

10-8-2018

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Recommended Citation

Coffman, Jackie, "Why Do Bail Abolition Advocates Oppose the California Money Bail Reform Act?" (2018). *SLU Law Journal Online*. 27.
<https://scholarship.law.slu.edu/lawjournalonline/27>

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Why Do Bail Abolition Advocates Oppose the California Money Bail Reform Act?

By Jackie Coffman*

Cash bail has long been the subject of much debate among scholars and reformers. The idea behind bail is simple in theory: a criminal defendant posts money in order to be released from custody pending trial.¹ This system is theoretically designed to ensure the defendant will appear in court.² However, the reality of cash bail is that it creates a system which inherently perpetuates a crippling cycle of poverty: the affluent are able to post bail and, uninterrupted, continue with their lives pending trial; the poor, unable to afford their pretrial freedom, may remain incarcerated for weeks, months, or even years, risking their jobs, homes, child custody, and more.³

There have been several cases in the last few years that have drawn attention to the devastating harm that accompanies pretrial incarceration, such as that of Kalief Browder, the New York teenager who was unable to make bail after being accused of stealing a backpack and spent three years at Rikers Island awaiting trial.⁴ During this time, he was subject to prison violence and spent nearly two years in solitary confinement.⁵ The charges against him were eventually dropped due to a lack of evidence, but the psychological damage took its toll: Browder committed suicide two years after being released.⁶ Browder's case brought some much-needed attention to the harms that await indigent defendants who are unable to post cash bail.

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¹ Melissa Block, Interview with Judge Truman Morrison, *What Changed After D.C. Ended Cash Bail*, National Public Radio (Sept. 2, 2018, 7:43 AM), <https://www.npr.org/2018/09/02/644085158/what-changed-after-d-c-ended-cash-bail>.

² *Id.*

³ Gerald Goldstein, Book review of *Pretrial Imprisonment: Jails: The Ultimate Ghetto of the Criminal Justice System*, 54 Tex. L. Rev. 1169 (1976).

⁴ Margaret Talbot, *The Case Against Cash Bail*, *The New Yorker* (Aug. 25, 2015), <https://www.newyorker.com/news/news-desk/the-case-against-cash-bail>.

⁵ Jennifer Gonnerman, *Before the Law*, *The New Yorker* (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law>.

⁶ Talbot, *supra* note 4.

On August 28, 2018, California became the first state in the country to eliminate cash bail with the passing of the California Money Bail Reform Act (the “Act”).⁷ Governor Jerry Brown signed the bill into law, calling the legislation “an important step forward in reducing the inequities that have long plagued California’s bail system.”⁸ This day has been a long time coming for Brown, who has been advocating for bail reform for over 40 years.⁹ A California appellate court opened the door for this reform earlier this year when it found the State’s current cash bail system violated due process and was thus unconstitutional.¹⁰ The new law is scheduled to go into effect in October 2019, although a suit challenging the law is expected from the American Bail Coalition (a trade organization which supports the bail bond industry), which may postpone the date the law is effective.¹¹

Under the new law, individuals who are arrested and charged with a crime will not be required to front money in order to be released.¹² The power to determine who is eligible for release and who must remain in custody until trial will now be passed on to local courts, who will make these decisions in part by using algorithms that are determined by each jurisdiction.¹³

If allowing a computer to determine one’s chance of pretrial freedom has you raising your eyebrows, you are not alone. There are several bail abolition advocates that actually oppose the new legislation, including the ACLU, the NAACP, PICO, and noted constitutional law scholar and Berkeley law professor Erwin Chemerinsky, among others.¹⁴ After initially supporting an earlier draft of the legislation, the ACLU has been increasingly vocal in its opposition of the final version of the bill. In a press

⁷ Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight*, National Public Radio (Aug. 28, 2018, 10:49 PM), <https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail>. Washington D.C. also has a cashless bail system. See also *SB-10: Pretrial release or detention: pretrial services*, California Legislative Information (Aug. 28, 2018), https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180SB10.

⁸ Steve Dubb, *California Moves to End Cash Bail, But New System May Create New Problems*, Nonprofit Quarterly (Aug. 23, 2018), <https://nonprofitquarterly.org/2018/08/23/california-moves-to-end-cash-bail-but-new-system-may-create-new-problems/>.

⁹ Romo, *supra* note 7.

¹⁰ *In re Humphrey*, 19 Cal.App.5th 1006, 1044 (Ct. App. Cal. 2018).

¹¹ Romo, *supra* note 7.

¹² *Id.*

¹³ *Id.*

¹⁴ Dubb, *supra* note 8.

release just days before the passing of the bill, the ACLU of Northern California stated:

Unfortunately, this amended version of SB 10 is not the model for pretrial justice and racial equity that the ACLU of California envisioned, worked for, and remains determined to achieve. We oppose the bill because it seeks to replace the current deeply-flawed system with an overly broad presumption of preventative detention. This falls short of critical bail reform goals and compromises our fundamental values of due process and racial justice.¹⁵

As indicated in the release, the ACLU's response is primarily due to "preventive detention" language that was added to a later draft of the bill to appease prosecutors and law enforcement groups.¹⁶ This provision will allow prosecutors to file for pre-trial detention in cases where the prosecution believes there are insufficient means of ensuring public safety or the defendant's appearance at trial.¹⁷

In addition, the ACLU has criticized the bill's reliance on risk assessment tools, which are algorithms designed to assist judges in measuring a defendant's risk of flight or re-offending.¹⁸ These types of risk assessment tools are utilized not just as a pretrial device, but have been consulted during many stages of criminal proceedings, including sentencing.¹⁹ In 2016, ProPublica analyzed the workings of these tools in a Florida county and found the scores were remarkably unreliable: only twenty percent of the individuals who scored as having a re-offense risk actually went on to do so.²⁰ Additionally, the study found significant racial disparities: the algorithm consistently discriminated against blacks, who were falsely flagged as future criminals almost twice as often as white defendants with

¹⁵ Abdi Soltani et al, *ACLU of California Changes Position to Oppose Bail Reform Legislation*, ACLU of Northern California (Aug. 20, 2018), <https://www.aclunc.org/news/aclu-california-changes-position-oppose-bail-reform-legislation>.

¹⁶ Dubb, *supra* note 8.

¹⁷ Alexei Koseff, *Bill to eliminate bail advances despite ACLU defection*, Sacramento Bee (Aug. 20, 2018, 3:07 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article217031860.html>.

¹⁸ *Id.*

¹⁹ Julia Angwin et al: *Machine Bias*, ProPublica (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

²⁰ *Id.*

similar histories for similar crimes.²¹ Considering that one of the justifications to move towards using these tools is to avoid discrimination bias in humans, these results are concerning.

Where do companies get the data used to inform these risk assessment tools? Northpointe, a private for-profit company whose software is one of the most widely used in the country, gathers 137 data points about each individual defendant, either by surveying the defendant or from criminal records.²² While the exact calculations are proprietary and thus courts are unable to see the weight given to each factor, questions include things such as education levels, whether the defendant has a job, whether the defendant has parents who were ever in prison, how many of their friends are currently taking illegal drugs, and how often the defendant got in fights in school.²³ While judges have discretion in how many grains of salt they choose to take along with the scores, there have been documented instances where judges heavily defer to the scores, such as a Florida case where a judge overturned an agreed-to plea deal of probation because the defendant had a high risk score, instead imposing two years of incarceration.²⁴

If risk assessment tools prove to have biases similar to humans, is this really a better system than cash bail? Some would still agree that it is. The Honorable Truman Morrison, a senior judge on the D.C. Superior Court, said in a September interview: “We need to take great care to be refining our use of risk assessments as much as we can. But the alternative is to do it the way we’ve always done it, which is the rely on judicial hunch and money, which, of course, makes no sense.”²⁵ In support of the movement’s success, Judge Morrison detailed that among the ninety-four percent of individuals arrested who were released without cash bail, eighty-eight percent made every court appearance; eighty-six percent were never arrested for additional criminal offenses; and of those who were arrested for additional offenses, only two percent were violent crimes.²⁶

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Julia Angwin et al: *Machine Bias*, ProPublica (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

²⁵ Block, *supra* note 1.

²⁶ *Id.*

Thus, while the impact of the Act on defendants and the criminal justice system as a whole is yet to be determined, there is some evidence that in Washington, D.C., the elimination of cash bail has been somewhat successful. The vigilance of the ACLU and other bail abolition groups in refining the Act's language moving forward will help to further the fight towards treating both the wealthy and the indigent the same in the presumption of innocence during the pretrial stages.

Edited by Carter Gage