

Pretrial Release and Detention: Legal Principles

The U.S. Supreme Court is clear that pretrial release is the norm and detention the carefully limited exception. But, release is not the norm in many jurisdictions.

Too often, a person's liberty depends on paying a financial condition. In some jurisdictions, the financial condition is determined by a fixed "bond schedule." This means the amount is set based on the person's charge. Even in places where there is no bond schedule, there may be a presumption that many—if not most—people will have to pay a financial condition to secure their freedom.

A growing number of jurisdictions are rethinking their approach to pretrial release—in part, to ensure that their practices fully align with the federal, state, and local laws that govern pretrial release and detention decisions. This document summarizes the federal pretrial legal landscape set forth in the U.S. Constitution and federal court decisions.

"Bail" refers to the process of pretrial release. It does not refer to money bond or any other financial condition. Although money is one possible condition of bail, it is not bail itself.

Pretrial release is the norm, and detention before trial is the carefully limited exception

The right to physical liberty is a foundational principle of the U.S. Constitution. The Supreme Court has emphasized the "fundamental nature" of a person's interest in pretrial liberty¹ and has underscored the importance of the country's "traditional right to freedom before conviction."² In short, the U.S. Constitution provides a right to be free before trial to the vast majority of people who are arrested.

*The Supreme Court warned that without a right to pretrial release, "the presumption of innocence would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951).*

State guidance on pretrial law is found in state constitutions, statutes, court rules, and court decisions. Most states' constitutions set forth a broad right to pretrial release and spell out who is eligible for pretrial detention.

Detention is permitted only for certain purposes—and it must be the last resort

Detention may be used only when there are no conditions of pretrial release that can provide *reasonable assurance* that a person will not flee and/or commit a serious offense that compromises public safety. Detention cannot be used to punish, "send a message," or require mental health or substance use treatment.

Due process is required before a person may be detained

Because detention is such a significant deprivation of liberty, it may not be imposed unless a person is provided robust due process. The federal process requires—among other things—a hearing in court where the state bears a heavy burden of proof, the person is represented by counsel and is allowed to provide evidence, and the judicial officer's³ decision is justified in writing.

1 *United States v. Salerno*, 481 U.S. 739, 750 (1987).

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

3 A judicial officer may be a justice, judge, magistrate, bail commissioner, or another officer of the court, as defined locally or in state or federal statutes.

Release conditions imposed must be the least restrictive necessary

The Supreme Court held that conditions of release must be set at a level designed to assure a constitutionally valid purpose “and no more.”⁴ This is one way of expressing the legal principle that courts must impose the “least restrictive conditions” necessary to provide a reasonable assurance of appearance and public safety.

Release conditions must be individualized

A judicial officer must look at the person before them and decide whether and which conditions of release are necessary. Conditions, including financial conditions, should not be imposed categorically or simply based on charge. Some courts have ruled that the use of a monetary bond schedule is unconstitutional.⁵

Money cannot be used to intentionally detain

A growing body of appellate case law holds that financial conditions may not be used to intentionally detain someone.⁶ These cases also hold that unaffordable financial conditions will be subject to increased scrutiny, and a person’s ability to pay must be assessed before setting financial conditions. If a state’s constitution and/or statutes define who can be detained and how, judicial officers must abide by those laws and not set a secured financial condition in order to detain. If they do, it will effectively negate the state’s laws regarding which people are eligible for pretrial detention.

Supreme Court Justice Robert Jackson wrote, “Bail always involves a risk...a calculated risk which the law takes as the price of our system of justice.” Stack, 432 U.S. at 8 (Jackson J. concurring)

⁴ *United States v. Salerno*, 481 U.S. 739, 754 (1987).

⁵ In 2019, a federal district court ruled that the use of a bond schedule “significantly deprives plaintiffs of their fundamental right to liberty.” *Buffin v. San Francisco*, No. 15-cv-04959-YGR (N.D. Cal., March 4, 2019).

⁶ See, e.g., *O’Donnell v. Harris County*, 892 F.3d 147, 158 (5th Cir. 2018) (“[M]agistrates may not impose a secured bail solely for the purpose of detaining the accused”).

Resources for Reporters

APPR legal experts are available to discuss national and state legal principles, as well as to offer advice for researching state legal resources. Contact media@cepp.com.

A number of prominent national organizations have articulated standards for legal and evidence-based pretrial practices:

- [American Bar Association](#)
- [National Association of Pretrial Services Agencies](#)
- [National Institute of Corrections](#)

Fundamentals of Bail (2014), by [Timothy R. Schnacke](#), is a valuable primer on the history of bail, fundamental legal principles, pretrial research, and national standards on pretrial release and detention.

Learn more at advancingpretrial.org/legal-analyses.