. When then-Chief Justice Rehquist said in 1987 that "liberty is the norm," there is no way to believe he would have felt the same way when 31 years later liberty is absolutely not the norm. In fact, the expansion of pre-conviction detention and supervision by the state is the norm. The American Civil Liberties Union (ACLU) warned of this danger in 1984, which Justice Thurgood Marshall echoed in dissent in Salerno.

Thirty four years after the federal government embarked on this grand risk-based bail experiment, an experiment which no one thought constitutional at the time, it is now time instead for a fourth generation of bail reform. One that returns the American bail system into what it is supposed to be. A bail bond which is solely based on the defendant's appearance in which judges set appropriate bail that balances the rights of the victim of crime, the person accused of the crime, and the people who seek to prosecute the accused.

II. The Fourth Generation of Bail Reform

The principles of the "Fourth Generation of Bail Reform" are built around fourteen recommendations:

1. Protecting the fundamental Consitutional Right to Bail and opposing general preventative detention policies.
2. Improving due process and bail review procedures for defendants, prosecutors and victims.
3. Eliminating the use of bail as a collections mechanism.
4. Eliminating the restrictions on the way to post bail and protecting the right to personal surety.
5. Promoting statutes that adopt the concept of nuisance bail and meaningful recognizance bonds.
6. Eliminating pre-conviction probation except in certain circumstances and require individualized consideration.
7. Eliminating pretrial risk assessment tools in favor of complete and real data concerning the statutory and constitutional factors in setting bail to accompany decision makers when setting bail.
8. Eliminating full cash ONLY bail, unsecured bail, and 10% deposit to the court bail.
9. Improving regulation regarding bail agents and recovery agents with arrest authority.
10. Rethink public and private bail funds to afford the indigent the ability to exercise the right to bail rather than be supervised by the state.
11. Unpaid fines and fees should never be a reason to deny bail.
12. Pretrial incarceration or the setting of bail with the intent to detain should be eliminated.
13. Administrative delays in the bail process should immediately be addressed and immediately reduced.
14. Statutes that encourage speedy trial reforms should be highly encouraged so as to equally reduce all negative aspects of the period between arrest and disposition.

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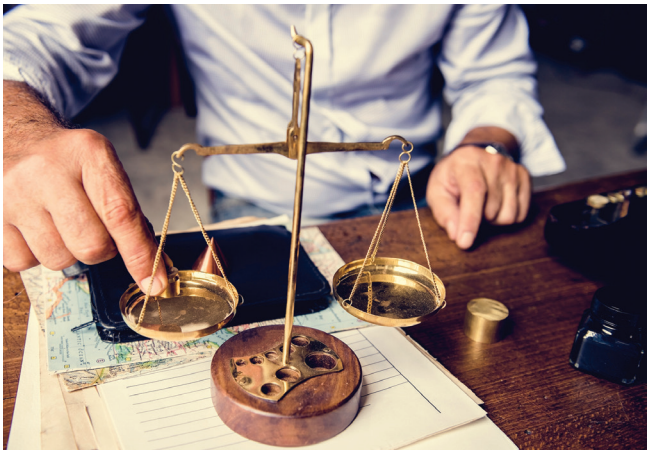
III. *Protecting the Fundamental Constitutional Right to Bail; Opposing Preventative Detention Policies*

The Eight Amendment provides that excessive bail should not be required. The American Bail Coalition supports the many states that provide that all persons shall be bailable by sufficient sureties. The right to bail forces judges to create the right balance in each case, and should absolutely be maintained. Bail is also often a third-party provided benefit, and thus the right to bail also protects core constitutional rights of association and right to familial and spousal relationships.

The American Bail Coalitions also stands strongly against the expansion of general preventative detention policies. Jurisdictions should not embrace the federal or Washington, D.C. systems of preventative detention. Preventative detention policies have been shown over time to erode constitutional rights, label persons as dangerous for which they may never be exonerated, and are, according to research, ineffective at curbing pretrial crime. In New Jersey, the expansion of preventative detention has been nothing short of astounding, with the government now filing motions seeking detention in the majority of all criminal defendants who are arrested. In addition, such policies unnecessarily detain many persons who will appear and will not commit a new crime. In the federal system, more than 70% of all defendants are detained, up from 24% prior to the passage of the Federal Bail Reform Act of 1984.

Surgical and circumspect changes to preventative detention, constitutional provisions or state statutes might be warranted if a case can be made for a certain type of case or crime, i.e., like in California where a specific threat to a witness or victim, proven by clear and convincing evidence may form the basis for preventative detention. No general preventative detention statutes or policies should be implemented, and legislatures should not be passing crime of the week bills to impose detention when the clear need for it has not been demonstrated.

Said Justice Thurgood Marshall in dissent in Salerno:



This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day, the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves. Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.

IV. *Due Process in Bail Setting and Review Must be Substantially Improved*

All Persons shall be heard by a judge on the issue of the setting of bail no later than 48 hours after arrest.

Ideally, that period would be a few hours, and the court would be in session 24 hours a day to have individualized consideration of every defendant. Bail schedules, however, should be maintained where necessary to allow for release from jail 24 hours a day. All reviews from bails set by a bail schedule should occur within the constitutional time period, which we know is constitutional at 48 hours.

All persons should have the ability, when, after a certain period of time has passed and that person remains in custody, to have a second *de novo* hearing on bail.

Several states, including New York, have such a provision, and the American Bail Coalition believes that all criminal defendants who remain in custody should have a right to a second de novo bail hearing if they remain in custody for more than 10 days after arrest or if there is a change in circumstances warranting an additional hearing.

The expansion of due process should also include the rights of the people to argue for increases in bail or changes in conditions of release or the imposition of specific individualized considerations. The right of due process of victims of such crimes should also be increased in the process.

V. *Bail Should Not Be Used As A Collections Mechanism and If it Is, the Priority Should be that All Funds Are First Transmitted to the Direct Victims of the Crime, Including Indemnitors*

Many states have policies that allow for bail to be used as a collections mechanism.

These include setting cash-only bonds and 10% to the court bonds that then go into the coffers of the courts themselves or to special funds. Bail upon conviction, in many places, is simply kept. That is not the purpose of bail.

Instead, all deposits should be returned to the defendant upon conviction unless a prosecutor makes a showing, by a preponderance of the evidence, that the keeping of the funds is necessary to serve a legitimate and important state purpose. No bail moneys may be kept automatically and without individual consideration by a judicial officer and a motion band proof by the state that the immediate taking of the funds is necessary.

Forfeited bails, whether from a compensated surety, cash, 10% or unsecured bonds, should not go directly to the coffers of the court system because such creates an appearance of impropriety and could create an impermissible incentive that is outside the purposes for which bail is set. Forfeited bails should go the general fund or for some other purposes that is not the funding of the court system to remove any appearance of impropriety or potential conflict of interest.

All statutes that allow for the keeping of bail by the government, whether forfeited bails or cash or 10% bails kept upon conviction, should first prioritize that any and all such funds should first go directly to compensating the direct victim of such crime, including those who indemnify such victims. Only then should such funds be used for other purposes.

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VI. *Statutes Should Not Allow for Restricting How A Bail is Posted—Defendants Should Have a Fundamental Right to Choose How to Post Bail*

Judges should not impose different bail amounts, higher or lower, depending on how a defendant or third-party indemnitor chooses to post bail. In many states, courts have the power to impose cash-only bonds, which deprive the defendant of the right, as recognized by the U.S. Supreme Court, to enter into an indemnity contract for bail or to post property.

Instead, **the bail should be set in an appropriate amount, and a defendant may then select from cash, property or surety**. As noted, there should be no unsecured and/or 10% to the court bonds—the court should make a decision as to whether a secured bond is necessary, and if not the person is released on their own recognizance. If the state has an interest in restricting that choice, a prosecutor should have to make a showing on the record that a particular method of posting bond is necessary, and a judge should have to sign on off on that request.

VII. *Statutes Should Embrace the Concept of Nuisance Bail and Recognize the Role of Financial Incentives*

The reason bail works as security is not just that people tend to show up when they have a financial incentive—instead, it is the availability of a cure when a third-party indemnitor has an incentive to return a defendant who failed to show up for court or when the person has become too great of a risk to be at large (for example, they begin to commit additional crimes or they continue using illegal substances).

Third parties and defendants are typically not incentivized to do much of anything by low bails. A bail recovery agent may return someone on $100 bail, but typically nothing but informal resolution may occur for that low of an incentive. The defendants themselves perceived that they bought their way out of jail, because they know the state will ultimately keep their $100 anyway, thus killing the incentive for attendance in court. While indigent parties do in fact need consideration and lowering of bonds or not having bonds imposed as necessary and within the discretion of judges, and perhaps there may be cases where low bails could occur, **instead, jurisdictions should embrace the concept of looking at cases where the bail is merely a nuisance bail, used for collections or some other purpose that does not square with the purposes and intent of bail, rather than actually providing a true incentive to return someone to court.**

Jurisdictions need to instead focus on those cases where the person has committed additional crimes while on bail or has failed to appear, and then impose more meaningful bails in such cases while attempting to eliminate some bails in low-level nuisance bail situations. In addition, if classes of identifiable cases are going to get release on recognizance, re-visit the necessity of arresting all of that class of identifiable persons.

VIII. *Eliminate Pre-Conviction Probation and Supervision Except for Violent, DUI, or Serious Felony Offenders and Require Individualized Consideration*

Supervision by the state of defendants who have not yet been convicted erodes the presumption of innocence and has unfortunately become routine in this country. The growth of the penal state over the last 50 years relied on risk assessing and the employment of government programs to trammel on individual civil liberties in the name of being free from jail rather than respecting such rights. Plus, the pre-disposition period, particularly in lower-level offenses, is so short that whatever is being done with the defendant will most certainly come to an abrupt end. Instead, **jurisdictions are better off putting resources into diversion programs or post-conviction programs that will address criminogenic needs and reduce recidivism or putting their efforts in programs to divert defendants out of the criminal justice system after they are arrested.**

The drafters of the Judiciary Act of 1789 did not have electronic surveillance techniques available to them when they put the modern architecture of our court system together. There is no reason for them now on a pre-conviction basis, unless the state can make an individual showing. They are resource intensive and have not, since introduced, been revolutionary in reducing or solving pre-disposition crime.

All bail conditions of supervision or monitoring by the state should be individualized and not assigned by a computer or schedule. They should be limited to a specific class of cases (i.e., violent or felony cases, or DUI cases—example: interlock devices). A prosecutor must demonstrate the need for such a condition and the court then must agree that such condition is necessary to meet the purposes for which bail is set in the first place.

IX. *Pretrial Risk Assessments Should Not Be Used, and If Used, Should Be Subject to Strict Safeguards.*

Pretrial risk assessment should not be used, and if used, they should be subject to due process and other safeguards. Judges should be provided all of the information the risk assessments consider and the assessments should provide information as to risk but not recommend a specific bail and conditions of release.

In one jurisdiction, a police officer was killed by a suspect who had prior charges and convictions for assaulting public safety officers, but the justice of the peace did not have that information when he gave that defendant a personal recognizance bond. **Comprehensive criminal history information, including the nature and circumstances of all charges and convictions, and all information pertaining to the statutory factors of bail considered by judges, should be provided to all judges at all levels of the judiciary in all jurisdictions within the United States of America.**

Risk assessments instruments should no longer be used in setting bail or considering risk. To the extent such assessments are used, a party to a criminal case must decide to use such an assessment, and a criminal defendant must agree to be assessed.. The proponent of the assessment and the result must defend the validity and calibration of such assessment if such becomes an issue in a criminal matter.

Risk assessments or risk assessment processes should not make specific recommendations as the the bail or specific conditions of release as part of a decision making framework, because that is not scientific or evidence-based. The relative risk class of the defendant, e.g., 1, 2, 3, etc., and what those categories mean, e.g., category risk four represents a 34% failure to appear rate and a 15% risk of committing a new offense, should be the information that is presented to judges.

Risk assessments are not individualized consideration. They are instead dehumanizing because they label people with numbers and sort them into arbitrary categories calibrated not by science but by setting a substantive tolerance of risk. The assessments are cloaked in science, yet they are calibrated by people who are inherently biased and they are set by ex parte agreements among local counsels of several branches of government often behind closed doors. By employing an algorithm, we lock in the past, prevent change, and guarantee that all institutional biases from which we work to reduce going forward are not reduced because they are locked in by assumptions made by the builders of a computer program.

In addition, risk assessments fail to, in an evidence-based fashion, provide judges any information on risk reduction and how to address criminogenic needs when offenders cannot be constitutionally ordered to treatment prior to conviction, there are little services available to them other than supervision and monitoring by the state, and thus there is virtually little hope that any reduction in crime could occur. The assessments tell judges who is risky, but they don't tell judges how to reduce that risk other than to expand the dragnet of pre-conviction monitoring and supervision.

Risk assessments have done nothing over a generation to reduce mass incarceration, and instead have been blamed for over-labeling people, particularly racial minorities, as risky to further justify the expansion of the penal state, prevent true rehabilitation, and lock out the possibility of healing and remorse by permanently affixing a criminal risk scarlet letter onto a person. America can do better.

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X. *Unsecured Bail, Including 10% to the Court, or Any Other Partially Secured Deposit Bail Should Not Be Used—The Government Should Not Be in the Bail Collection Business*

Unsecured bail, promising to forfeit a sum, does not work any better than a promise to appear in court or a release on own recognizance. It is also the key to the door by which governments begin siphoning and becoming dependant on such fee and fine revenue. In addition, the government unnecessarily turns itself into a collections agency by having to collect the 90% (in cases of 10% to the court) or up to 100% (pure unsecured bail, promise to forfeit an entire amount with no deposit) of the funds when a defendants' bond is forfeited. The other problem is that unsecured bail creates an additional disincentive for someone to come back to court because they will have to pay the forfeited bail and may face a bail jumping or contempt of court charge when they come back.

Governments rarely collect these outstanding forfeited pledges. In addition, unsecured bail creates a façade of false hope by the public, prosecutors, and victims of crime who wrongly assume that a defendant had to have some skin in the game now, and not simply put up their name as security. The simple fact is the same person promising to pay the bail amount is the person who has failed to appear in court. What is the probability of either happening?

Instead, a judge should set an appropriate secured bail amount if necessary, and leave it at that. For those for whom an unsecured bail is set today, the vast, vast majority should be released on their own recognizance with a judge imposing a secured bail on some small percentage where they believe it is necessary. The defendant would then select how to post that bail, and would post 100% of it by using cash, property or surety. Credit card and other transaction fees should not be any greater than offsetting the cost of providing such services, and the bringing of cash and certified funds should not be denied and no fee may be charged.

XI. *All Agents Possessing Arrest Powers Should be Regulated by State Governments*

Some states have loopholes where persons may act with arrest powers but not be licensed by a state jurisdiction to perform such tasks. All states should regulate and allow for the recovery of bail jumpers by regulated bail recovery agents and we should look at creating model bail recovery agent licensure to ensure reciprocity. No state should allow someone without a license to conduct an arrest of a defendant. In addition, this should include specific training requirements designed to make the process of arrest as safe as possible.

XII. *Regulated Public and Private Bail Funds Should be Established to Allow for Persons to Excercise their 8th Amendment Right to Bail*

Regulated public and private bail funds should be established to help indigent and low-level eligible defendants to afford them a right to bail, rather than trammel their liberties by subjecting them instead to state supervision.

In the third generation of bail reform, the answer for the indigent was to say when you are too poor to afford your bail, you get to be on probation while a guy who made bail does not have to. Instead, in the fourth generation of bail reform, regulated private and public bail funds will be set up that will allow for indigent defendants to do the same thing defendants who can make bail do—call a bail agent and get out of jail with back-end accountability.

Today, $830 million is spent annually by state governments for attorneys for indigent defendants. $0 annually is spent by state governments to provide indigent defendants access to bail. This should change. Bail agents, 15,000 strong nationwide, are poised to serve this population that otherwise would be stuck in jail but that judges believe are releasable if there is an economic incentive for their return. Regulated funds should be allowed where the incentives of bail may be harnessed and used to improve access to bail while not losing the economic incentives that make it work.

We strongly believe that we could cut pretrial populations by as much as 10% if this initiative were truly implemented with the involvement of the bail industry, and we believe private bail agents are already in place nationwide and could handle the load. Private funds could get more persons accountably and safely out of jail, helping them avoid supervision and other intrusions into their liberty. Bail agents would clean up any problems and help the funds stay solvent. State governments should immediately begin exploring how such public and private solutions may come together to make the right to bail as important of a right as the right to counsel.

XIII. *Unpaid Fines and Fees Should Not Be Grounds to Deny Bail*

When a person has posted bail but still owes unpaid fines or fees from existing or previous cases, such shall not serve to detain that person in jail. Fees, in particular, from previous periods of pre-conviction supervision shall not serve as grounds to detain a defendant unless the prosecutor can prove a separate case of willful contempt of court due to present ability but refusal to pay.

XIV. *Recommending Pretrial Incarceration or Setting Bails with the Intent of Incarceration Should be Prohibited*

Many risk assessments are calibrated to recommend just release and detention. **No person or risk assessment in the United States of America should recommend the preventative detention of a person other than when preventative detention is specifically allowable pursuant to the facts and circumstances of that case.** As noted above, we would advocate that recommending detention including using a risk assessment to make a recommendation up to and including detention should not occur.

No judge or prosecutor should intentionally seek or set bail with the specific purpose of detention, but instead shall set bails that are not excessive pursuant to constitutional and statutory provisions and meet the purposes for which bail is set.

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XV. Administrative Delays in the Bail Process Should be Reduced

In 2019, it is simply unacceptable that persons are detained in jail one second longer than they need to be because it takes time to administratively process them and a couple extra hours in jail is seen as no big deal. For example, in one large urban jail, the quickest someone could get out of jail is typically no less than 24 hours because of processing time. In one major urban jail, a defendant was lost by the jail and spent 30 additional hours in jail after his bond was posted.

System-wide, administrative delays must be reduced. The right to bail is hampered by systematic delays that must be reduced. All persons in the modern era should be releasable within a matter of hours if not minutes when they have posted bail. State and local governments should pursue technology solutions to reduce the time needed to process someone into jail and process them out in order to reduce unnecessary pre-disposition incarceration.

XVI. Speedy Trial Reforms Should be Sought in Order to Reduce Pre-Disposition Incarceration

The criminal justice process increasing the speed of resolution is the only fair and most simple way to reduce unnecessary detention in jail pending trial. Every percentage decrease in the time of a felony matter to conclude will represent a similar percentage decrease in pre-disposition incarceration or other liberty restricting conditions of release. Applying government or private resources toward increasing spending to increase pre-conviction monitoring or supervision is therefore wasteful because it creates a governmental incentive to keep the status quo and not reduce the time or intensity of supervision. Instead the period from arrest to disposition should be so short that pre-conviction probation is not an economically viable alternative. That would be a good thing.

XVII. Conclusion

The fourth generation of bail reform is upon us in America, and it is time to get to work. We are going to embark on this mission because it is necessary to stop the government from eliminating the right to bail and instead embracing a system of tyranny where detention without bail may be based on the blowing of political winds rather than justice. The right to bail is in the bill of rights for a reason, and we encourage people from all sides of the aisle to work with us. We will protect the heart of the right to bail, return it to what it is supposed to be, reduce bias in its application, ensure accountability, and remove the generational false assumption that piling-on by overcharging criminal defendants before they are convicted will fix them and make them show up for court.

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