Pretrial Roadmap: 2022

Navigating the Pretrial Debate & Bail Reform

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Policy Solutions and the Path Forward

Pretrial Roadmap 2022

The pretrial space is an area of criminal justice that has long been debated. The stakes could be no higher when balancing the rights of victims and the safety of communities along with the presumption of innocence for those accused of crimes. However, widely misunderstood is that the notion of pretrial release and the presumption of innocence has no correlation. The function of bail and personal surety exists to allow defendants a pathway to pretrial release while guaranteeing their appearance in court to answer to charges filed against them.

As an expert in pretrial justice and bail reform, over the last six months of traveling this great country I have been asked two key questions. One, how did we get here with this bail reform mess? Two, more importantly, what do we do about it? This document and the attached simple model policies can be used to respond to what is a now a crisis in our system – in part due to the unraveling of judicial discretion by legislative edict and the premise that we can simply ignore individual consideration in pretrial release decision making and move to a mandate for select charges. Sheriffs, judges, legislators, and public officials are all going to have to work together this time around to stop this massive crime-wave now emboldening repeat criminals.

About the Author

Jeffrey Clayton joined the American Bail Coalition as Policy Director in May 2015 before taking the role of Executive Director in 2016. Jeff is a licensed attorney who has worked in various capacities as a public policy and government relations professional. Mr. Clayton spent six years in Government service, representing the Colorado State Courts and Probation Department, the Colorado Department of Labor and Employment, and the United States Secretary of Transportation. Mr. Clayton has presented on the issue of bail in a number of spaces, including TV, print, radio and as a peer-reviewed published author.

How Did We Get Here?

For the past decade plus policymakers and even some judges decided that the crime charged should determine whether judges are allowed to even set bail (thus requiring someone to post bail or stay in jail) or to get out on a simple promise to appear, called a release on own recognizance. In other words, a simple shoplifting is only a minor charge, so no bail should be imposed when someone is charged with that. Unfortunately, this is despite uncontroverted national evidence for a generation that other factors, mostly prior criminal history and prior failing to appear, are the only true way to calculate risk. Unfortunately, when defendants commit the same crime numerous times a day, these policies have the same result—zero bail.

The other alternative we have seen has been very low bails—for example, the $1 and $2 bails given to prior felons in possession of firearms in Denver, Colorado. The problem is that there are a small class of career criminals that commit every charge in the book and are at high risk to reoffend and high risk to fail to appear in court on *every charge* they commit whether it is a traffic offense or manslaughter. Unfortunately, the reforms, in the name of making the system fairer, have instead had the concomitant and unintended consequence of making it easier for repeat and violent criminals to escape jail, avoid prosecution, and avoid punishment. As one study in New York found, of those who do not post bail and stay in jail, the average defendant who remains in jail has six prior felony arrests and four prior failures to appear.

We are also seeing an unfortunate expansion of policies that require only the posting of cash, depriving defendants of their right to a personal surety and the posting of a surety bond and/or property bond. These policies may run afoul of constitutional provisions[1], and on the merits surety bonds posted by licensed compensated bail agents outperform the posting of 100% cash bonds[2] because commercial bail bond agents have interstate arrest powers and third party involvement (often family and friends), which ultimately prove to be the "long arms of the law."[3] Depriving the right to a personal surety both trammels defendants liberties and is actually less effective than if the defendant had the choice of a licensed bail bonding agent to post a surety bond.

[1] https://caselaw.findlaw.com/wa-supreme-court/1674501.html
[2] https://ambailcoalition.org/download/20/bureau-of-justice-statistics/805/bureau-of-justice-statistics-1990-2004.pdf
[3] https://www.youtube.com/watch?v=QbfGxvphI5A&t=77s

Further, the unwarranted expansion of the doctrine of the presumption of innocence has also caused problems. When a defendant has substantial prior convicted criminal conduct and a long record of failing to appear, the presumption of innocence simply cannot and should not excuse that. And that is *exactly* what judges are required to look at when setting bail. The Supreme Court has said as much any number of times and also said that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."[4] Yet, in this area, the presumption of innocence unfortunately served to cloak repeat and violent criminals as mere indigents mixed up in the system.

We have also seen a rash of crimes committed by those bailed out by unregulated charitable bail funds, some of whom champion the notion of not even looking at what defendants are charged with and bailing them out[5]. Numerous people, too many to count, have faced serious bodily injury and even death by defendants bailed out by bail funds in cases where bail agents and other third parties refused to bail such defendants out, due absolutely to their dangerousness. Charitable bail funds play a role in the system in theory, but they must be regulated and they should be limited to low risk and other misdemeanor cases. Seven states (ID[6], IN[7], MN[8], NY, PA[9], TX, and VA[10]) have introduced legislation to regulate charitable bail funds, and two states (NY[11] and TX[12]) have passed such legislation.


October 25, 2021 | @ 3:14 pm | The Hammer and Nigel Show | By: Brandon

BAIL PROJECT INDIANAPOLIS HELPED FREE ANOTHER MAN NOW ACCUSED OF MURDER

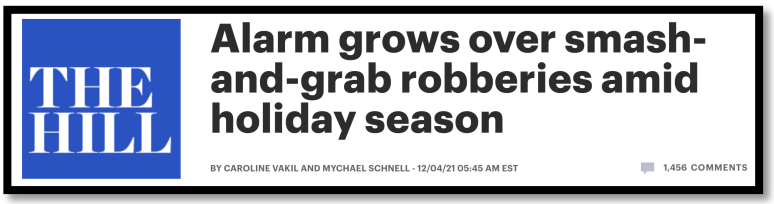
Finally, there has been a lack of information provided to judges to set bail and a lack of data to the system to understand the impact of bail on public safety. For example, lack of available criminal history information led to the death of Texas Trooper Damon Allen[13], who's murderer was unfortunately released by a judge who was unaware of the fact that Allen was already out on bond and had a lengthy criminal history. To compound the problem, when we want to know what is

[4] BELL v. WOLFISH (1979) No. 77-1829: https://caselaw.findlaw.com/us-supreme-court/441/520.html
[5] https://www.youtube.com/watch?v=V2amfLkZd3Q
[6] https://legislature.idaho.gov/sessioninfo/2021/legislation/H0151/
[7] http://iga.in.gov/legislative/2021/bills/house/1376
[8] https://www.revisor.mn.gov/bills/bill.php?b=Senate&f=SF415&ssn=0&y=2021
[9] https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2021&sind=0&body=H&type=B&bn=2046
[10] https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+HB2152&211+sum+HB2152
[11] https://www.dfs.ny.gov/apps_and_licensing/bail_bond_agents/charitable_bail_organization_application
[12] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=872&Bill=SB6
[13] https://www.dps.texas.gov/news/dps-trooper-dies-line-duty-shooting

happening in the system in order to figure out which defendants are being over-taxed by the system and those who are getting off to easily, there is little to no data upon which to base reforms.

As a result, what we are seeing today is a rash of violent defendants, often involving firearms, committing crimes over and over again and getting out on personal recognizance bonds and not having to post bail. If you give Harris County, Texas District Attorney Kim Ogg's analysis a read[14], you'll understand exactly what I am talking about. "Bail reform," she says, is part of the "crime crisis" gripping the community. The number of people we are letting out to offend over and over and over again is astounding—for example, a 400% increase in the number of persons who are out with 4 and 8 *pending* felony criminal charges. It's no wonder the amount of crimes while on bail have tripled in five years. Judges in the past would have raised the bails each time until ultimately no one would put up for the defendant—no friends, no family, no bail agents, and the defendant would remain in jail.

States and localities have tried these no bail, zero bail, end cash bail policies. They haven't worked. From California to New York, Houston to Chicago, Salt Lake to Concord, Anchorage to Atlanta, these policies have failed putting the public and victims at risk. The Los Angeles Mayor announced a crackdown on organized retail theft, arresting 14 suspects—all who were immediately released[15]. These policies in short have increased failing to appear in court, thus delaying justice for victims, and increased pretrial crime[16].


THE HILL

Alarm grows over smash-and-grab robberies amid holiday season

BY CAROLINE VAKIL AND MYCHAEL SCHNELL - 12/04/21 05:45 AM EST

1,456 COMMENTS

At the end of the day, the Supreme Court said that bail shall be set at a figure reasonably calculated to guarantee the defendant's appearance in court and to protect public safety and no higher. And that is what we need to get back to and make sure judges are doing. Unfortunately, setting a $1 bail on an illegal gun charge on a convicted felon who is not supposed to have a gun simply cannot do that. But judges in places like Denver for whatever reason think it *is reasonably calculated* to do so in roughly 40% of those cases. But in our quest to protect people who


NEWS

City Court judge sets $1 bail for Albany murder suspect

Suspect remains in custody; prosecutors believe judge erred and are researching an appeal

Brendan J. Lyons

May 27, 2021 | Updated: May 27, 2021 6:24 p.m.

[14] https://ambailcoalition.org/download/52/texas/6014/hcdao-bail-crime-public-safety-report-09-02-21_0.pdf
[15] https://ktla.com/news/local-news/14-arrested-after-series-of-smash-and-grab-robberies-lapd/
[16] https://ambailcoalition.org/download/171/briefing-documents/6087/abc-bail-reform-updates-11-4-21.pdf

cannot afford their bail, who we for a decade heard were there "solely because they cannot afford it," what we really know is that judges set appropriate bail because they already had on average ten strikes against them and if no one on the outside can trust them after all of that, then they simply cannot be trusted[17].

Unless some fundamental shift to combat recidivism in the bail system occurs, we can expect the system of non-accountability and continued criminal behavior to continue. We agree—resources should not be focused on low-risk cases. But, that is not what we are talking about any more. We are talking about a brashness and total disrespect for human life by these offenders that is something we have not seen in a long time. To say that such policies dehumanize the victims of these crimes is much more than a mere understatement. Unless legislators and the public send the signal to repeat criminals that such behavior will not be tolerated, we can expect a whole lot more of it. It is time to act.

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[17] https://www.youtube.com/watch?v=QbfGxvphI5A&t=5s

I. Legislation to Restrict Eligibility for Personal Recognizance

First, it is important to point out that bi-partisan legislation passed in both Delaware and Texas that severely restricted the availability of personal recognizance bonds in certain dangerous felony crimes or factual circumstances. Data clearly supports the notion that prior failures to appear in court and prior criminal record are the overwhelming top two factors in predicting pretrial failures, i.e., failure to show in court or commit a new crime. In addition, another key predictor is whether someone is already on probation, parole or released on a pending charge. We have simplified these concepts into a model policy that is simple to implement. Additionally, policymakers can continue to look to specific offenses or other circumstances where data may show the need to strengthen these policies in their jurisdictions.

In particular, the model policy would require that defendants are not eligible for a personal recognizance bond and must post security for their release in an amount reasonably calculated to guarantee their appearance in court or protect public safety in the following instances where: (a) A person has been convicted of a prior felony or violent charge within the past five years; (b) A person is already on bond on a pending charge; (c) A person is on probation or parole; (d) A person is charged with possession of a firearm when disqualified to do so based on a prior conviction of a felony; (e) A person has failed to appear in court as required once in the previous three years; or, (g) A person has failed to appear in court on a personal recognizance bond.

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1 **Model Policy:** CREATING A STRONG PRESUMPTION AGAINST PRETRIAL RELEASE ON PERSONAL RECOGNIZANCE BONDS FOR VIOLENT AND REPEAT OFFENDERS[18]

Policy Summary:

This legislation creates a strong presumption that may be overcome that defendants who are violent and repeat offenders, as defined by the categories, are not eligible for a personal recognizance bond, which is defined as a promise to appear in court without the requirement of security, meaning a cash,

[18] https://ambailcoalition.org/download/176/model-policy/6088/model-policy-reducing-pretrial-crime-and-fugitive-rates.pdf

property, or surety bond. Jurisdictions may add or subtract from the list as specific categories or circumstances may warrant the presumption.

The goal of this legislation is to reduce pretrial crime and reduce failures to appear in court and long-term fugitive rates. Research shows that past criminal history, particularly violent, and repeat failures to appear in court are by far the greatest predictors of pretrial failures. As much as 80-90% of the ability to predict pretrial failures rest in those two indicators among all indicators tested over a generation.[19] Research also shows that defendants released on a commercial bail bond are 28% more likely to show up for court and 45% less likely to be fugitives over the long term.[20] Research also shows that secured bonds via cash and property are also more effective at reducing failures to appear in court and decreasing the chances that the defendant will be a long term fugitive.

Model Policy Language:

Notwithstanding any provision of the law or court rule, the following shall apply when a judge or judicial officer sets bail in all courts in [state] and shall be applicable to all offenses charged: (1) When setting bail and conditions of release in [state], consideration of public safety shall be the paramount consideration; (2) There shall be a presumption against release on one's own recognizance or unsecured bond that may only be overcome by clear and convincing evidence that a person is not a flight risk or danger to the community in the following circumstances: (a) A person has been convicted of a prior felony, sexual offense, or violent charge within the past five years; (b) A person is already on release on a pending charge; (c) A person is on probation or parole; (d) A person is charged with possession of a firearm when disqualified to do so based on a prior conviction of a felony; (e) A person has failed to appear in the immediate matter as required; and, (f) A person has failed to appear in court as required once in the previous three years.

[19] https://ambailcoalition.org/download/20/bureau-of-justice-statistics/805/bureau-of-justice-statistics-1990-2004.pdf
[20] https://www.youtube.com/watch?v=QbfGxvphI5A&t=5s

II. Public Safety Report Required

Second, states need to require that all judges and prosecutors are given a complete history profile of the defendants. Despite all of our fancy computers, cases continue fall through the cracks. We need to follow the lead of Texas and implement the statewide Public Safety Report. Model legislation, based on Texas Senate Bill 6[21], which passed the Second Special Session of 2021 and was signed by Governor Abbott has led the way in pretrial reporting requirements.

2 **Model Policy**: CREATING A PRETRIAL PUBLIC SAFETY REPORT SYSTEM (PSR) AND MANDTORY JUDICIAL TRAINING TO INFORM PRETRIAL DECISION-MAKING[22]

Policy Summary:

This legislation is modeled upon Texas Senate Bill 6, which passed the 2021 Second Special Session.

In particular, the section of this bill was named after Texas Trooper Damon Allen. Trooper Allen was killed by a repeat offender, who was unfortunately released on low bail.[23] This was caused by an unfortunate lack of criminal history information. The judge who released Trooper Allen's killer was unaware that he was already out on bond for assaulting a police officer.[24] Curing the gaps in the criminal history reporting system and providing complete reports is essential. Some states and local jurisdictions already have robust systems, where others are lacking. This legislation will require court administration to create a standardized uniform, state-wide criminal history report to inform judicial decision-making. This legislation could also be implemented as a local legislative or judicial policy or county ordinance mandating the uniform reports.

While there has been much criticism of pretrial risk assessments and use of demographic factors, use of prior criminal history and prior appearance in court are touchstone factors that date to settled law that predates nationhood. Giving the judges the *actual information*, rather than scoring it and providing a summary, better informs the case-by-case balancing act in which judges are required to

[21] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=872&Bill=SB6
[22] https://ambailcoalition.org/download/176/model-policy/6089/model-policy-pretrial-public-safety-report-ppsr.pdf
[23] https://www.cbs19.tv/article/news/crime/judge-explains-low-bond-for-trooper-murder-suspect/501-495020245
[24] https://www.dps.texas.gov/news/dps-trooper-dies-line-duty-shooting

engage when setting bail pursuant to requirements of the Eighth Amendment and the various state constitutional provisions.

Second, this legislation requires robust judicial training on bail and bail setting. Bail is often ignored despite the fact that initial custodial decisions are crucial for all parties involved – the People, the community and victims of the crime, and the accused. Unfortunately, the prevailing view over the last decade is that defendants enjoy a near absolute presumption of innocence and thus they should not have to suffer any pretrial deprivations of liberty. To the contrary, the U.S. Supreme Court said …[25] We do however respect the presumption of innocence, as the Court said, it is "axiomatic," but, as the Supreme Court also said judges are task with setting a bail that meets the purposes of bail, and no higher.[26]

Unfortunately, as one study found, the average defendant who stays in jail for want of bail has typically six prior arrests and four prior failures to appear in court.[27] The presumption of innocence does not excuse prior conduct for purposes of setting bail—in nearly all states judges are already required to consider it.

Recent cases also stand for the position that more expedient hearings that do consider the defendant's ability to pay are required. These expedient hearings reduce the chances that persons will be detained *solely* because they cannot afford bail.

Judges need to understand the recent developments in the case law, have unbiased information presented to them, and have continuing education on bail setting.

Creating a uniform pretrial Public Safety Report (PSR) and training judges on how to set bail on a recurring basis is essential to better public safety decision-making.

Model Policy Language:

Section 1: PUBLIC SAFETY REPORT SYSTEM.

[25] https://www.law.cornell.edu/supremecourt/text/156/432
[26] https://supreme.justia.com/cases/federal/us/342/1/
[27] https://www.youtube.com/watch?v=QbfGxvphI5A&t=5s

(a) The Office of Court Administration of the Texas Judicial System shall develop and maintain a public safety report system that is available for use for purposes of Section 2.

(b) The public safety report system must:

(1) provide the defendant's name and date of birth or, if impracticable, other identifying information, the cause number of the case, if available, and the offense for which the defendant was arrested;

(2) provide information on the eligibility of the defendant for a personal recognizance bond;

(3) provide information regarding the applicability of any required or discretionary bond conditions;

(4) provide, in summary form, the criminal history of the defendant, including information regarding any:

(A) previous misdemeanor or felony convictions;

(B) pending charges;

(C) previous sentences imposing a term of confinement;

(D) previous convictions or pending charges for:

(i) offenses that are offenses involving violence as defined [section]; or

(ii) offenses involving violence directed against a peace officer; and

(E) previous failures of the defendant to appear in court following release on bail; and

(5) be designed to collect and maintain information designed to report to the legislature and the public on the bail system.

(c) The office shall provide access to the public safety report system to the appropriate officials in each county and each municipality at no cost. This subsection may not be construed to require the office to provide an official or magistrate with any equipment or support related to accessing or using the public safety report system.

(d) The public safety report system may not:

(1) be the only item relied on by a judge or magistrate in making a bail decision;

(2) include a score, rating, or assessment of the defendant's risk or make any recommendation regarding the appropriate bail for the defendant; or

(3) include any information other than the information listed in Subsection (b).

Section 2. JUDICIAL OFFICER TO CONSIDER PUBLIC SAFETY REPORT.

(a) A judicial officer at first appearance considering the release on bail of a defendant charged with an offense punishable as a [category] misdemeanor or felony offense shall consider the

public safety report system developed under to prepare a public safety report with respect to the defendant.

(b) The public safety report prepared under Subdivision (1) be provided to the judicial officer setting bail and conditions of release as soon as practicable but not later than 48 hours after the defendant's arrest.

(c) A judicial officer may not, without the consent of the sheriff, order a sheriff or sheriff's department personnel to prepare a public safety report under this article.

(d) Notwithstanding Subsection (a), a judicial may personally prepare a public safety report, before or while making a bail decision, using the public safety report system developed under Section 1.

(e) Notwithstanding The judicial officer shall consider the public safety report before setting bail and conditions of release.

(f) In the manner described by this article, a judicial may, but is not required to, order, prepare, or consider a public safety report in setting bail for a defendant charged only with a misdemeanor punishable by fine only or a defendant who receives a Citation. If ordered, the report shall be prepared for the time and place for an appearance as indicated in the citation.

Section 3. TRAINING ON DUTIES REGARDING BAIL.

(a) The Office of Court Administration shall develop or approve training courses regarding a judicial officer duties, including duties with respect to setting bail in criminal cases. The courses developed must include: (1) an eight-hour initial training course; and (2) a two-hour continuing education course.

(b) The office shall provide for a method of certifying that a judicial officer has successfully completed a training course required under this article, including an annual continuing education course, and has demonstrated competency of the course content in a manner acceptable to the office.

(c) Any training course developed by the Office of Court Administration shall be made available to all judicial officers remotely and free of charge.

III. Public Safety Data Collection and Accountability

Third, state legislators need to study the problem and mandate appropriate Public Safety Data Collection and Accountability. This should include scrutiny of pretrial service programs in addition to the setting of bail. Many defendants are being supervised by these probation-like programs that spend billions in taxpayer dollars to "protect public safety," but there is little to any evidence that they actually protect public safety. In addition, defendants are paying such programs and vendors for their own supervision, which may divert revenue from restitution and other programs that should have priority over pretrial supervision.

3 **Model Policy**: PRETRIAL PUBLIC SAFETY REPORTING ACT[28]

Policy Summary:

This legislation is modeled upon Texas Senate Bill 6, which passed the 2021 Second Special Session. It is also modeled upon § 16-4-106, Colorado Revised Statutes, which requires annual reporting by pretrial services programs.

Basic data is lacking by policy makers to understand the scope and degree of the problems existing within the current bail system. We see many examples of defendants released on bail who go on to commit new crimes, but seldom do we see any real data that captures in a snapshot or in trend what is going on. The State of Texas moved forward with a reporting system to require robust data and annual report to capture bail setting practices and outcomes in Texas.

Nearly a decade ago, Colorado began requiring annual reports of pretrial services programs to allow policymakers to assess their effectiveness. While billions of dollars around the county are pumped into risk assessment algorithms and staff to run them, unproven and unsuccessful pre-conviction supervision, and the mass expansion of correctional technologies, it is time for public officials to have real data as to whether such programs are worth the investment. Persons supervised pre-conviction cannot be constitutionally ordered into addiction treatment or mental health counseling, and typically, they are going to transition to probation or parole. Recognizing that the surest deterrent of criminal behavior we have is the swiftness of the punishment, what would make more sense would be the spending of scarce resources on things like speedy trail reform. Also, other reforms like

[28] https://ambailcoalition.org/download/176/model-policy/6090/model-policy-public-safety-reporting-act-psra.pdf

meaningful post-conviction drug and alcohol treatment, gang intervention, and even crime prevention programs may be a better use of such scarce resources. If building at a state pre-conviction dragnet over the last generation has worked, it is far from time for such programs to prove their worth. This legislation requires the reporting of such results.

Better informed, perhaps bail reforms that better balance public safety while also protecting the rights of defendants may be achieved. But until we get a full picture if what is happening and a true evaluation of the present system, reforms will fail to solve the true problem that is ailing us.

Model Policy Bill Language:

PRETRIAL PUBLIC SAFETY REPORTING ACT.

BAIL AND PRETRIAL RELEASE INFORMATION.

(a) The clerk of each court setting bail in criminal cases shall report to the Office of the State Court Administrator:

(1) the number of defendants for whom bail was set after arrest, including:
(A) the number for each category of offense;
(B) the number of personal bonds; and
(C) the number of surety or cash bonds;
(2) the number of defendants released on bail who subsequently failed to appear;
(3) the number of defendants released on bail who subsequently violated a condition of release; and
(4) the number of defendants who committed an offense while released on bail or community supervision.

(b) The office shall post the information in a publicly accessible place on the agency's Internet website without disclosing any personal information of any defendant, judge, or magistrate.

(c) Not later than October 1 of each year, within the previous eight quarters of data to reported on October 1, 2022, the office shall submit a report containing the data collected under this section during the preceding state fiscal year to the governor, lieutenant governor, speaker of the house of

representatives, and presiding officers of the standing committees of each house of the legislature with primary jurisdiction over the judiciary.

(d) Commencing October 1, 2022, within the previous eight quarters of data to reported on October 1, 2022, each pretrial services program shall provide an annual report to the Office of the State Court Administrator no later than October 1 of each year. The State Court Administrator shall present an annual combined report to the house and senate judiciary committees of the house of representatives and the senate, or any successor committees, of the legislature. The report to the State Court Administrator must include, but is not limited to, the following information:

(i) The total number of pretrial assessments performed by the program and submitted to the court;
(ii) The total number of closed cases by the program in which the person was released from custody and supervised by the program;
(iii) The total number of closed cases in which the person was released from custody, was supervised by the program, and, while under supervision, appeared for all scheduled court appearances on the case;
(iv) The total number of closed cases in which the person was released from custody, was supervised by the program, and was not charged with a new criminal offense that was alleged to have occurred while under supervision and that carried the possibility of a sentence to jail or imprisonment;
(v) The total number of closed cases in which the person was released from custody and was supervised by the program, and the person's bond was not revoked by the court due to a violation of any other terms and conditions of supervision; and
(vi) Any additional information the judicial department may request.
(vii) For the reports required in this subsection, the pretrial services program shall include information detailing the number of persons released on a commercial surety bond in addition to pretrial supervision, the number of persons released on a cash, private surety, or property bond in addition to pretrial supervision, and the number of persons released on any form of a personal recognizance bond in addition to pretrial supervision.
(viii) for all new crimes committed by defendants supervised by the program, a complete listing of all of the new crime or crimes alleged to have been committed by defendants, without identifying information, while on supervision by the program.

IV. Legislation to Regulate "Bail Disruptors" and Bail Funds

Finally, states need to pass legislation to regulate the self-titled "bail disruptors," the nationwide network of organized crowd-sourced bail funds that have raised[29] hundreds of millions of dollars to bail out defendants[30]. Thus far escaping much scrutiny, these funds are bailing out violent and repeat defendants that would have remained in jail, all without any accountability and oversight. The public deserves better. Model legislation based on the seven acts that have far been introduced, and in particular the two that have become law, New York and Texas, is attached.

4 **Model Policy**: GUARANTEE ACCOUNTABILITY AND TRANSPARENCY OF CHARITABLE BAIL FUNDS BY REQUIRING BASIC REGULATION AND REPORTING[31]

Policy Summary:

Charitable bail organizations were created to attempt to help low-level, indigent defendants in cases where if they had a surety they would probably be released. In the past few years, the funds have nationalized, and are now operating in fashion to destabilize the bail system. They are self-titled "bail disruptors." The disruption caused has been quite significant.[32]

One author argues that charitable bail is by definition not a sufficient surety because such transaction lacks incentives[33]. As such, she argues, all charitable bail should be disallowed.

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[29] https://www.insider.com/community-bail-funds-raised-75-million-since-floyd-protests-began-2020-6

[30] https://projects.propublica.org/nonprofits/display_990/814985512/05_2021_prefixes_81-82%2F814985512_202006_990_2021052018151890

[31] https://ambailcoalition.org/download/176/model-policy/6091/model-policy-charitable-bail-fund-regulation-and-reporting.pdf

[32] https://www.fox9.com/news/minnesota-nonprofit-with-35m-bails-out-those-accused-of-violent-crimes, https://www.youtube.com/watch?v=V2amfLkZd3Q&t=1s, https://www.bostonglobe.com/2020/08/11/metro/supporters-turning-against-massachusetts-bail-fund-bailing-out-registered-sex-offender-who-allegedly-raped-again/, https://www.wave3.com/2020/10/29/crime-victims-question-local-group-that-bails-out-violent-suspects/, https://www.wrtv.com/news/local-news/crime/indianapolis-gave-100k-grant-to-non-profit-that-bailed-out-man-accused-of-killing-girlfriend

[33] https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2912&context=hlr

Instead, we think the better approach is to follow the lead of New York and legislation put forward in Indiana and Texas last year. The below model act is a blending of all three acts. In summary they create a basic framework of regulation, allow posting of bonds only in misdemeanor cases, do not allow bonds to be posted over $2000, and require the defendant to be indigent. The Texas reporting provisions are included, with the exception that the reports are quarterly instead of monthly.

Legitimizing charitable bail is also important to protect donors to such funds. Many donated under the idea that they were bailing out peaceful protestors, when in reality many violent defendants that were not protesting are being bailed out using such proceeds.

Protecting public safety requires accountability and oversight of the entire process of arrest and release from custody. When mistakes are made, harm is done, whether it be to the defendant, the victim, or the community. This model act is but one approach. In the footnotes, we provide links to the acts introduced in the seven states.

Model Policy Bill Language:

Section 1: CHARITABLE BAIL ORGANIZATION REGULATION ACT.

(1) A charitable bail organization, when operating in compliance with this section, may post bonds for criminal defendants as authorized under this section. A charitable bail organization that fails to comply with this section may not post bonds in this State until in compliance with this section.

(2) Definition: A “charitable bail organization” is an organization that:
(A) is certified by the commissioner;
(B) posts bail for more than two (2) individuals in a one hundred eighty (180) day period;
(C) solicits or accepts donations from the public;
(D) agrees to deposit money for bail for another person.

(3) For purposes of this, the commissioner of the department of insurance may certify a person as a charitable bail organization if the person:
(A) is a nonprofit charitable organization under Section 501(c)(3) of the Internal Revenue Code;
(B) is currently registered to do business in this State;
(C) is located in this State; and

(D) exists for the purpose of depositing cash bail of two thousand dollars ($2,000) or less for an indigent person charged with a misdemeanor.

(4) A person may apply for certification under this section in accordance with rules adopted under this section.

(5) The commissioner shall certify a person as a charitable bail organization if the:
(A) person pays an application fee of three hundred dollars ($300);
(B) person meets the requirements of this section; and
(C) person, including an officer or director of the person, has not engaged in conduct that: constitutes fraud, dishonesty, deception, malfeasance, misfeasance, or nonfeasance in dealing with money; or
(D) resulted in the suspension or revocation of a previous loss of certification.

(6) A charitable bail certification is valid for two (2) years from the date of issuance and may be renewed upon payment of a renewal fee of three hundred dollars ($300). If a person applies for renewal before the expiration of the existing certification, the existing certification remains valid until the commissioner renews the certification, or until five (5) days after the commissioner denies the application for renewal. A person is entitled to renewal unless the commissioner denies the application for renewal.

(7) The commissioner may suspend, revoke, or refuse to renew a certification if the commissioner finds that the person no longer qualifies as a charitable bail organization under this section, or does not otherwise meet the requirements of this section; person violated a requirement; or the person, including an officer or director of the person, has engaged in conduct that constitutes fraud, dishonesty, or deception; or malfeasance, misfeasance, or nonfeasance in dealing with money.

(8) A charitable bail organization must comply with all of the following:

(A) If the charitable bail organization pays, or intends to pay, bail for more than two (2) individuals in any one hundred eighty (180) day period, the charitable bail organization must be certified by the commissioner under this section before depositing money for bail for another person.

(B) If the charitable bail organization is not certified under this section, the charitable bail organization may pay bail for not more than two (2) individuals in any one hundred eighty (180) day period.

(C) A charitable bail organization may only deposit cash bail of two thousand dollars($2,000) or less for an indigent person charged with a misdemeanor. A charitable bail organization may not pay bail for a defendant charged with a felony, even if the defendant is also charged with a misdemeanor.

(D) A charitable bail organization may not execute a surety bond for a defendant.

(E) A charitable bail organization shall, before paying bail for an individual, execute the agreement described in allowing the court to retain all or a part of the bail to pay publicly paid costs of representation and fines, costs, fees, and restitution that the court may order the defendant to pay if the defendant is convicted.

(F) A charitable bail organization may not charge a premium or receive any consideration for acting as a charitable bail organization.

(9) The commissioner shall adopt rules implement this section.

Section 2. CHARITABLE BAIL ORGANIZATION—PUBLIC SAFETY REPORTING.

Not later than the 10th day of each quarter, a charitable bail organization shall submit an affidavit, to the commissioner of insurance in a form designated by the commissioner, a report that includes the following information for each defendant for whom the organization paid or posted a bail bond in the preceding calendar quarter:

(1) the name of the defendant;
(2) the cause number of the case;
(3) the county in which the applicable charge is pending, if different from the county in which the bond was paid;
(4) any dates on which the defendant has later failed to appear in court as required for the charge for which the bond was paid;

(5) whether or not a forfeiture was declared or paid for each failure to appear, and the outcome of each failure to appear; and,
(6) any new arrests or criminal charges, and the specific charges and nature of the charges, later filed against the defendant during the period the defendant was released on a bond paid by the charitable bail organization;

Conclusion

Research clearly shows that prior failures and criminal history are the best guide to future outcomes. Moving the system to disfavor repeat offenders and favor non-repeat offenders is the pathway forward. Prohibiting repeat offenders and those with a history of criminal activity from being released on a simple promise to appear will, at a minimum, increase the odds that the person will not offend again, will return to court as required and not be a fugitive at large for extended periods of time.

While it is tempting to give the judges the power to keep defendants in jail by imposing large cash-only bonds, that practice is constitutionally defective and cuts off the right to a personal surety. Refocusing judges and the system on the problem of repeat defendants, regardless of what they are accused of today, is the touchstone of future reforms. For a decade we have lessened the burden on those in poverty, some of whom were in jail due to routine bail practices that harmed them due to their poverty. But the time for those reforms has passed, and the time to refocus scarce criminal justice resources on those who should either be in jail for want of bail or should be required to secure their release based on persons in the community and licensed bail bonding agents has begun.

Release on a surety bond has been the most effective form of release for more than a generation according to the U.S. Department of Justice, and it also properly balances the rights of the defendant, the People and victim. Having accountable family members and friends and bail agents with interstate and national arrest powers to return them, and a financial incentive to do so, is exactly what is needed in the system. The personal surety system has and will stand the test of time. It is now time to recalibrate it more firmly against those who have found the ability to exploit the existing gaps in the system and harm communities. It is time for jurisdictions to refocus the efforts of the system, from wasteful and ineffective pre-conviction supervision to free passes in the name of poverty, on those who are repeat offenders who do what they do regardless of the section in the criminal code or potential sentence.

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