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BAIL OR JAIL: A STUDY OF BAIL TRENDS AND OPTIONS IN THE U.S. CRIMINAL JUSTICE SYSTEM

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ABSTRACT

Monetary bail is a fixture in the U.S. criminal justice system that has existed for several centuries. Bail was imported into the U.S. from England in the 1600s. It was so ingrained in the U.S. Colonies that it was incorporated into one of the First Ten Amendments of the Constitution's Amendment Eight-- "**Excessive bail shall not be required, nor excessive fines imposed**, nor cruel and unusual punishments inflicted." The question of what exactly is excessive bail has not been defined by the U.S. Supreme Court, and this issue has not been incorporated into the Fourteen Amendment as has the clear majority of the other Constitutional protections enumerated in the U.S. Constitution. This paper explores this excluded amendment into the Fourteen Amendment and substantiates why this amendment should be incorporated into the Constitution's Fourteenth Amendment to substantially change the costly and unfair system of bail in the U.S.

Keywords: Bail, U.S. Constitution, Fourteen Amendment, Eighth Amendment, Pre-trial Release

INTRODUCTION

Definition of Bail

Bail is the temporary release of an accused person awaiting trial, sometimes on condition that a sum of money be lodged to guarantee their appearance in court. Bail was significantly important to the framers of the U.S. Constitution that they made it a part of the Eighth Amendment. The Eighth Amendment reads, "**Excessive bail shall not be required**, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is interesting to note that "excessive bail" is combined with excessive fines and cruel and unusual punishments. Analysis of the Eighth Amendment tells us that the states demanding the ten amendments to the Constitution felt that excessive bail was as pernicious as excessive fines and cruel and unusual punishment. So why hasn't the U.S. Supreme Court incorporated this section of the Eight Amendment into the Fourteenth Amendment to require the States to comply with fair and equitable bail requirements, or vastly restrict bail altogether to only a few heinous crimes? This paper explores this issue.

Why is Bail Controversial?

Bail is controversial because it is controlled by bail bonds private agencies which are not a part of the criminal justice system. Private bail bonds agencies are no more than surety companies which seek to make a sizeable profit from the crimes committed by citizens who are, for the most part, the least able to pay the percentage of the bail amount to the bail bonds agency in turn for their release. Most bail bonds agencies charge ten percent of the total bail amount for the crime which is non-refundable even if the defendant appears for all of his/her required court appointments. Thus, there is a movement nationwide to restrict or eliminate the bail bonds industry. "The movement is upending a cornerstone of the American criminal-justice system and

threatening to deal the most severe blow to the multibillion-dollar bail-bonds industry since it began in the late 1800s" (Hong & Mahtani, 2017, p. 1).

Research Questions

The following are the research questions to be answered in this research:

1. Does bail favor the wealthy over the poor in the criminal justice systems of the state and federal governments?
2. Are bail bonds agencies unregulated?
3. Are bounty hunters given enforcement powers exceeding that of police officers and federal agents under the U.S. Constitution?
4. Are there viable and successful alternatives to the bail system?
5. Should bail, for the most part, be replaced by a local "Release on Recognizance" system?
6. How does bail in the U.S. compare to systems in Western European criminal justice systems?
7. How do local and state jurisdictions overcome lobbying by the Bail Bonds Industry in order to significantly restrict the influence of the Bail Bonds Industry in the Criminal Justice Systems of the state and federal governments?

These research questions will be addressed in the Conclusions and Recommendations Section of this research.

LITERATURE REVIEW

Introduction

Bail law in the United States remained relatively unchanged from 1789 until 1966. In 1966, the U.S. Congress passed the **Bail Reform Act**, which was designed to allow for the release of defendants with as small a financial burden as possible. Before signing the act, President Lyndon B. Johnson gave a speech that contained stunning examples of how the bail system had hurt people in the past. Here's one particularly disturbing example: A man spent two months in jail before being acquitted. In that period, he lost his job, he lost his car, he lost his family -- it was split up. He did not find another job, following that, for four months. Other anecdotes related similar stories: poor people spending months in jail only to later have the charges dropped; others forced to sit in jail, unable to work, only to be found innocent of all charges. In short, the bail system was biased against the poor and filling jails with people who should be out on bail (Shibani, 2017, p. 1). "Sixty percent of jail inmates are there simply because they are too poor to afford bail." (Flom & Chettiar, 2016, p. 1).

Bail, The Eighth and Fourteenth Amendments

The Eighth Amendment states: **Excessive bail shall not be required**, nor excessive fines imposed, nor cruel and unusual punishments inflicted. This paper focuses on the "bold" section of the Eighth Amendment ratified by Congress in 1791. The "excessive bail clause" of the Eighth Amendment has never been applied to the 50 states by the U.S. Supreme Court through the incorporation doctrine of the Fourteenth Amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws." Consequently, each states' legislatures and courts can devise their own bail system or not have a bail system at all.

A Short History of Bail in England and the U.S.

Short History of Bail in England. Bail in England dates back to medieval times. Sheriffs (shire-reeves) had complete authority to hold or release miscreants, and they could demand monetary bail as a condition of release. This lead to corruption and bribery. The Statute of Westminster (1275) limited the discretion of sheriffs but only regarding bailable and non-bailable offenses; sheriffs retained the power to set bail amounts. In 1677, Parliament passed the *habeas corpus act* which established that magistrates would set terms for bail rather than sheriffs. The English Bill of Rights of 1689 set restrictions against excessive bail, and this inspired the Eighth Amendment to the U.S. Constitution (Bounty Hunter for Hire, n.d.).

Short History of Bail in the U.S.

Among the many adaptations of British law in the U.S., bail was one of the more controversial and subsequently made its way into the U.S. Constitution. "Since at least 1835, judges in the U.S. have required arrested individuals to put down money, also known as a bail or bond, as an incentive to appear in court. Defendants who can pay are released, while those who cannot remain in jail until trial or until they plead guilty. In most instances, the money is refunded after the cases are resolved, if the defendant makes every court appearance" (Hong & Mahtani, 2017, p. 1).

Judiciary Act of 1789. Section 33 of the 1789 Judiciary Act eventually codified bail as an unequivocal right to bail in federal non-capital criminal cases (Kelleher, 2016, p.799).

Bail Reform Act of 1966. The purpose of this act was to ensure that indigent defendants were not discriminated against based on their inability to pay bail. This Act allowed judges to

consider the defendant's background, family ties, and prior criminal record in setting bail. In lieu of monetary bail, a judge could release a worthy defendant "release on recognizance (ROR)" or the defendant's promise to appear in court versus paying a set bail amount (Harr, Hess, Orthmann, & Kingsbury, 2015, p. 411-412).

Bail Reform Act of 1984. This Act reversed the advances that the Bail Reform Act of 1966 established. This Act granted judicial authority to include specific conditions of release for community safety. In addition, it eliminated a presumption in favor of pretrial release through the bail process and allowed a court to deny bail for defendants when the prosecution can demonstrate, during a hearing, clear and convincing evidence that no conditions will reasonably ensure the community safety. This Act allowed federal courts to deny bail based on danger to the community or of risk to not appear at trial (Harr, Hess, Orthmann, & Kingsbury, 2015, p. 412).

It should be noted that these two Acts are U.S. Congressional Acts, and are not enforceable on the states. Nevertheless, states tend to follow federal law, and the status of bail in the U.S. reflects this. Overall, bail is the preferred method of release of defendants prior to trial. For this reason, the author believes that bail is draconian and unfair for poor (indigent) defendants, and an anachronism of the criminal justice system that needs serious reform.

Alternatives to Bail

Is it possible that modern society has come so far, but the anachronistic U.S. criminal justice system is still living in the 19th Century? Regarding bail, this certainly seems to be the case. Bail is certainly not the only method by which a pre-trial detainee can be released. The key here is assessing risk. Financial advisors are extremely capable of doing this in the financial sector for their investing clients. It can certainly be done efficiently in the criminal justice

system also by eliminating bail for most crimes. Below are the many alternatives to monetary bail:

1. Release on Recognizance: This may be the most popular alternative to bail. It requires the court to conduct a background check of the accused in the areas of employment, property ownership in the community, family, or other ties to the community that will make appearances at subsequent hearings likely. No bail is required if the accused shows to be a minimal to no-risk flight prospect swears to appear at all court appearances.
2. Collateral: Officially offering valued property, such as a home or other asset, as collateral to assure appearance at hearings and trial.
3. Posting the full amount of the bail: This is possible only for wealthy accused when bail is set at significantly high amounts, i.e., many thousands.
4. Supervised Release: This most often involves the use of electronic monitoring and GPS technology to keep track of the released accused prior to court appearances.
5. Home Confinement: Can be combined with supervised released as another layer of surety.
6. Trust to Relative: Relatives of the accused can be sworn that they will ensure the appearance of the accused.
7. Foundation: Foundations such as the MacArthur Foundation, Vera Research Foundation, Ford Foundation, etc. could provide a nationwide donated fund foundation for bail that would be distributed equally among the states that could be assessed by experts to determine worthy candidates for bail. This would virtually eliminate or significantly reduce the need for “for-profit” bail bondsmen. This option will be discussed in more detail in the Chapter V, Conclusions and Recommendations.

When Should Bail Become the Best Option?

There are clearly a few conditions when bail should be the norm: (a) The crime is a particularly violent crime and others have been injured and there is reason to believe the arrestee will injure others if released (example--shootings where the suspect has killed or seriously injured others in a random attack, i.e., ??????), (b) repeat offenders who did not appear after release for a previous crime or crimes, (c) bailees who "jumped bail" on a previous arrest, and (d) an arrestee who can be shown, by clear and convincing evidence, will not appear for his or her court appearances. All other arrestees should be considered for one of the alternatives to bail. The above (a) through (d) situations comprised only a few of the total arrestees in any given year. The clear majority of arrestees should be considered for the 1-7 alternatives to bail listed above.

Why Haven't the Courts Used These Options?

The answer is a conundrum, but can generally be explained as follows: It is much "easier" and "safer" for judges to go to a bail schedule and set bail. The judge is thus assured that the arrestee will not be free to commit more crimes, and he or she does not have to wait for or devote resources to a process whereby the arrestee's flight or non-appearance possibility can be assessed. It really comes down to laziness and a laissez-faire attitude that seems to be prevalent in the courts. An analogy is plea bargaining. It is easier and faster to bargain a plea in over 90% of criminal cases than conduct a trial.

Who Are Bail Bondsmen?

Bail bondsmen are the insurance providers for bail in the U.S. Courts. They provide a service to the courts that is invaluable to the continuance of bail. The courts do not have the capacity or resources to offer bail to arrestees that it assigns bail. Some bail amounts exceed a

million dollars. This is where the bail bonds industry steps in to fill this void. The bail bondsman charges the arrestee 10% of the court-ordered bail as his or her fee, but must also submit a surety bond to the court (obligee) for the remaining 90%. Therefore, as a surety agent, the bail bondsman is risking the possible loss of 90% of the bail amount, if the arrestee absconds. However, courts sometimes do not demand the bond from the bail bondsman. If an arrestee does abscond, the bail bondsman or his agent now becomes a "bounty-hunter" who may legally pursue the absconder to return him or her to appear in court.

What Are the Incentives to Become a Bail Bondsman?

Bail bondsmen make an average, middle-class salary. In California, for example, their salaries can range from $50,000 to $150,000 per year, according to BailBonds 101.com (Guerra, 2017). This range is determined, in part, by the experience of the bail bondsman in assessing the risk of the bailee. California bail bondsmen are regulated under Insurance Code § 1800-1823. Bail Bondsmen and their "bounty hunter" agents are given powers equivalent to a California citizen: They are armed under PC 832 certification, but they are not restricted by U.S. Amendment IV Search and Seizure and Amendment V Self-Incrimination provisions because private citizens are not restricted by the federal and state constitutions as police officers are. Bail Bondsmen become bail bondsmen because the occupation is somewhat lucrative, and because the job allows them to have some police powers without the restrictions placed on police officers.

What is the Status of Bail Nationwide?

As of the penning of this article, Kentucky, Arizona, Colorado, Virginia, and Washington, D.C. have instituted "pretrial services" which requires their courts to conduct "risk assessments" in lieu of bail for most offenses. Illinois, Connecticut, Maryland, New York, and

most recently California have legislation to drastically alter the money bail system. California's bill would require all 58 counties to create "pretrial service agencies" to screen the arrested and conduct a formal risk assessment and is supported by U.S. Senator Kamala Harris. "This bill would join several other states (mentioned above) in eliminating bail for many crimes. Senate Bill 10 (SB 10) would jettison county bail schedules in favor of 'pre-trial assessments' to determine whether the defendant poses a safety threat or flight risk. Counties would also develop a plan for low-risk defendants aimed at making sure they appear for all court dates" (Murphy, 2017, p. 10). Local magistrates, judges or court commissioners could use that guidance to recommend release, as opposed to bail, if the accused isn't found to be a danger to society or a flight risk (Young, 2017). Kentucky's pretrial assessment program has been very successful with estimates of 70 percent of the screened arrestees showing up for their court appearances. (Young, 2017). Of course, the bail bonds industry is lobbying against the pending legislation in each of the states because its survival is at stake.

METHODOLOGY

Secondary Data Analysis

The research method utilized to conduct this study was secondary data analysis with a concentration on existing document/statistical research. Secondary data analysis can be defined as "data gathered by an individual or collective other than the user." Routine sources of secondary data used in criminal justice research include the Uniform Crime Reports, the National Crime Victimization Survey, research funded by the National Institute of Justice, Sourcebook of Criminal Justice Statistics, etc. and data collected through studies conducted by other researchers and students. Existing document/statistical research is the act of reanalyzing pre-existing quantitative data.

In this study, the author will be ???????

FINDINGS

Bureau of Justice Statistics Data

Pre-trial Release of Felony Defendants in State Courts

The Bureau of Justice Statistics has been the agency tasked with determining the status of bail in the U.S. The agency has used the 75 largest counties in the U.S. as their measuring rod. The downside to the data is that it is outdated. The last years covered were 1990 – 2004. This leads this author to believe that the BJS believes this data is unimportant any longer, or the agency has curtailed this statistical measure due to funding cuts requiring priorities which this measure did not meet. The author is surmising, so no conclusion is given. Nevertheless, the author believes that any data is better than none, so results from the 1990-2004 compilation is presented.

"Between 1990 and 2004, 62% of felony defendants in State courts in the 75 largest counties were released prior to the disposition of their case. Beginning in 1998, financial pretrial releases, requiring the posting of bail, were more prevalent than non-financial releases. Among the 38% of defendants detained until case disposition, about 5 in 6 had a bail amount set but did not post the financial bond required for release" (Cohen & Reeves, 2007, p. 1).

Table 1-- Type of pretrial release of detention for State court felony defendants in the 75 largest counties, 1990-2004

Detention Release-Outcome	**State court felony defendants in the 75 largest counties Number**	**Percent**
Total	424,252	100%
Released before Case Disposition	**264,204**	**62%**
Financial Conditions	125,650	30%
Surety Bond	86,107	20%
Deposit Bond	23,168	6%

Full Cash Bond	12,348	3
Property Bond	4,027	1
Non-Financial Conditions	136,153	32%
Personal Recognizance	85,330	20
Conditional Release	32,882	8
Unsecured Bond	17,941	4
Emergency Release	2,801	1
Detained Until Case Disposition	**159,647**	**38**
Held on Bail	132,572	32
Denied Bail	27,075	6

Source: Cohen, T. H., & Reaves, B.A. (2007, November). State Court Processing Statistics, 1990-2004: Pretrial Release of Felony Defendants in State Courts. *Bureau of Justice Statistics Special Report, NCJ 214994.*

There is no reason to believe that the above data, if replicated today by the Bureau of Justice Statistics, would be significantly different from the reporting date of 2007 by the BJS. Most likely, there are still 38% of defendants (if not more) being held until trial 10 years later in 2017. This should not be the case. Evidence from the non-financial conditions suggests that Personal Recognizance, Conditional Release, and Unsecured Bond, could be expanded significantly. There must to be a desire to do this for district attorney's and public defenders in the U.S.

Do Defendants Held Prior to Trial Plead Guilty More Often than Released Defendants?

There is empirical evidence to show that defendants who are held in custody prior to trail will plead guilty more frequently than defendants who are released prior to trail. A Canadian study of bail and plea bargaining found that individuals held in pretrial detention are more likely to enter into guilty pleas (Kellough & Wortley, 2002). Reasons given are (1) the plea bargain may not involve any prison time; (2) a plea may result in a sentence of time served and therefore a release from jail; and (3) pleading guilty might mean moving to a better correctional facility (Kellough & Whortley)

Sacks and Ackerman (2012) present convincing evidence that pre-trail detention can have significant detrimental results for defendants who are unable to produce bail. The authors extracted a sample of n=634 cases pending before the New Jersey Superior Court in October 2004.

> They found that 24% (n=151) of the arrestees were released on their own recognizance, while 76% (n=483) were subject to a final bail requirement. The average bail was $48,725; the median amount was $10,000. Approximately 64% (n=308) of the defendants could post bail; whereas, about 36% (n=175) could not and languished in jail awaiting trial. They found that cases in which defendants are held in pre-trial detention are more likely to reach faster case dispositions which means plea bargaining even if not guilty (p. 272).

What are the Benefits of Defendants Being Released Prior to Trial?

Another key factor for defendant's release prior to trail, if qualified, is his or her ability to mount a successful defense at trial. If a defendant is not held in jail, he/she can actively assist the public defender or private attorney in building an adequate defense. This process is much more difficult when a public defender or defense attorney must go to the jail to interview a client who should explain his/her innocence versus being able to actually take the attorney to his/her witnesses or direct to other possible exculpatory evidence sources.

> If they have you in jail, the power has shifted to the prosecutorial arm of the system, and they can force you to make a plea. If you are out of jail, the power dynamic is completely different. Our research shows that when bail is posted, at least one-half the cases are going to be dismissed outright and most will result in no jail time at all. This is why prosecutors

fight so desperately for bail (Walshe, 2013, p. 1.)

Can the Bail bond Industry be Eliminated and is this Prudent?

Only four states-Wisconsin, Illinois, Oregon, and Kentucky-have eliminated the use of commercial bail to secure pretrial release for the accused. In doing so, these states have excluded private, for-profit businesses from this form of involvement in the justice system. This is clearly a bold step by these four states in the face of intense lobbying by the bail bond industry.

Wisconsin's statue is perhaps the most far-reaching:

> Wisconsin has a bail system based on release on recognizance, unsecured appearance bonds, and secured bonds paid to the court. When deciding conditions of release, judges must set reasonable conditions designed to ensure appearance in court, and protect members of the community from serious bodily harm and witnesses from intimidation. If cash bail is imposed, it must be only in an amount found necessary to ensure the appearance of a defendant (Billings, 2016, p. 1346).

Wisconsin's system puts complete emphasis on pre-trial services agencies (PSAs). These PSAs are responsible for determining the risk on release of all defendants. The employees in the PSAs are trained to do thorough investigations of pre-trial defendants to determine the defendant's likelihood of returning for their court appearances. They also monitor the pre-trial defendants to make sure they return for their appearances. They use technology such as electronic monitoring to keep track of pre-trial defendants. If a pre-trial defendant is found to be unworthy of pre-trial release, the PSA recommends that the defendant be held in custody prior to trial. Consequently, the process shifts from a monetary bail system determining a pre-trial defendant's fate to one where the PSA determines the defendant's fate without any cash bail

having to be deposited with the court. Detention prior to trial no longer becomes a "pay-for-the privilege" system, and has been quite successful in the four states where it has been implemented.

The pressing question, of course, is will this system work in much larger states than Wisconsin such as California? Can these PSAs be effective in screening a much larger pool of pre-trial defendants in California? The answers seems to be "yes," but the investment in many PSAs in each of the 58 counties in California, for example, requires legislative approval of millions of dollars to hire and train PSAs. These are funds that must replace the "free" extant bail bonds system. So, in a very liberal-leaning state such as California, does the State Assembly have the political will to take on the California Bail bonds industry?

CHAPTER V

Conclusions and Recommendations

Bail Bonds versus Pre-Trial Services Agencies

Even though bail has been a mainstay of the criminal justice system in both England and the U.S. since the 15th Century in England, it appears to be an anachronism in 21st Century America. This paper has attempted to show the inequities of the criminal justice system with regard to bail. Through years and acceptance of bail in the criminal justice system, there has been a symbiotic relationship that is now clearly out of date. The time has come to end the monetary bail system in California in favor of a system similar to that in Wisconsin. This can work if the California legislature passes laws favoring a system of Pre-Trial Assessment (PSA). This PSA system would require that California hire and train a significant number (undetermined in this research study) of pre-trial service agency evaluators in each county who will assess the

likelihood of appearance at trial of the defendants. These trained PSAs would evaluate all pre-trial detention cases to determine each defendant's case for release on recognizance or some other method other than bail. Of course this is an additional financial commitment by the California legislature, but this expense will be offset by the savings in release of pre-trial detainees.

U.S. Supreme Court and Application of the Eighth Amendment Via the Fourteenth Amendment to the U.S. Constitution

The U.S. Supreme Court has applied the Fourteen Amendment to the fifty states through the Fourtheen Amendment. The Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (U.S. Constitution, Amendment Fourteen).

The Eight Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (U.S. Contitution, Amendment Eight). The Supreme Court has never singled-out a court case that could be used to apply the Eight Amendment to the states through the Fourteen Amendment, as has been done with almost all of the other Ten Amendments. The author firmly believes that the clause, "nor deny to any person within its jurisdiction the equal protection of the laws" applies to our current bailbonds system in the 46 states which have not jettisoned bail. It is the author's opinion that bail is excessive if it denies release based on the defendant's ability to pay and descriminates against those who

cannot pay versus those who can. The author's opinion is this is a clear violation of the Fourteenth Amendment, because it is a denial of the equal protection of the laws.

What Can be Done to Make the Bailbonds Industry Fair to Everyone?

The author sees two alternatives to the current bailbonds system. The first alternative is a modified bailbond's system:

Pretrial Service Agencies with Modified Bail. In this alternative, a state would retain the bailbonds industry, but with significant modification. Pretrial Service Agencies (PSAs) would predominate over the bailbond's industry. PSAs would thoroughly screen pretrial detainees using proven techniques such as background investigations, and the application of technology such as electronic monitoring to release defendants on recognizance. Of course this would require a significant investment in a staff of PSA investigators who would need training to qualify for this position. Bail would be an alternative to defendants who choose this option, and to those defendants the PSA investigators deem unreliable for release on recognizance. An additional option would be "collateral" offered to the court such as property forfeiture. This alternative would require a significant financial investment to hire and train PSA investigators, but it would "pay for itself" in the many fewer defendants held in custody prior to trial at the cost of housing and feeding each of these defendants.

Pretrial Service Agencies with No Bail Option. This option is essentially the current pretrial release method in the four states which have jettisoned bailbonds and the bailbonds industry. There would be no licensed bailbond industry. The PSAs would be the sole agency to decide release of defendants prior to trial, and ability to pay would be removed as a condition of release. The PSA investigators would review all pretrial detention cases and would decide whether a defendant was a reliable candidate for release. Those defendants who are deemed

unreliable for release would be held in custody until trial. Ability to pay bail would no longer be a condition for pretrial release, so both poor and wealthy defendants would be cast into the same evaluation portfolio. The bailbonds industry would be eliminated along with its seedy profit at the expense of the poor, and its infamous bounty hunter affiliation.

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