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The End of Cash Bail: As Simple as Sending a Text Message?

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Almost every jurisdiction in the United States relies upon cash bail as a condition of pretrial release.¹ The idea behind cash bail almost makes sense. The cash that is handed over to grant a release is used as a guarantee that defendants will return for their trial or hearings.² The money is returned to the persons accused if they make all of their necessary court appearances, otherwise the bail is forfeited to the government.³ If defendants do not have the money to pay the assigned bail, they will be forced to stay in prison until their case is resolved, regardless of their innocence or lack thereof. In most jurisdictions, a standard bail amount is prescribed for any alleged offense, but judges typically have discretion to raise or lower the bail or to decide to waive bail entirely and release defendants on their “own recognizance,” with a promise that the defendants will show up when they’re supposed to.⁴

While the idea sounds logical, it has had disastrous results. Pre-trial detainees, none of whom have been convicted of the crime they are accused, make up more than 70% of the U.S. jail population.⁵ Bail practices are also frequently discriminatory; for example, Black and Latino men are assessed higher bail amounts than white men for similar crimes by 35 and 19 percent on average, respectively.⁶ While the national average for felony bail amounts was around \$10,000, bail amounts of even \$250 can have devastating effects.⁷ For instance, over a five-year period in Monroe County, New York, more than 1,900 people spent one week or more behind

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¹ COLIN DOYLE, CHIRAAG BAINS & BROOK HOPKINS, CRIMINAL JUSTICE POLICY PROGRAM, BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS 1 (2019).

² Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUSTICE (June 2, 2020), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ BERNADETTE RABUY, DANIEL KOPF, PRISON POL’Y INST., DETAINING THE POOR 2 (2016).

bars on a bail of \$250 or less.⁸ Currently, the median bail bond amount in this country represents eight months of income for the typical detained defendant,⁹ with the average Black man, Black woman, and Hispanic woman who has been detained for failure to pay a bail bond already living below the poverty line before incarceration.¹⁰ With the recent focus on criminal justice reform, dozens of jurisdictions have attempted multiple methods to change the system by sending more defendants home to await trial.¹¹

Can an alternative to cash bail really be as simple as sending a call or a text? At the very least, it is a start. Multnomah County, Oregon ran a pilot program that placed automatic calls to pretrial defendants to alert them of upcoming court dates. The program increased appearance rates by 31% and saved the county over a million dollars in eight months.¹² Similarly, a study of New York City found that text message reminders increased appearance rates by 26%.¹³ If something as simple as a text reminder can increase appearance rates, why do we need to keep people imprisoned under the guise of making sure they appear in court?

Other jurisdictions have had similar successes in finding alternatives to cash bail. In our nation's capital, Washington D.C., there is a strong presumption of unconditional pretrial release.¹⁴ In 1992, the District's city council passed the D.C. Bail Reform Act.¹⁵ The Act sets out a presumption of unconditional pretrial release.¹⁶ If a judge determines that more restrictive conditions than personal recognizance is required, a judge must

⁸ NEW YORK CIVIL LIBERTIES UNION, PRESUMED INNOCENT FOR A PRICE: THE IMPACT OF CASH BAIL ACROSS EIGHT NEW YORK COUNTIES 5 (2018).

⁹ RABUY & KOPF, *supra* note 7, at 2.

¹⁰ *Id.*

¹¹ Jon Schuppe, *Fair or dangerous? Days after ending cash bail, New York has second thoughts*, NBC NEWS (Jan. 7, 2020), <https://www.nbcnews.com/news/crime-courts/fair-or-dangerous-days-after-ending-cash-bail-new-york-n1111346>.

¹² DOYLE, *supra* note 1, at 22.

¹³ BRICE COOKE, BINTA ZAHRA DIOP, ALISSA FISHBANE, JONATHAN HAYES, AURELIE OUSS, ANUJ SHAH, UNIVERSITY OF CHICAGO CRIME LAB & IDEAS, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES 4 (2018).

¹⁴ DOYLE, *supra* note 1, at 35.

¹⁵ *Id.*

¹⁶ D.C. CODE. § 23-1321(B) (2014).

impose the least restrictive conditions that will reasonably assure the appearance of the defendant and the safety of the community.¹⁷ Because of the Act, the District releases 94% of defendants pre-trial and between 88% and 90% of the released defendants make their scheduled court dates.¹⁸

While a judicial presumption of release and sending text messages have both been shown to be successful pre-trial alternatives to cash bail, these programs are not successful on their own. They are successful because they operate in conjunction with other pre-trial services. In Santa Clara County, California, where, in 2016, pretrial detainees comprised as much as 74% of the county's jail population,¹⁹ the county created an Office of Pretrial Services as an independent county department.²⁰ The Office of Pretrial Services has three components: a jail unit, a court unit, and a supervision unit.²¹ The jail unit conducts pretrial risk assessments upon booking, so that low-risk people can be released quickly after review by a judge.²² The court unit officers then interview defendants, conduct risk assessments and make release recommendations.²³ Lastly, the supervision unit monitors people on conditional release and coordinates any applicable services, such as giving defendants released on their own recognizance court date reminders by phone or mail.²⁴ This office, in combination with new risk assessment tools, saved the county over \$30 million in jail costs in 2011.²⁵ Between 2013 and

¹⁷ D.C. CODE. § 23-1321(C)(1)(B) (2014).

¹⁸ PRETRIAL SERVS. AGENCY FOR D.C., RELEASE RATES FOR PRETRIAL DEFENDANTS WITHIN WASHINGTON, D.C. (2017),

<https://www.psa.gov/sites/default/files/2017%20Release%20Rates>

<https://www.psa.gov/sites/default/files/2017%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf>; COURT SERVICES AND OFFENDER

SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA, FY 2016 AGENCY FINANCIAL REPORT, 27 (Nov. 15, 2016),

<https://www.psa.gov/sites/default/files/FY2016%20CSOSA%20AFR%20FINAL%2011-15-2016.pdf>.

¹⁹ News Release, County of Santa Clara, Santa Clara County Joins Data-Driven Justice Initiative to Enhance Local Efforts to Address Pretrial Detention Rates of the Mentally Ill and Chronically Homeless (July 5, 2016), *available at* <https://www.sccgov.org/sites/opa/nr/Pages/Santa-Clara-County-Joins-Data-Driven-Justice-Initiative-to-Enhance-Local-Efforts-to-Address-Pretrial-Detention-Rates-.aspx>.

²⁰ DOYLE, *supra* note 1, at 61.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 63.

2016, defendants in the county who were released on their own recognizance or under monitoring appeared in court 95% of the time and avoided re-arrest 99% of the time.²⁶ Similarly, in Kentucky, where release on recognizance is prescribed by statute to be the default pretrial disposition,²⁷ a successful statewide pre-trial services agency interviews defendants, conducts risk assessments, makes release recommendations, monitors people on pretrial release, and notifies every released defendant of upcoming court dates through automated text messages.²⁸ Kentucky releases around 70% of pretrial defendants, and less than 10% of those released miss court dates or are re-arrested on release.²⁹ Thus, alternatives to cash bail can be successful when applied in conjunction with other pre-trial services.

In the land of the free, where one is presumed innocent until proven guilty, is it ethically right that tens of thousands of legally innocent people sit in jail solely because they cannot afford to leave? If ethics does not sway you, perhaps the economic benefits of ending cash bail will. Either way, the end of cash bail might begin with something as simple as a text message.

Edited by Ben Davisson

²⁶ CINDY CHAVEZ ET AL., CNTY. OF SANTA CLARA BAIL AND RELEASE WORK GRP., FINAL CONSENSUS REPORT ON OPTIMAL PRETRIAL JUSTICE 44 (2016).

²⁷ KY. REV. STAT. ANN. § 431.520 (West 2014).

²⁸ See KY. R. CRIM. P. 4.06.

²⁹ Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV 303, 348 (2018).