

Solving the Riddle of the Indigent Defendant in the Bail System

by John Clark

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Historically, the sole purpose of bail was to assure the appearance of the accused at trial. In medieval England, a defendant could be released to the custody of a person willing to take responsibility for the defendant's appearance. As originally set in practice, if the defendant failed to appear, the custodian, or surety, would stand trial in the defendant's place and submit to any punishment the defendant would have received. This practice ultimately gave way to a more humane system; instead of the surety putting up his physical body as assurance of the defendant's appearance at trial, he would put up money or property, which would be forfeited if the defendant failed to appear.

Two questions arose almost immediately under this new "enlightened" system: (1) How much money or property is required to assure a defendant's appearance? and (2) What if the defendant and his surety could not raise that amount? The answer to these questions was as unsatisfactory then as it is now: Judicial officers should not require "excessive bail." And it has led to a consistent result: Those with financial means are able to purchase their freedom, while those without financial means lose their liberty during a period when they are presumed innocent.

In 1965, Professor Caleb Foote summed up the problem with a bail system whose only rule was an ambiguous one—to prohibit excessive bail. "The central problem [with this bail system] is how to apply the standard of excessiveness of bail . . . to a criminal population which is at least 50 percent indigent," stated Professor Foote. This central problem, noted Foote, creates a "riddle of the indigent [that] is insoluble in the context of the bond system."¹

Forty years after Foote made this observation, many jurisdictions across the country are still trying to solve this insoluble riddle. This article describes efforts to de-

fine how the money bail system can work, and notes what critics have said about why that system can never work. It also describes a different approach to pretrial release decision making—an approach that began with great promise, but which has not been fully realized because of our reluctance to let go of our reliance on money bail.

The "Excessive Bail" Clause

The first use of the "excessive bail" clause can be found in the English Bill of Rights, which was passed by Parliament in 1689. Ten years earlier, in 1679, Parliament had passed the Habeas Corpus Act establishing procedures to close loopholes that were making it more difficult for persons accused of crimes to be admitted to bail. When judges responded to the provisions of the Habeas Corpus Act by simply setting impossibly high bail, Parliament decreed that "excessive bail" should not be set. However, the Bill of Rights did not define what was meant by that term.

The excessive bail clause was introduced into the United States' legal lexicon in 1776. Clause 9 of the Virginia Declaration of Rights, authored by George Mason, provided: "[E]xcessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This or very similar language was later adopted in most state constitutions.

Similar language also was adopted as the Eighth Amendment to the U.S. Constitution, which provides that "excessive bail shall not be required." As the U.S. House of Representatives was debating adoption of the Bill of Rights in 1789, one congressman, in referring to the proposed Eighth Amendment, noted, "I have no objection to it, but as it seems to have no meaning in it, I do not think it necessary. What is meant by the term 'excessive bail'?" Unfortunately, this question went unanswered. The record

shows that there was no other discussion in the House regarding this amendment before it was passed and sent to the states for ratification.

Almost two centuries would pass after ratification of the Eighth Amendment before the U.S. Supreme Court addressed the meaning of excessive bail; and even then, it was in dicta. In 1951, the Court heard an excessive bail challenge from 12 co-defendants charged with conspiracy, each of whom was given a \$50,000 bail. The Court ruled that bail decisions must be individualized to each defendant. In dicta to this ruling, the Court wrote:

Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as an additional assurance of the presence of the accused. *Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment.*²

With this definition, the Court confirmed a long-standing position in this country—that the Eighth Amendment does not require that bail be set at an amount that the defendant can post.

Criticisms of the Bail System

Regardless of the legal interpretation of the excessive bail clause, the bail system in the United States has long been subject to criticism, particularly for its impact on the indigent. In 1835, Alexis de Tocqueville wrote in his seminal work, *Democracy in America*:

The civil and criminal procedure of the Americans has only two means of action—committal or bail. The first act of the magistrate is to exact security from the defendant, or in the case of refusal, to incarcerate him. . . . It is evident that such a legislation is hostile to the poor, and favorable only to the rich. The poor man has not always a security to produce, and if he is obliged to wait for justice in prison, he is speedily reduced to stress.³

In 1927, Arthur Beeley studied bail setting in cases coming through Chicago's

municipal and criminal courts. His conclusion: "In too many instances, the present system neither guarantees security to society nor safeguards the right of the accused. It is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe."⁴

Criticisms of the bail system and its impact on the poor reached a peak during the 1960s. In a 1964 book, Ronald Goldfarb wrote:

The bail system is to a great degree a socially countenanced ransom of people and of justice for no good reason. It is an unworkable and unreasonable abortive outgrowth of historical Anglo-American legal devices which worked once in a far different time and place and in a far different way.⁵

Professor Foote traced the development of bail laws in England and the United States in a 1965 law review article. He described how they were enacted at the same time as the "poor" laws which, among other things, allowed for the imprisonment of debtors. According to Foote, in the year 1830, it was estimated that there were three times as many persons in jail as debtors as were locked up on criminal charges.

It is not surprising that a society unconcerned about the callous cruelty of the poor laws or the imprisonment of civil debtors also did not become excited about economic discrimination against alleged criminals. What is surprising is that it is taking so long for the changed attitude towards the poor in other contexts to percolate down to the bail system.⁶

The Bail Reform Movement

When Foote wrote these words, he had reason for hope, as major changes in the bail system were well underway. In 1961, the Vera Institute of Justice had started the Manhattan Bail Project, the first pretrial services program in the country. The program successfully tested the proposition that indigent defendants with strong community ties were just as likely to come back to court if released on their own recognition as they would if released on money bail. What's more, since most indigent defendants could not afford bail, the avail-

ability of an alternative (non-financial) release mechanism could significantly reduce the number of indigent defendants awaiting adjudication of their cases behind bars.

Over the next several years, similar pretrial services programs were established in jurisdictions all over the country. These programs gathered information about arrestees, conducted an assessment of their likelihood of appearing in court based on their ties to the community, and made recommendations to the court.

By 1964, the Bail Reform Movement was officially launched when Attorney General Robert F. Kennedy and Chief Justice Earl Warren convened the National Conference on Bail and Criminal Justice. This conference brought together the administrators of these new pretrial services programs, as well as judges, prosecutors, defenders, and legal scholars, to highlight the viability of the new approach, which had the potential to significantly diminish, if not eliminate, the use of money in pretrial release decision making.

In 1966, the Bail Reform Movement received a major boost with the passage of the Federal Bail Reform Act.⁷ The act contained two landmark provisions. First, as President Lyndon Johnson said when signing the bill into law: "This legislation, for the first time, requires that the decision to release a man prior to trial be based on facts—like community and family ties, and not on his bank account." Second, the law established a range of release options for the judicial officer. As President Johnson noted: "Under this Act, judges would—for the first time—be required to use a flexible set of conditions, matching different types of release to different risks."⁸

Then, in 1968, the American Bar Association (ABA) released the first edition of its *Standards on Pretrial Release*. The standards called for eliminating commercial surety bail, limiting the use of other forms of money bail, and developing non-financial release.

Thus, by the end of the 1960s, it seemed that the framework was in place to transform the bail system from one that, as Foote noted, created an insoluble riddle of the indigent, to one that created viable non-financial pretrial release options to match the range of risks presented by defendants. And in many jurisdictions, significant trans-

formations did take place, resulting in large increases in pretrial release rates. Moreover, another major change was on the way that would make the money bail system even more unworkable.

An Evolving Framework

Beginning in the 1970s, a second purpose of bail—to protect the safety of the community—began to be introduced in state statutes. This purpose was codified in federal law by the Federal Bail Reform Act of 1984.⁹ This additional reason for bail created a further riddle for systems that continued to rely heavily upon money bail: What bail amount protects the safety of the community? As antiquated as was the money bail system for ensuring the appearance of defendants, it was particularly ill-suited for ensuring public safety. On the other hand, the alternate system—the one that focused on providing bail-setting judicial officers with information and options on individual defendants—provided the necessary tools with some minor adjustments.

The framework for an effective pretrial release system that considers both appearance in court and the safety of the community is perhaps best described in the 2002 revision of the ABA's *Standards on Pretrial Release*.¹⁰ Those standards call upon every jurisdiction in the country to establish a pretrial services program.¹¹ The program should conduct an investigation "in all cases in which the defendant is in custody and charged with a criminal offense."¹² The investigation should be conducted prior to the first appearance in court.¹³ And the investigation "should focus on assembling reliable and objective information relevant to determining pretrial release and should be organized according to an explicit, objective, and consistent policy for evaluating risk and identifying appropriate release options."¹⁴

The ABA's standards caution against giving "inordinate weight to the nature of the present charge in evaluating factors for the pretrial release decision."¹⁵ According to the standards, in making the release decision, the court should consider, in addition to the nature and circumstances of the offense, the defendant's:

... character, physical and mental condition, family ties, employment status and history, financial resources,

length of residence in the community, community ties, past conduct, history related to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings.¹⁶

Recognizing that defendants pose a wide range of risks, the ABA's standards call for pretrial release conditions that

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provide a wide range of options to address those risks.¹⁷

Financial conditions, the standards state, should be used only as a last resort.

Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.¹⁸

In addition, "[f]inancial conditions should not be employed to respond to concerns for public safety."¹⁹ The standards also state that financial conditions "should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge," but rather be an "individualized decision taking into account the special circumstances of each defendant."²⁰

The National District Attorneys Association (NDAA) also has addressed the pretrial release decision-making process in its *National Prosecution Standards*. As with the ABA, the NDAA calls for limited use of financial bail. "There should be a presumption that the defendant is entitled to be released on order to appear or on personal recognizance. This release should require

no bail but will be on condition of supervision as deemed necessary by the court."²¹

Many jurisdictions have implemented pretrial services along the lines suggested by the ABA and the NDAA. These programs interview defendants; assess their risks of failure to appear and danger to the community; and offer a wide range of options that include electronic monitoring,

house arrest, curfew, drug and alcohol testing, mental health treatment, and regular reporting requirements. With such a range of options, the judicial officer can select the most appropriate condition or combination of conditions of release that will serve to minimize the risks to community safety and failure to appear in court.

In addition, over the past 40 years, most states have re-written their bail laws to establish a presumption for release on the least restrictive conditions necessary to reasonably ensure court appearance and public safety.

Letting Go of the Money Bail System

Notwithstanding these advancements, any assessment of how we are doing in solving the riddle of the indigent in the bail system is not encouraging. Two findings stand out.

First, the majority of criminal defendants have to post a money bail if they are to be released during the pretrial period; money bail is set in two-thirds of felony cases nationwide.²² This means that the only way these defendants can be released is by purchasing their freedom.

Second, the majority of criminal defendants are indigent. Data show that 87 percent of defendants charged with felonies are sufficiently indigent as to receive either

a court-appointed attorney or a public defender.²³

It is not surprising, then, that our jails are full of poor people awaiting adjudication of their cases. According to the most recent data, 56 percent of inmates being held in local jails have not been convicted of any crime, but are awaiting adjudication of their cases.²⁴ Most of these inmates are being held on bails that they cannot afford—and these bails are not necessarily high.

In half the felony cases where money bail is set, defendants are not able to post their bail and remain detained throughout the pretrial period.²⁵ Looking at the bail amounts, 11 percent of those with nominal bails of \$500 or less are held in lieu of bail while awaiting adjudication of their charges, as are 18 percent of those with bail amounts of \$501 to \$1,000, and 29 percent of those with bail amounts of \$1,001 to \$5,000.²⁶ Since a defendant need only put up a percentage of the face value of the bond—typically 10 percent to the court or to a bail bondsman—it is the want of a few hundred dollars that keeps these defendants detained.

It is also clear that many high-risk defendants are buying their way out of jail. For example, 30 percent of defendants who have bail set in the range of \$40,000 to \$50,000 post that bail and are released, as are 11 percent of those with bail amounts over \$50,000.²⁷

Conclusion

Professor Foote's observation that the riddle of the indigent in the bail system is insoluble is correct insofar as there is a continued reliance on money bail. As this article describes, while there is an available framework for solving the riddle, it consists of changing the system to take money out of the equation. This will involve embracing the model laid out in the ABA and NDAA standards.

Many jurisdictions have done so with great success. Others have gone part of the way and realized modest gains in improving the release rates of the indigent, but they still find their jails crowded with those who are too poor to buy their way out. Still other jurisdictions are exclusively entrenched in the old money bail system.

The implications for defendants of being held in jail solely due to the inability

to post bail are as significant as they are apparent: (1) indigent defendants lose their liberty, even though they share the same presumption of innocence as those who can post bail; (2) they are at risk of losing their jobs, housing, and connections to their families and communities; and (3) they are less able to assist in their own defense.

Such implications do not resonate well with the public, which has little sympathy for people who get into trouble with the law. While such cherished concepts as equal justice and due process should always be stressed, the public also needs to understand the implications for society of a system that relies on money bail. When a judicial officer sets a money bail, the outcome of whether the defendant is released or held is out of the hands of that judicial officer. It is then left to the defendant, his or her family, or any of the bail bondsmen working in the community to determine if the defendant stays in jail or goes home.

From a public policy perspective, this flies in the face of good government, because the result is that public officials have little control over the use of one of the most expensive and limited resources in any community—a jail bed. Not surprisingly, many jurisdictions are facing jail crowding crises, which often lead to the release of inappropriate inmates, construction of new jail cells at enormous taxpayer expense, or both.

Solving the riddle of the indigent in the bail system will lead toward the solution of other difficult riddles, such as how to protect the safety of the community and ensure high court appearance rates, while also maintaining high pretrial release rates. For jurisdictions willing to grasp it, the solution is there. ■

¹ *Proceedings of the National Conference on Bail and Criminal Justice—May 27-29, 1964*, 226-227 U.S. Department of Justice (1965).

² *Stack v. Boyle*, 342 U.S. 1 (emphasis added).

³ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 55-56 (Washington Square Press 1964).

⁴ ARTHUR BEELEY, *THE BAIL SYSTEM IN CHICAGO* (University of Chicago Press 1927).

⁵ RONALD GOLDFARB, *RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM* 5 (Harper and Row 1964).

⁶ Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 975 (1965).

⁷ 18 U.S.C. § 3146.

⁸ Statement of President Lyndon Johnson, June 22, 1966.

⁹ 18 U.S.C. § 3141, *et seq.*

¹⁰ CRIMINAL JUSTICE STANDARDS ON PRETRIAL RELEASE: THIRD EDITION (2002).

¹¹ *Id.*, Standard 10-1.10.

¹² *Supra* n. 10, Standard 10-4.2.

¹³ *Supra* n. 10, Standard 10-1.10 (a).

¹⁴ *Supra* n. 10, Standard 10-4.2 (g).

¹⁵ *Supra* n. 10, Standard 10-1.7.

¹⁶ *Supra* n. 10, Standard 10-5.1 (b) (ii).

¹⁷ *Supra* n. 10, Standard 10-1.2.

¹⁸ *Supra* n. 10, Standard 10-5.3(a).

¹⁹ *Supra* n. 10, Standard 10-1.4(d).

²⁰ *Supra* n. 10, Standard 10-5.3.

²¹ NATIONAL PROSECUTION STANDARDS: SECOND EDITION Standard 45.5(a) (1) (National District Attorneys Association 1991).

²² THOMAS H. COHEN AND BRIAN A. REAVES, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES*, U.S. Department of Justice, Bureau of Justice Assistance (2006).

²³ *Id.*

²⁴ WILLIAM J. SABOL, TODD D. MINTON AND PAIGE M. HARRISON, *PRISON AND JAIL INMATES AT MIDYEAR 2006*, U.S. Department of Justice, Bureau of Justice Statistics (2007).

²⁵ *Supra* note 12.

²⁶ Extrapolated from *State Court Processing Statistics Project*, 2002 data.

²⁷ *Id.*



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