BY KENECHUKWU OKOCHA

Approximately 15-30 minutes into most episodes of the television show *Law & Order* there is a standard hand-off. The crime has been investigated and a perpetrator arrested, and the lawyers are about to take over. The clear signal that the "cop show" is turning into a "legal drama" is often a court hearing when a judge determines bail (or the amount of money an arrestee must pay to get out of jail while awaiting trial). Actual tradition and television legal dramas have normalized the use of money in this manner.

However, not every jurisdiction allows money to be such a vital determiner of pretrial freedom. Several organizations have heralded Washington, D.C.'s pretrial system for its virtual absence of money bail.[1] Other jurisdictions, including an increasing number of counties in Wisconsin, are experimenting with incorporating new bail processes that may reduce the role of money. [See "Milwaukee Moves Away From Cash-based Pretrial Release" at page 38.] The differences between these types of pretrial systems are not merely ornamental. The ability, or conversely inability, to afford bail implicates many factors, including incarceration rates, state and county budgets, racial and socioeconomic disparities in criminal justice, public safety, and individual liberty.

Background on Bail

In 1965, then U.S. Attorney General Robert Kennedy stated, "usually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is simply, money. How much money does the defendant have?"[2]

Kennedy championed the Bail Reform Act of 1966 in response to his concerns regarding the influence of money in pretrial incarceration. The act curbed

Nationwide Trend: Rethinking the Money Bail System

Dollars and cents are easy to count, but that doesn't necessarily add up to money bail serving as a good tool for determining whether defendants should be spared incarceration before trial.

SUMMARY

In many U.S. jurisdictions, only one factor determines whether a charged individual stays in jail before trial. That factor is not guilt or innocence, the nature of the crime, nor the character of the defendant. The factor is money, specifically, how much the defendant has or can borrow.

This article looks at trends in money bail systems nationwide, with a focus on Wisconsin and Washington, D.C. The latter has pioneered a system that removes financial considerations from the process of determining which individuals will remain incarcerated before trial and concentrates on defendants' dangerousness and flight risk.

Looking at both specific individual cases and study and survey results, the author discusses the effects of money bail systems and non-money alternatives on defendants, their communities, and the criminal justice system.

the use of monetary bail in the federal system and shifted the focus of judicial consideration in pretrial release to defendants' likelihood of returning to court (that is, their *flight risk*).[3] In 1984, a new crime bill overhauled the federal bail system, allowing judges to consider *dangerousness* or the impact a defendant's release would have on the safety of others.[4]

In 1987, the U.S. Supreme Court affirmed that, with the proper procedural safeguards, a defendant's dangerousness and flight risk were constitutionally permissible bases for pretrial detention.[5] Both federal and state courts must abide by the 1987 Supreme Court ruling, but the two bail reform acts apply only to federal courts.

Wisconsin's Pretrial System

The Wisconsin Legislature created a pretrial release system in which, if monetary bail (also known as cash bond) is imposed, it is restricted to an amount that will ensure a defendant's return to court.[6] In determining whether to issue monetary bail, a Wisconsin judicial officer (a commissioner or judge) must review a whole host of statutorily proper considerations including the nature and gravity of the offense and the defendant's criminal history and previous performance on release.[7]

The defendant's ability to pay is also a consideration but is not necessarily a determining factor when setting the bail amount.[8] Thus, bail can be set above the amount a defendant is able to pay if deemed necessary to ensure his or her appearance at later court hearings.[9] Consequently, a defendant may remain in custody until the resolution of his or her case, strictly because of an inability to afford a bail payment.

Wisconsin lawmakers provided options beyond bail. Judicial officers may also order the defendant's release under a signature bond, which is essentially a promise to return to court. Signature bonds are often reserved for defendants who commit minor offenses and show minimal dangerousness or flight-risk factors. Judicial officers may also order defendants to follow specific conditions while awaiting trial (for example, not to possess firearms, not to drink alcohol, or to stay away from the victim).[10] An obscure legal provision allows judicial officers under certain circumstances to detain defendants without bail for certain dangerous crimes, but this provision is rarely used.[11]

Independent assessments and monitoring of defendants are available on a county-by-county basis. Certain counties give judicial officers discretion to implement additional tools for greater monitoring of released defendants, such as ordering installation of GPS tracking devices, frequent check-ins, or specialized pretrial programming for alcohol or other drug abuse. Other counties release defendants on cash or signature bonds with limited or no outside monitoring of compliance.

As part of the overall bail scheme, the Wisconsin Legislature also ordered the yearly promulgation of a uniform bail schedule.[12] This schedule designates specific bail amounts for misdemeanor offenses and is often used by law enforcement officers when judicial officers are unavailable. New arrestees can avoid waiting days in jail for a bail hearing by paying the law enforcement agency the amount designated on the schedule. However, an inability to pay results in detention until a bail hearing can be scheduled.

Washington, D.C.'s Pretrial System

In the District of Columbia (D.C.), defendants are not incarcerated pretrial because they cannot afford bail nor are they generally allowed to pay for release.[13] If after a hearing a judicial officer determines a defendant is too dangerous or too great a flight risk, the defendant is detained.[14]

D.C. lawmakers enacted a rebuttable presumption that a defendant is too dangerous to be released pretrial if the judicial officer finds probable cause that he or she committed certain offenses, such as murder or a violent felony while armed with a firearm.[15] In other circumstances (for example, if the defendant is charged with a misdemeanor and is on

The Role of Bail Bond Agents and Commercial Bail in Pretrial Release Systems

Bail bond agents, or bail bondsmen, are private actors who profit by acting as a surety for defendants who cannot afford to pay their bail. Generally, in commercial bail systems bail bond agents pay the total bail in exchange for a fee paid by defendants. The fee is often 10 percent of the total bail amount. The bail bond agents are financially responsible for ensuring defendants appear at their hearings. The court returns the entire bail to the bail bond agents when defendants successfully make their court appearances. The agents keep the 10 percent fee as revenue. However, the court holds the agents responsible for the entire bail when defendants fail to appear. Courts often give bail bond agents an opportunity to return the defendants when they abscond. Often agents employ bounty hunters to capture fugitive defendants.

The bail bond industry has been a strong opponent of the recent bail reform efforts in New Jersey, Maryland, and New Mexico, often out of fear of job loss.[71] Additionally, supporters of the industry often claim that commercial bail is the better pretrial release option to ensure court appearances. These supporters often cite a U.S. Department of Justice study that between 1990 and 2004, felony defendants when released with bail appeared more often than those released on their own recognizance.[72] However, critics note that the study had several limitations,[73] among them that the study did not control for important factors such as the defendant's employment status, community ties, residency, or substance abuse.[74]

Major national organizations representing varying criminal justice actors (to include the American Bar Association, National Association of Criminal Defense Lawyers, National Association of Pretrial Services Agencies, and National District Attorney's Association) have opposed commercial bail.[75] These organizations often note four main arguments, claiming that commercial bail 1) disconnects ability to pay from possible risks to public safety; 2) abdicates the decision of release from courts to for-profit entities; 3) hampers transparency because important decisions regarding the release of defendants are made in secret by private actors; and 4) discriminates against individuals with relatively low incomes or low assets.[76]

Commercial bail is illegal everywhere in the world except the Philippines and certain jurisdictions in the United States.[77] Wisconsin, Illinois, Kentucky, and Oregon have also outlawed commercial bail.[78] In 2013, the Wisconsin Legislature sought implementation of a commercial bail system.[79] The *Milwaukee Journal Sentinel* claimed that judges, clerks of courts, sheriffs, and others in the legal community (including then Attorney General J.B. Van Hollen) "nearly universally opposed the plan."[80] Some of the judges and clerks were concerned that the bail money, currently designated for victim's restitution, would instead end up as profit for bail bond agents.[81] Governor Scott Walker eventually vetoed the commercial bail plan.[82] **WL**

probation) the judicial officer has discretion to determine the defendant's pretrial detention or release.[16] For most of the remaining situations, the judicial officer must release the defendant on his or her own recognizance.[17] D.C. judicial officers may order conditions of release similar to those used in Wisconsin.[18]

D.C. has established a pretrial services agency (PSA), which aids judicial officers in making a decision to detain or release. PSA officers interview defendants shortly after their arrest and investigate their background. The PSA thereafter conducts a 70-factor risk assessment and issues a recommendation regarding detention or release.[19] PSA officers are also responsible for monitoring defendants while they are on release, which can include conducting regular check-ins, administering drug tests, and installing GPS tracking devices.

Additionally, D.C. does not have a bail schedule. For minor-misdemeanor arrests, defendants either wait for a pretrial release hearing or are released with a citation that orders them to return to court later.

A Question of Fairness

The U.S. Supreme Court stated, "[i]n our society, liberty is the norm, and detention prior to trial ... is the carefully limited exception."[20] The American Bar Association (ABA) appears to cast doubt on whether money bail can be the proper tool for this exception, noting its "very nature requires the practically impossible task of transmitting risk of flight into dollars and cents."[21] According to the ABA "[p]retrial incarceration should not be brought about indirectly through the covert device of monetary bail."[22] The ABA further notes that money bail can lead to two disturbing scenarios: "a defendant who could safely be released may be detained or a defendant who requires confinement may be released."[23]

Unfortunate examples of the inequities of wealth-based pretrial detention or release abound. In 2015, a Texas judicial officer ordered Sandra Bland to pay a $515 bond after being charged with an offense akin to assaulting an officer.[24] (According to the Federal Reserve, 46 percent of adults could not afford an emergency $400 payment in 2015.[25]) Bland could not afford her bail.[26] As a result she was incarcerated and she died in custody a few days later.[27] A grand jury ended up indicting the police officer who accused Bland of assault for perjury charges stemming directly from his mishandling of her arrest.[28]

In 2010, a New York judicial officer held 16-year-old Kalief Browder on $10,000 bail for stealing a backpack.[29] The prosecution refused to try his case and instead requested eight continuances of the trial date.[30] The court did not release Browder until approximately three years later when the prosecution agreed to dismiss the charges.[31] While incarcerated Browder attempted suicide six times and eventually took his own life after he was released.[32]

While Bland and Browder were incarcerated, wealthy movie director and convicted child sexual abuser Roman Polanski remained free in Europe. The state of California charged Polanski with child rape-related offenses in 1978.[33] A judicial officer released him on $2,500 bail.[34] Polanski pleaded guilty to one of those charges, but fled the country before his sentencing.[35] Polanski is currently working on his latest film as he travels through France and Poland, which have both refused to extradite him.[36]

In Texas, law enforcement officials arrested Robert Durst for a murder while the authorities in New York were investigating him for a separate murder.[37] Durst, heir to a real estate fortune, promptly paid the $300,000 Texas bail and fled the state, launching a man-hunt for the arrested murder suspect.[38]

Aside from the extremes faced by Bland and Browder, wealth-based pretrial incarceration often has additional collateral consequences. Defendants who remain in custody pretrial may lose employment or surrender access to state services. As a result, they can lose housing or be unable to afford legal fees. Incarcerated defendants often have less opportunity to coordinate with their lawyer or witnesses for trial preparation. Studies also show that money bail has a disparate impact based on race. An Ohio study revealed that judicial officers issue African-Americans ages 18-29 significantly higher bail amounts than all other types of defendants.[39]

Increasing Costs to Taxpayers

Taxpayers are paying additional money to keep pace with the large increases in pretrial jailing of defendants. Local jail populations grew by approximately 19 percent between 2000 and 2014 and pretrial detainees accounted for 95 percent of that growth.[40] In 2009, 61 percent of inmates in jail were in pretrial status, while in 1996 the same population was just over 50 percent.[41] The increased use of money bail appears to be a major contributor to the rise in jail populations. Between 1990 and 2004, the percentage of pretrial defendants released from custody fell from 66 percent to 56 percent.[42] Conversely, during that same period, the proportion of defendants required to post money bail rose from 54 percent to 69 percent.[43]

Increased jail populations create issues for both the detained pretrial defendants and the public. Pretrial detainees may suffer from unsafe jail conditions, which often accompany overcrowded jails. Lawsuits resulting from poor conditions connected to excessive jail populations can cost local governments' taxpayer funds in damages.[44] For example, Sandra

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