THE DEMISE OF MONEY BAIL

BY ALEXANDER BUNIN

ALEXANDER BUNIN is the Chief Public Defender for the Harris County Public Defender's Office in Houston, Texas. He previously established and managed federal public defender offices in Southern Alabama, Northern New York, and Vermont. He may be contacted at alex.bunin@pdo.hctx.net.

Bail is based on a simple premise. A judge may require a defendant to pledge money to assure his or her appearance in court, with the release of the obligation at the conclusion of the case. That procedure has existed in various forms since medieval England. However, longevity and simplicity do not always guarantee the correct approach. It has been said, "there is always a well-known solution to every human problem—neat, plausible, and wrong." (H.L. Mencken, Prejudices: Second Series 158 (Alfred A. Knopf 1920).)

There are both practical and legal reasons why money bail does not work as originally intended and why it cannot be fair for all defendants. Although those problems were known by many within the criminal justice system for decades, only recently, through a series of class action lawsuits, have courts had to confront them.

Inability to pay money bail has incarcerated millions of criminal defendants who were merely alleged to have committed a crime, even those charged with nonviolent misdemeanor offenses. Although the amount of bail may have been relatively low, they lacked the money to pay. The US Constitution prohibits excessive bail, and most states provide a right to bail, but criminal defendants may remain in custody when their money bail is set beyond their ability to pay.

EXCESSIVE BAIL VIOLATES THE EIGHTH AMENDMENT

The Eighth Amendment to the US Constitution prohibits "excessive bail." The last US Supreme Court case to discuss the meaning of that clause was *Stack v. Boyle*, 342 U.S. 1 (1951). Bail that is "set at a figure higher than an amount reasonably calculated" to "assure the presence of the accused" is excessive. (*Id.* at 3.) Perhaps that was an easier calculation for judges in another era, but in jurisdictions that are now processing tens of thousands of human beings annually, defendants' ability to pay often is ignored.

To reduce the difficulty of balancing assets with the incentive to appear and abiding by the law, courts went to simple devices such as bail schedules. These are charts where offenses are ascribed specific bail amounts or ranges. Although laws in those jurisdictions still required ability to pay and other factors to be individualized, it is far easier for magistrates to apply fixed rules that do not differentiate among defendants.

Over time, that is exactly what happened. The schedules caused individuals to be treated the same despite different financial situations. Two persons charged with the same crime were ordered to pay the same money bail regardless of wealth. A poor person, charged with a minor offense and with no criminal history, could be stuck in jail, while a rich recidivist of more serious crimes might purchase his or her freedom.

MONEY IS A POOR PRETRIAL RELEASE TOOL

Recent empirical studies have shown that pretrial detention increases a defendant's chance of conviction and length of sentence. (3 Reforming Criminal Justice: Pretrial Detention and Bail 22 (Erik Luna ed. 2017).) The increase in convictions is primarily an increase in guilty pleas among defendants who otherwise would have had their charges

dropped. Two studies found evidence that pretrial detention increases the likelihood that a person will commit future crime. (*Id.*)

The US Court of Appeals for the Fifth Circuit found that in Harris County, Texas, there was no link shown between financial conditions of release and appearance at trial nor of law-abiding behavior before trial. (ODonnell v. Harris Cnty., Tex., 892 F.3d 147, at 161 (5th Cir. June 1, 2018).) However, there was evidence that money bail actually may increase failure rates for appearance and offending. (*Id.* (citing Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 786–87 (2017)).)

Some jurisdictions have implemented new risk assessments to make release determinations more objective and less intuitive. However, algorithms can both remove and cement biases in the system. Simple terms like "failure to appear" can have various meanings. (*See* Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677 (2018).) The decision to release cannot be rigidly formulaic. Using any single source of information is insufficient and will only magnify the problems that are discussed below.

The jurisdictions adopting risk assessments often combine them with the priority to use nonmonetary forms of release. For instance, the federal Bail Reform Act of 1984 created a list of potential conditions in which release without conditions is to be considered first. (18 U.S.C. §3142.) Surety bonds have lower priority. Bail bonding businesses were even banned in some jurisdictions. (*See, e.g.*, KY. REV. STAT. ANN. § 431.510.)

MONEY BAIL UNDER THE FOURTEENTH AMENDMENT

In a series of class actions lawsuits, the nonprofit legal organization Civil Rights Corps, working with other nonprofit organizations and law firms, sued local governments that imposed strict money bail schedules that failed to account for individual characteristics of the defendants and their ability to pay for their release. (*See* Pierce v. City of Velda City, No. 4:15-CV-570-HEA, 2015 WL 10013006 (E.D. Mo. June 3, 2015); Jones v. City of Clanton, No. 215CV34-MHT, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015); Thompson v. Moss Point, No. 1:15CV182LG-RHW, 2015 WL 10322003 (S.D. Miss. Nov. 6, 2015); Walker v. City of Calhoun, Ga., No. 4:15-CV-0170-HLM, 2017 WL 2794064 (N.D. Ga. June 16, 2017); Edwards v. Cofield, No. 3:17-CV-321-WKW, 2018 WL 1413384 (M.D. Ala. Mar. 21, 2018).) In each, plaintiffs alleged that the procedures violated the due process and equal protection clauses of the Fourteenth Amendment.

In *Pierce*, *Jones*, *Thompson*, and *Walker*, federal district courts approved settlements in which the defendant local governments agreed to change their procedures to replace rigid bail schedules with meaningful hearings in which a defendant's individual characteristics and ability to pay are considered, so that defendants will not be detained on misdemeanor charges solely for their poverty. In *Edwards*, the county changed its policies in such a manner that the district court found a preliminary injunction was not required, but the lawsuit could not be dismissed as moot.

Two lawsuits in major urban jurisdictions remain. One involves the City and County of San Francisco. (Buffin v. City & Cty. of San Francisco, No. 15-CV-04959-YGR, 2018 WL 424362 (N.D. Cal. Jan. 16, 2018).) The other is against Harris County, Texas, which is the City of Houston and its surrounding cities, towns, and unincorporated areas. (ODonnell v. Harris Cnty., Tex., 251 F. Supp. 3d 1052, 1087 (2017).) Harris County is the third largest county in the United States.

Other jurisdictions voluntarily changed their procedures to reduce the use of money bail. Some states followed the lead of the federal government and the Bail Reform Act of 1984 (e.g., Maryland, New Mexico, New Jersey). The federal system prioritizes nonmonetary conditions of release and allows preventative detention only for enumerated serious felonies after an adversary hearing for represented defendants and supported by appealable written findings. Those procedures were upheld by the Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987).

LITIGATION IN HARRIS COUNTY, TEXAS

Harris County, Texas, charges about 50,000 defendants each year with misdemeanors that may be punished by jail of either up to six months or a year. (*ODonnell*, 892 F.3d at 158-59) In *ODonnell*, Harris County defended a bail schedule—created by judges and applied by hearing officers—that resulted in the release of less than 10 percent of misdemeanor defendants on bonds that did not require paying money. Of those who were detained, many quickly disposed of their cases with guilty pleas for short sentences.

The defendants raised issues seeking to defeat the lawsuit without reaching the merits of the claim. First, they argued that by acting as judicial officers they were not liable to enforcement under 42 U.S.C. § 1983. The Fifth Circuit agreed with the district court that when the judges created rules enforcing the bail schedule, they were acting as county policymakers and therefore they subjected the county to liability under § 1983. (*Id.* at 155-56)

Second, the defendants argued that the abstention doctrine barred federal relief affecting a state criminal proceeding because the plaintiffs had an adequate remedy at law (i.e., a writ of habeas corpus). (*See* Younger v. Harris, 401 U.S. 37, 43–44 (1971).) The Fifth Circuit affirmed the district court's finding that the state criminal proceedings did not offer an adequate opportunity to raise constitutional challenges in order to change the pretrial bail proceedings to consider inability to pay. (*ODonnell*, 892 F.3d at 160)

Third, the defendants claimed that the plaintiffs had an adequate remedy pursuant to the Eighth Amendment. However, the Fifth Circuit found that someone jailed for inability to pay money had both due process and equal protection claims, just as the plaintiffs were seeking. (*Id.*)

Moving on to the merits, the Fifth Circuit adopted the district court's findings that the procedures for bail in Harris County violated both the due process and equal protection clauses of the Fourteenth Amendment. (*Id.* at 157-63) With two changes to the district court's remedy, the Fifth Circuit adopted all factual and legal findings in the district court's 116-page published opinion.

DUE PROCESS

Texas provides a constitutional right to bail by sufficient sureties, with limited exceptions. (TEX. CONST. art. 1, § 11.) To honor that state-made liberty interest, the court held, "secured bail will, in most cases, have the same effect as a detention order. . . . [T]he current procedures are inadequate. . . . (*ODonnell*, 892 F.3d at 158–59.) "[T]he current procedure does not sufficiently protect detainees from magistrates imposing bail as an 'instrument of oppression.'" (*Id.* at 159.)

At the time the lawsuit was filed, unrepresented defendants in Harris County appeared before hearing officers (magistrates) after charges were accepted by the district attorney's office. The hearing officers then had the authority to determine probable cause, set bail, and inquire whether a defendant sought appointed counsel. Defendants

were discouraged from speaking at these brief proceedings and there were no written findings except for some notations, typically referring to their criminal history or the safety of the community. The hearing officers received information provided by pretrial services officers and prosecutors before setting bail. Bail was set pursuant to the county's bail schedule in most cases. (*See ODonnell*, 251 F. Supp. 3d at 1094.) The district court found, and the Fifth Circuit affirmed, that these procedures failed to provide due process. (*ODonnell*, 892 F.3d at 158-59.)

Harris County had previously agreed to a federal court order in 1987 that the ability to pay and other individual circumstances will be considered. (*See ODonnell*, 251 F. Supp. 3d at 1087.) Texas law requires no less. (Tex. Code Crim. Proc. Ann. art. 17.15 ("The ability to make bail is to be regarded, and proof may be taken on this point.").) Even the local rules require the same. (*ODonnell*, 251 F. Supp. 3d at 1086.) The statistical analysis accepted by the Fifth Circuit indicated that despite these laws, rules, and the settlement, magistrates and judges were not actually applying them. (*ODonnell*, 892 F.3d at 161 ("[W]e agree that the County procedures violate ODonnell's due process rights.").)

In creating a remedy to address inadequate due process, there were two points where the Fifth Circuit disagreed with the district court. Texas requires by statute that a detained misdemeanor defendant have probable cause determined within 24 hours of arrest. (Tex. Code Crim. Proc. Ann. art. 17.033.) Although, this is typically the same hearing where bail is set (*see* Tex. Code Crim. Proc. Ann. art. 15.17), the Fifth Circuit found that the time limit for setting bail should be 48 hours, which was the constitutionally created deadline for determining probable cause, mandated in *Gerstein v. Pugh*, 420 U.S. 103 (1975).

The second point of divergence was that the Fifth Circuit held the findings of the magistrates setting bail need not be in writing. Otherwise, the Court of Appeals affirmed procedures that require individualized findings, consider the ability to pay, prohibit prescheduled money bail that a misdemeanor defendant cannot afford, require an adversary hearing within 48 hours of arrest, and release all misdemeanor defendants who do not receive these protections and are not subject to other legal holds.

EQUAL PROTECTION

Regarding the equal protection argument, the Fifth Circuit found:

> In sum, the essence of the district court's equal protection analysis can be boiled down to the following: take two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

(*ODonnell*, 892 F.3d at 163.)

The statistics showed that Harris County magistrates imposed the preset bail schedules 88.9 percent of the time in misdemeanors. Most of the remainder were set above the schedule and the judges presiding over those cases changed few decisions. (*ODonnell*, 251 F. Supp. 3d at 1095–96.) Less than 10 percent of misdemeanor defendants were released on bonds that were not secured by money. The district court compared these statistics to the magistrates' testimony that all applicable factors were considered, including the ability to pay, and found their testimony was not credible. The Fifth Circuit accepted these findings. (*ODonnell*, 892 F.3d at 162-63.)

Additionally, the district court had access to 2300 video recordings of hearings before the magistrates. From those, the district court found the magistrates did not consider ability to pay even when indigence was clear from the pretrial report, when a defendant attempted to explain his or her poverty to the court, or when the nature of the offense (e.g., begging) indicated the defendant's lack of wherewithal to pay cash or a surety. The only individual characteristic that was regularly mentioned—typically to justify a money bond—was criminal history. (*ODonnell*, 251 F. Supp. 3d at 1100–01.) The Fifth Circuit stated, "We are satisfied that the court had sufficient evidence to conclude that Harris County's use of secured bail violated equal protection." (*ODonnell*, 892 F.3d at 162–63.)

CONCLUSION

A system of bail that minimally complies with the US Constitution must (1) provide an adversary bail hearing within 48 hours of arrest (2) that considers the defendant's individual circumstances and (3) only requires the posting of money after first considering the defendant's ability to pay. The application of due process by federal courts will differ among state jurisdictions depending on the state's right to bail and procedures for preventative detention. How to fix a bail system that violates due process will depend on the laws of that jurisdiction. Many of the arguments of the plaintiffs that were upheld in class action lawsuits could apply with equal force to low-level felonies like minor drug possession cases.

However, the evaluation of equal protection remains the same, regardless of the local procedures. Although it is never specifically stated as such, equal protection in this instance is a statistical outcome test. The percentage of cases in which defendants are detained for inability to pay money is what will make the difference. It is empirical evidence that few are released on unsecured bonds, combined with the use of a rigid money bail schedule, that will most easily support a systemic challenge to the way a jurisdiction determines release or detention of defendants.

Money bail is a poor guarantee of appearance or community safety. It even may increase the failure of those goals. There are other conditions of release and methods of supervision that statistics show work better. In any case, the use of money bail to discriminate between rich and poor is unconstitutional. Its days as the primary method of release are numbered. ■