CHAPTER ONE

The Origins and History of Bail in the Common Law Tradition

INTRODUCTION

In 1964 US attorney general Robert Kennedy testified before a subcommittee of the US Senate Judiciary Committee to advocate for legislation reforming the bail system in the United States. He began his remarks by saying that "the rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail."[1] He illustrated this point with a number of poignant stories:

> Recently, in Los Angeles, a man was forced to stay in jail awaiting trial for a minor crime because he could not afford bail. His case came to trial after 207 days. He was acquitted.
>
> A Pennsylvania man who could not raise $300 spent 54 days in jail awaiting trial on a traffic offense—the maximum penalty for which was *five* days in jail.
>
> In Glen Cove, New York, Daniel Walker was arrested on suspicion of robbery and spent 55 days in jail for want of bail. Meanwhile, he lost his job, his car was repossessed, his credit destroyed, and his wife had to move in with her parents. Later, he was found to be the victim of mistaken identity and released. But it took him four months simply to find another job.[2]

In the more than half century since Kennedy shared these observations, little has changed in the United States, which remains one of only two countries in the world that continues to utilize an extensive system of money bail for those awaiting criminal trial that is dominated by for-profit commercial bail agents.[3] Consider the stories of Derek West Harris, Kenneth Humphrey, and Kalief Browder.

Derek West Harris was a well-dressed and well-liked barber from Newark, New Jersey. He was pulled over for a minor traffic violation in May 2009. Police arrested the fifty-one-year-old for failing to register and insure his new car, as well for having several unpaid traffic tickets. Unable to pay the $1,000 bail set for him, West Harris was placed in a halfway house, where he was robbed and killed for the $3 he had in his pockets.[4]

In May 2017, sixty-three-year-old Kenneth Humphrey was arrested and charged with robbery for going into his neighbor's room in a senior citizens' housing complex and allegedly stealing $5 and a bottle of cologne from that neighbor. Even though he posed no threat to society, he spent 250 days in the San Francisco County Jail because he could not afford to pay the $350,000 bail set in his case.[5] Not only did the California Court of Appeals order that Humphrey be released after finding that his bail had been unconstitutionally excessive, but also, as explained in chapter 2, it ordered all state judges to consider a defendant's ability to pay when making bail decisions rather than strictly relying on published bail schedules.[6] As of the writing of this book, review by the California Supreme Court is pending.

Perhaps the most well-known case of injustice in the contemporary bail context is that of Kalief Browder. In October 2014 the *New Yorker* published an article by Jennifer Gonnerman that detailed the sad series of events that led to Browder's suicide.[7] In May 2010, less than two weeks before his seventeenth birthday, Browder and a friend had attended a party in the Bronx. As they walked home in the early morning hours, a police car drove toward the two boys. A few minutes later a New York City police officer confronted the two teens, saying that a

man had just reported that they had robbed him. Browder denied the accusation and invited the officer to check his pockets. The search revealed nothing. The officer returned to his squad car to talk with the alleged victim, at which time the man changed his story and said that the two boys had not robbed him that night, but rather had stolen his backpack two weeks earlier.

Browder and his friend were taken into custody. Browder, who maintained that he had not committed the crime, was charged with robbery. Because he was already on probation for a previous joyriding offense, the judge ordered that Browder be held in custody unless he posted $3,000 bail. Because his family could not afford to post bail, the young man was taken to Rikers Island. More than two months passed before Browder next appeared in court. During that time a grand jury indicted him for the alleged robbery. He entered a plea of "not guilty." But because Browder had been on probation at the time of the alleged offense, the judge remanded him into custody without bail.

As the weeks and months passed, Browder steadfastly refused to plead guilty, insisting on his innocence. This differentiates Browder from many pretrial detainees in the United States, who plead guilty to escape the conditions of their pretrial confinement. "Individuals who insist on their innocence and refuse to plead guilty get held[,] … [b]ut the people who choose to plead guilty get out faster."[8]

More than two years went by, during which more than a half dozen requests for continuances by the prosecution resulted in postponement after postponement of Browder's trial date. During this time, Browder spent a significant amount of time in solitary confinement, largely as a result of minor infractions. He became depressed and twice attempted to commit suicide.

In the fall of 2012 prosecutors offered Browder a new plea deal. In exchange for a plea of guilty, he would be sentenced to two and one-half years in prison. Given the time he had already served, that meant Browder would be released in a matter of weeks. According to his court-appointed defense attorney, "Ninety-nine out of a hundred would take

the offer that gets you out of jail.... [But Browder] just said, 'Nah, I'm not taking it.' He didn't flinch. Never talked about it. He was not taking a plea."[9] In March 2013 a judge offered Browder a most tempting opportunity: plead guilty to two misdemeanor offenses in exchange for immediate release on time served. Browder refused yet again, asserting that he had not done anything wrong. Just over two months later, the judge dismissed the case against Browder.

Ultimately, Browder spent three years in jail awaiting trial, including nearly two years in solitary confinement. Browder was never able to recover from the psychological damage caused by his ordeal, which included enduring repeated assaults by both guards and inmates, as well as months of isolation in twenty-three-hour-per-day lockdown. In June 2015 he killed himself at the age of twenty-two.[10]

Browder's case garnered intense media attention. Indeed, Mayor Bill de Blasio cited what happened to Browder as part of the impetus to reform New York City's court system to reduce or eliminate the excessive delays that had caused Browder to be kept in jail for more than three years for a crime he most likely did not commit.[11] Jay-Z and Harvey Weinstein produced a six-part documentary series on Browder's ordeal for Spike television, which aired in 2017.

What happened to Derek West Harris, Kenneth Humphrey, and Kalief Browder serves as extreme examples of the potential consequences of the unjust ways in which pretrial detention operates in the United States. Browder's single-parent family could not come up with money for his $3,000 bail. Although Browder's status as a probationer ultimately caused him to be held without bail, the overwhelming majority of pretrial detainees remain in custody because they cannot afford to pay for their release on bail—just like Derek West Harris and Kenneth Humphrey. In contrast, wealthy defendants, even those who might be a flight risk, can pay high bail amounts and are set free. Take Robert Durst as an example. Durst, who was profiled in the HBO documentary *The Jinx*, was arrested for the murder of a neighbor in 2001;

after bail was set at $250,000, he promptly paid the amount and then absconded.[12] As he admitted in the documentary, his intention was always to put up the money and then leave. His wealth enabled him to be released almost immediately.[13]

However, most defendants do not have that luxury. According to a research report issued by the Prison Policy Initiative, 60 percent of the people who cannot pay bail come from the poorest third of society.[14] But this figure does not even begin to capture the financial toll the US money bail system takes on people accused, but not convicted, of criminal offenses:

> In a given year, city and county jails across the country admit between 11 million and 13 million people. In New York City, where courts use bail far less than in many jurisdictions, roughly 45,000 people are jailed each year simply because they can't pay their court-assigned bail. And while the city's courts set bail much lower than the national average, only one in 10 defendants is able to pay it at arraignment. To put a finer point on it: Even when bail is set comparatively low—at $500 or less, as it is in one-third of nonfelony cases—only 15 percent of defendants are able to come up with the money to avoid jail.[15]

The effects of not being able to post bail go beyond the loss of liberty while awaiting trial. Indeed, being held in pretrial detention is the single best predictor of case outcome, even after controlling for other factors. For example, roughly half of all nonfelony cases in New York City end with an acquittal; in contrast, the conviction rate skyrockets to 92 percent for pretrial detainees.[16] The New York City Criminal Justice Agency interpreted these data as supporting the proposition that pretrial detention is so unpleasant that it pressures those accused of crimes to plead guilty in order to escape the conditions of confinement.

Although bail now serves as both a mechanism "for locking people up" prior to any criminal conviction and for inducing guilty pleas, neither could be further from the intended emancipatory purpose of bail when the concept first came into practice in England.[17]

A PRIMER ON BAIL IN THE UNITED STATES

Bail is a guarantee.[18] In return for being released from jail, the accused promises to return to court as needed. The accused often needs to secure this promise by pledging money or property with the court. If the defendant appears in court when requested, the security is returned. If he or she fails to appear, the security can be forfeited.

Overview of Common Bail Procedures

Bail procedures vary by jurisdiction and according to the seriousness of the crime. In the majority of states, those arrested for minor misdemeanors can be released fairly quickly by posting bail at the police station. In most communities, lower-court judges have adopted a fixed bail schedule that specifies an exact amount for each offense. Although bail schedules provide for quick and easy decisions regarding release after arrest, "they seem to contradict the notion that pretrial release conditions should reflect an assessment of an individual defendant's risk of failure to appear and threat to public safety."[19] Such concerns have led appellate courts in Hawaii and Oklahoma to reject bail schedules on due process grounds.[20] In jurisdictions that do not use bail schedules, bail determinations are made on a case-by-case basis, in much the same way that bail decisions for felonies have historically been made.

Depending on the jurisdiction, bail may be set during an initial appearance, a preliminary hearing, or a separate bail hearing. In all these situations, the arrestee appears before a commissioner, magistrate, or lower-court judge, who must determine whether the arrestee qualifies for release on bail and, if so, what the conditions will be. As frequently depicted on the television show *Law and Order*, these proceedings are often very quick, frequently lasting only a few minutes. But unlike their television counterparts, bail determinations in real life often do not involve defense counsel arguing on the arrestee's behalf. In jurisdictions that use a judicial proceeding to set bail, arrestees may

TABLE 1
Common Forms of Pretrial Release

Type	Description
Release on recognizance (ROR)	Judges release a defendant without any bail if they believe the person is not likely to flee. Such personal bonds are used most often for defendants accused of minor crimes and for those with substantial ties to the community.
Cash bond	The accused must post with the court either the full amount of cash bail or a percentage of it in the form of a cash bond. All of this money will be returned when all court appearances are satisfied.
Property bond	Most states allow a defendant (or friends or relatives) to use a piece of property as collateral. If the defendant fails to appear in court, the property is forfeited. Property bonds are rare because courts generally require that the equity in the property be double the amount of the bond.
Bail bond	The arrestee hires a bail agent to post a bond for the amount required. The agent charges a nonrefundable fee for this service, typically set at 10% of the amount of the bond.

SOURCE: Adapted from table 10.3 in Neubauer and Fradella's *America's Courts and the Criminal Justice System*, 13th edition, p. 293. © 2019 South-Western, a part of Cengage, Inc. Reproduced by permission. www.cengage.com/permissions.

remain in police custody for a number of hours—perhaps as long as two days—before they have the opportunity to make bail.[21]

Common Forms of Pretrial Release

Once bail has been set, a defendant can gain pretrial release in four basic ways, which are outlined in table 1. Any of these types of release may be combined with nonfinancial conditions of pretrial release, such as supervision, drug testing, participation in counseling and rehabilitation services, electronic monitoring, residence restrictions, and no contact orders, just to name a few of the more common ones.[22]

Because many of those arrested lack ready cash, do not own property, or lack the needed social clout, the first three options for making bail listed in table 1 are often unavailable for them. As a result, nearly half of those granted financial bail have no choice but to resort to a commercial bail bond. Indeed, reliance on for-profit bail "is the most common form of release, doubling from 24 percent to 49 percent of releases from jail from 1990 to 2009."[23]

Commercial Bail

Bail bonds are a commercial business that, like all for-profit businesses, are run for the purposes of making money. Defendants who utilize the services of a bail bond company are required to pay a nonrefundable fee, and in exchange for that payment, which is usually tied to a fixed percentage of the overall bail amount assessed by a court, the commercial bail entity guarantees that the defendant will appear in court, usually by posting a surety bond underwritten by an insurance company.[24] If the accused fails to appear as promised, the bail business is in theory responsible for paying the full amount of the bail to the court, although as explained in chapter 2, that rarely occurs in practice. In addition, bail agents are then often empowered to apprehend the defendant who failed to appear in court, either themselves or by using the services of a bounty hunter.[25] Although bail agents claim to play an important role in the criminal justice system, as described in more detail in chapter 2, the industry is known for its corrupt and predatory practices.[26]

Preventive Detention

In the US system of monetary bail, those who are wealthy enough can often buy their freedom while awaiting trial. But the poor await trial in jail. On any given day, there are nearly 744,600 persons in jail (not prison), approximately 60 percent of whom have not been convicted

of any crime.[27] Approximately 90 percent of these pretrial detainees "had a bail amount set, but were unable to meet the financial conditions required to secure release."[28] In contrast, just 4 to 6 percent of those held in pretrial detention have been denied bail on one or more of several grounds, including the risk that the person will flee; the risk that the accused may threaten, injure, or intimidate a prospective witness or juror; or because the charged offense involved serious violence or major drug distribution or is punishable by life imprisonment or death.[29]

The Context of Bail Setting

Deciding whom to release and whom to detain pending trial poses critical problems for judges. The realities of the bail system in the United States reflect an attempt to strike a balance between the legally recognized purpose of setting bail to ensure reappearance for trial and the working perception that some defendants should not be allowed out of jail until the trial.

Trial court judges have a great deal of discretion in setting bail. Statutory law provides few specifics about how much money should be required, and appellate courts have likewise spent little time deciding what criteria should be used. Although the Eighth Amendment to the US Constitution prohibits excessive bail, appellate courts will reduce a trial judge's bail amount only in the rare event that flagrant abuse can be proved. In practice, then, trial court judges have virtually unlimited legal discretion in determining the amount of bail. That discretion is often guided by two primary factors: (1) the risk of flight or nonappearance in court, which often involves consideration of the arrestee's "ties to the community," such as stable employment, property ownership, marital status, number of close relationships, and length of presence in the community; and (2) the perceived risk the arrestee poses to himself or herself or others, which often involves consideration of the person's mental condition, the seriousness of the crime(s)

for which the person was arrested, and the arrestee's prior criminal history.

At first blush, these factors might seem straightforward. But uncertainty abounds because typically few details of the alleged crime are available shortly after a warrantless arrest. Similarly, information about the defendant's mental status, ties to the community, financial resources, and even criminal history is often in short supply. In many courts, for example, police "rap sheets" (lists of prior arrests) are available but typically do not contain information about the eventual disposition of prior cases: dismissal, plea, or imprisonment. Moreover, each bail decision is risky. In the face of the uncertainty caused by a lack of complete information, judges must weigh risks such as whether a defendant released on bail will commit another crime and whether police groups, district attorneys, and the local newspapers may criticize a judge severely for granting pretrial release to defendants. In addition, judges must worry about jail overcrowding. If an arrestee is placed in pretrial detention, judicial officials might worry that someone else—perhaps someone more dangerous—will be released from a jail crowded beyond its capacity.

Bail decisions also depend on what scholars refer to as *situational justice*: a subjective series of factors such as how the defendant appears, acts, responds to questions, and the like. Note that the use of situational justice might lead judges to make certain judgments about defendants based on demographic characteristics, resulting in racial, ethnic, gender, and sexual orientation disparities in bail decisions.[30]

THE COMMON LAW ORIGINS OF BAIL

The modern context and implications of bail decisions are examined in more detail in chapters 2, 3, and 4. In the balance of this chapter we explore the origins of bail and how it evolved into the pretrial release and detention systems now utilized in the United States.

Bail in the Anglo-Saxon Period

The concept of bail can be traced back in England hundreds of years before the Norman Conquest. With the fall of the Roman Empire in the early fifth century CE, much of Western Europe fell under the control of the kings of Germanic tribes from what is now Scandinavia. Germanic tribal justice blended retributive and restorative justice.[31] The former embodied the same principle of *lex talionis*—"an eye for an eye, a tooth for a tooth"—found in the law of many ancient civilizations, including the Babylonians under Hammurabi.[32] Such an approach allowed aggrieved parties to become agents of retribution. In the case of homicide, the surviving kin of a victim could avenge the death of their family member. This often led to "blood feuds" in which long-standing disputes between groups led to killings to avenge killings, which in turn led to more killing.[33]

Over time Anglo-Saxons implemented a legal process to avoid blood feuds that involved the payment of restitution for a variety of transgressions, even for murder, rape, theft, and assault.[34] This system of compensation varied based on the value of someone's "life and bodily faculties in accordance with his rank in society."[35] These compensatory payments generally fell into three categories: *wergild*, paid to a family group as compensation for the death of another family member; *bot*, paid for injuries less serious than death, including compensation for the repair of houses and tools; and *wile*, a public fine payable to a lord or monarch as atonement for a crime.[36] If *wergild* could not be paid or was refused, then the blood feud was permitted in homicide cases.

By the second half of the seventh century Anglo-Saxon kings sought to bring order and consistency to dispute resolution by creating a rudimentary court system in which an aggrieved man could initiate a complaint and the accused was required to "give *borh* (surety) and make any retribution prescribed by the judicial officer."[37] *Borh* is a synonym for bail; in the same way that bail is supposed to act as a surety today, *borh*

was designed to ensure that the accused appeared before a judicial officer to participate in the judicial process.[38] This system avoided the costs attendant on pretrial incarceration at a time when the "circuits of the itinerant justices were irregular, and often a matter of years."[39] The system also avoided numerous troubles associated with pretrial detention, most notably the ease with which escape from custody was often accomplished.[40]

Borh also served another important function: providing assurance that the applicable form of fine, whether *wergid*, *bot*, *wile*, or some combination thereof, would be paid if the accused were convicted. This function became even more important after the system of *borh* was extended from preadjudication surety to the time after trial.[41] The oath of the *borh* was especially important to this latter function if a person needed to pay *wergild* over time in installments.[42] Similarly, the oath of the *borh* was important if the accused fled. In such a circumstance, he was presumed guilty and the surety was expected to pay *wergild*, *bot*, and *wile*, as applicable, on behalf of the person for whom *borh* was pledged. Serfs were placed under the *borh* of their feudal lords, and foreign visitors were placed under the *borh* of their hosts.[43]

By the early 900s the Anglo-Saxon surety system permitted family, friends, and acquaintances to act as *borh*. Moreover, property could pledged in satisfaction of surety. But if the accused had neither property nor other forms of *borh*, then the law of England permitted that he be held in custody until judgment.[44] By the mid-900s every person in England was required to have a *borh*, thereby bonding "surety and principal . . .'body for body.'"[45]

Importantly, the value of the *borh* pledge in the Anglo-Saxon surety system was equal to the amount of the compensation to be paid as a penalty upon conviction. "Thus, the amount of the pledge, that is, the amount of bail, was identical to the penalty upon conviction."[46] As law professor June Carbone noted, this system deterred flight: "By tying bail to the potential penalty, the system necessarily linked the amount of the pretrial pledge to the seriousness of the crime."[47]

The Effects of the Norman Conquest on Bail

When William the Conqueror took control of England in 1066, he and the Normans brought with them very different views about the philosophy of justice. As a result, the administration of law in England changed dramatically.[48] Acts that today are considered to be crimes gradually came to be viewed as transgressions that required the intervention of the state.[49] By the time Henry II ruled England in the mid- to late twelfth century, crimes were no longer considered to be private matters, but instead were viewed as offenses against the Crown.[50] Partly as a result of this shift, the law of the land began to be harmonized into a "common law": one law that applied consistently throughout the king's lands.

As the common law developed, the criminal process of the state could be initiated in one of two ways. As had been the custom in the past, the alleged victim of a crime—or the next of kin in homicide cases—could swear, under oath, an accusation against the suspect.[51] But Henry II put in place a system of presentment by jury, a forerunner to the grand jury system, via the Assize of Clarendon in 1166. Pursuant to this mandate, twelve law-abiding men in each village were assembled and sworn under oath to "'present' those suspected of crimes to the royal courts."[52] Trials were often by water, ordeal, or combat.[53] Trial by water and ordeal gradually lost legitimacy, giving way to presenting to juries that determined guilt at trial. In 1215 the Fourth Lateran Council of the Roman Catholic Church banned clergy from participating in trials by water or ordeal.[54] This in turn cleared the way for trials to become adjudication processes before secular English tribunals.

A series of official abuses of state power relevant to criminal justice committed by three successive monarchs, such as curtailing the trial process, contributed to pushing England to the brink of civil war.[55] To avoid that consequence, King John signed Magna Carta in 1215. Article 39 of that document provided: "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed … except by the

lawful judgment of his peers and by the law of the land." The next clause stated: "To no one will We sell … deny or delay right of justice." Originally, these protections were meant for noblemen, but they soon applied to all citizens. These statements came to form the basis of the due process guarantees in the US Constitution, including the right to trial by jury.

Punishments under early English common law also changed significantly under the Anglo-Saxons from the compensation system that had been applicable to most offenses. The concept of paying damages and fines was largely considered to be insufficient for having offended against the monarch for all but the most trivial of offenses; rather, harsh punishments—ranging from corporal punishment to loss of limbs or life—became commonplace.[56]

Collectively, these changes in the criminal process necessitated modifications to the system of pretrial surety that worked well when *borh* and compensatory punishments were balanced. As long as offenses were punishable through one or more types of compensation, all transgressors were "bailable" under the Anglo-Saxon *borh* system.[57] But the harsher penalties enacted after the Norman Conquest changed the calculus that had made *borh* sensible when restorative justice principles governed the punishment of offenses. "The accused threatened with loss of life or limb had a greater incentive to flee than the prisoner facing a money fine, and judicial officers possessed no sure formula for equating the amount of the pledge or the number of sureties with the deterrence of flight. At the same time, the growing delays between accusation and trial increased the importance of pretrial release and the opportunities for abuse and corruption. The determination of whom to release became a far more complicated issue than calculating the amount of the [financial punishment]."[58]

At first those accused of homicide lost the right to bail, primarily because the offense became punishable by death.[59] Other offenses were subsequently made nonbailable, especially those so deemed by local sheriffs.[60] But this tremendous discretion in the hands of local law

enforcement officials not only led to widespread corruption concerning bail but also resulted in all but the most minor of offenses being nonbailable.[61] In an attempt to address both of these problems, Parliament enacted the Statute of Westminster in 1275.[62] It defined bailable and nonbailable offenses in a manner that lasted until 1826.[63]

The Statute of Westminster

The Statute of Westminster specified that all offenses not punishable by loss of life or limb were eligible for bail. But since so many offenses carried some form of corporal or capital punishment, the class of nonbailable offenses nonetheless remained sizable, including murder, arson, treason, escape, and certain forestry offenses on royal lands. In addition, just because an offense was bailable did not automatically establish a right to bail. The Statute of Westminster required sheriffs to weigh the likelihood of conviction as part of the decision to grant release on bail. "The statute required the sheriffs to inquire, first, whether the evidence was reliable, i.e., was the accused caught in the act, had he confessed, had he been named by someone who had confessed, or had he been charged only on the basis of light suspicion; and, second, did the behavior of the accused indicate his guilt, i.e., had he attempted to escape, had he committed crimes in the past, or was he of 'ill fame.'"[64] As a result, persons "caught in the act" could be detained even for relatively minor offenses, whereas those accused of serious offenses without significant evidence to support the suspicion against them could be granted bail. Great discretion remained for intermediate offenses, especially when balancing the reliability of the evidence against a suspect's reputation in the community.

Given the modest nature of the reforms contained in the Statute of Westminster, it should come as no surprise that it largely failed to curb local corruption in the granting or denial of bail. Parliament repeatedly tweaked the Statute of Westminster in attempts to add protections for the accused in the bail process, most of which proved ineffectual.[65]