

The Problem with Bail

A talk with Robin Steinberg

I. The Problem with Cash Bail

- How does the cash bail system work?
 - In most states, defendants awaiting trial, including those facing low-level charges, must pay money to get out of jail before the trial. Those who cannot afford the bail amounts await their trial in jail, which can be months or years in some cases.
 - As a form of conditional release, cash bail was created to incentivize defendants to return to court for trial. Bail, in theory, is supposed to be set at an amount that people can afford.
 - In the 1970s, the rationale for bail shifted to detaining those who pose a risk to public safety as a result of a nationwide increase in crime. Bail amounts rose as a result. The effect today is that even if they are a nonviolent misdemeanor offender, if a defendant is unable to afford bail, they will sit in jail.
 - The reality is that many Americans cannot afford even the supposed modest amounts set for them. The result is a bifurcated criminal justice system: one of the rich and one for the poor.
- High cost to individuals
 - Individuals unable to afford bail sit in jail until their trial. This has disproportionately dire consequences for low-income people. It affects all facets of their lives including their families, their housing status, employment, and immigration status. Even a short-term detention can mean losing custody of children or being fired from a job.
 - The pressure to plead guilty can become insurmountably high. A study has shown that individuals who were jailed pretrial are 30-40% more likely to be convicted.¹ Prosecutors know that individuals are more likely to agree to plea deals in such cases and take advantage.
 - One of the most high-profile and tragic examples of the devastating effects of cash bail is Kalief Browder. Kalief was arrested at age 16, accused of stealing a backpack. He was held at Rikers Correctional for 3 years, 2 of which were in solitary confinement. He was beaten by corrections officers, and his trial was repeatedly delayed by a backlog at the Bronx DA's office. He maintained his innocence and turned down offers to plead guilty. As a result of his

¹ New York City Criminal Justice Agency, Inc. Report Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases, November 2007: http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=669&doc_name=doc

experiences, Kalief developed symptoms of depression and after repeated failed attempts, he died by suicide 2 years after his release.²

- High cost to community
 - Cash bail system proliferates mass incarceration in the US and perpetuates racial and class inequality in the justice system.
 - Nearly two thirds of the incarcerated population in the US is made up of those who have not been convicted of a crime. The US has high incarceration rates in large part because of pretrial detention.
 - According to the Prison Policy Initiative, pretrial detentions cost local government about \$14 billion annually.³
- Who benefits from cash bail
 - When a defendant or family cannot pay cash bail, they may enlist a commercial bail bond agency. Agencies charge a nonrefundable fee, usually around 10% of the total bail amount, to secure the release of a defendant. When the agency posts bail on behalf of a client, they can set any kind of condition on the client, such as check-ins or drug tests, to ensure that the client are compliant of the condition of release and will return to court. Agencies can also tack on additional fees.
 - The commercial bail bond industry today is worth over \$2 billion. Nine major insurers largely underwrite the bail bond industry.
 - The commercial bail bond industry continues to lobby against any cash bail reform, citing flight and danger risks and increased cost considerations of instituting risk-assessment tools in setting bail.

II. The Reform Movement

- Reform efforts across the country
 - In many jurisdictions, there already exist alternatives to cash bail. Bail can be secured with property liens or unsecured with a promise to make payments if conditions of release are not met. However, these statutory alternatives have not often historically been used. Along with other legislative efforts, advocates are calling for a culture shift in the criminal justice system's overreliance on cash bail.

² Michael Schwartz and Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES, Jun. 8, 2015, <https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?module=inline>

³ Bernadette Rabuy, *Pretrial detention costs \$13.6 billion each year*, Prison Policy Initiative, Feb. 7, 2017, <https://www.prisonpolicy.org/reports/money.html - fnref:5>

- Many states have begun to reform cash bail. Several jurisdictions, including Alaska, Kentucky, and New Jersey evaluate the defendant's risk of re-offense or flight. The presumption is that most people will be released without bail. Generally, those charged with nonviolent misdemeanors or class C felonies are released without bail.
- California was the first state to eliminate cash bail entirely. Local courts determine whether a defendant will be kept in custody or released while awaiting trial. The law goes into effect in October 2019.⁴
- Nonprofit bail funds
 - Bronx Freedom Fund⁵ grew out of the Bronx Defenders, a public defender office in the South Bronx. The Bronx Freedom Fund is a revolving community bail fund that pays bail for those in need. When bail is returned at the end of a case, that money is returned back to the fund to be used to pay bail for others.
 - In 2012, a bill passed in New York officially recognizing the legality of nonprofit bail funds and allowing them to post misdemeanor bail up to \$2,000.⁶
 - The Bail Project⁷: The Bronx Freedom Fund served as the model for The Bail Project, a national effort to create funds in jurisdictions across the country through a national revolving bail fund. Today, the Bail Project has locations throughout the country.

⁴ California Money Bail Reform Act:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB10

⁵ The Bronx Freedom Fund website: <http://www.thebronxfreedomfund.org/>

⁶ Assemb. Bill A10640B, 2011–2012 Leg. Sess. (N.Y. 2012); Assemb. Bill A10640, 2009–2010 Leg. Sess. (N.Y. 2010).

⁷ The Bail Project website: <http://www.bailproject.org>