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THE BAIL CONUNDRUM

Bail obviously disadvantages the poor. What are the alternatives?

By Julius (Jay) Wachtel. On September 19, 2017 Mickey Rivera walked out of jail, a free man. Well, relatively free. Unable to post $35,000 bail, he had been locked up for more than two years awaiting trial for his role in the 2015 gang-related killing of a Boston man. In August 2017, though, the Massachusetts Supreme Court ruled in Brangan v. Commonwealth, an unrelated case, that absent specifically documented reasons, cash bail must not outstrip a defendant's ability to pay. After all, bail isn't intended as punishment but "to provide the necessary security for [a defendant's] appearance at trial." Given that decision, Rivera's lawyers appealed. Despite his substantial criminal record, Rivera's bail was reduced to $1,000. He paid up, was outfitted with a tracking device and let go. That, a legal expert told the Boston Globe, was perfectly appropriate:

> Nancy Gertner, a retired federal judge and a senior lecturer at Harvard Law School, defended McGuire's decision to reduce bail, saying he was following a state court decision that is part of a national bail reform effort to prevent people from being jailed before trial simply because they are poor. "What the judge did is exactly right," Gertner said.

Real life tends to muddy things, and this case is no exception. In June 2018, nine months after being set loose, Rivera was arrested for drunk driving. Although he was still awaiting a criminal trial, Rivera was released without bail (his driver license was suspended.) One month later, on July 28, Massachusetts cops observed him speeding and driving erratically. Rivera took off, with cops in pursuit. The chase ended when Rivera slammed head-on into another vehicle, killing a man who had just visited his wife and newborn daughter in the hospital. Rivera was also killed, and a passenger in his vehicle died the following day.

As one might expect, Rivera's case led to considerable recrimination and finger-pointing. Lots of criticism was directed at the judges who reduced Rivera's bail in the killing to a token amount and, much later, let him walk on the DUI. Both were blamed for not making the effort to articulate the need to set a substantial bail amount, even beyond Rivera's ability to pay, as state law and the court decision allow. Of course, the judges had a built-in excuse: despite his many run-ins with the police, Rivera had always shown up.

Showing up? Is that what bail is all about? Apparently, the answer is yes. Bail's only mention in the Constitution is in the Eight Amendment, which stipulates that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." While these few words don't address bail's purpose, *Stack v. Boyle* (342 U.S. 1, 1951), the leading Supreme Court case on point, prohibits setting bail "at a figure higher than an amount reasonably calculated to fulfill the purpose of assuring the presence of the defendant...." Here is how Justice Robert H. Jackson suggested that be determined:

> Each accused is entitled to any benefits due to his good record, and misdeeds or a bad record should prejudice only those who are guilty of them. The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance...This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount.

Wait a minute. Doesn't a suspect's dangerousness also matter? Unfortunately, the underlying offense in Doyle was nonviolent so that concern didn't come up. For a clue we return to Brangan, the Massachusetts case. There the crime was armed robbery, so the justices had no option but to address dangerousness. And their answer, as far as bail is concerned, was "no":

> ...a judge may not consider a defendant's alleged dangerousness in setting the amount of bail, although a defendant's dangerousness may be considered as a factor in setting other conditions of release. Using unattainable bail to detain a defendant because he is dangerous is improper....(emphasis ours)

That doesn't mean that the nature of a crime is irrelevant. After all, serious crimes carry serious punishment, and that might make an accused more likely to flee. In fact, Brangan and its precedents require that factors such as the nature of an offense, community ties, mental condition, criminal record and failures to appear (FTA) be considered when setting bail, but only to evaluate the risk of flight. And there are limits. After all, bail inherently discriminates against the poor. Here's another extract from *Brangan*:

> A bail that is set without any regard to whether a defendant is a pauper or a plutocrat runs the risk of being excessive and unfair. A $250 cash bail will have little impact on the well-to-do, for whom it is less than the cost of a night's stay in a downtown Boston hotel, but it will probably result in detention for a homeless person whose entire earthly belongings can be carried in a cart.

That argument parallels the views of justice activists who have called for the elimination of bail altogether. Here, for example, is an extract from the ACLU "Smart Justice" website:

> ...bail was supposed to make sure people return to court to face charges against them. But instead, the money bail system has morphed into widespread wealth-based incarceration. Poorer Americans and people of color often can't afford to come up with money for bail, leaving them stuck in jail awaiting trial, sometimes for months or years. Meanwhile, wealthy people accused of the same crime can buy their freedom and return home.

By design, offense severity and prior record strongly influence bail setting and pretrial detention. Research has also revealed that in comparison to white arrestees, blacks and Hispanics are less able to afford bail and less likely to be released without posting bail, thus more likely to remain in pretrial custody. For example, see "Sentenced to Pretrial Detention: A Study of Bail Decisions and Outcomes" (a review of recent New Jersey data) and "Recommended for release on recognizance: Factors affecting pretrial release recommendations" (an earlier review in Toledo.)

Concerns about extralegal disparities led New Jersey to implement a statewide "risk assessment" system in 2017. Pre-trial investigators collect information to help courts determine whether releasing defendants through "non-monetary means" would unduly risk their flight or imperil public safety. Cash bail remains an option but its use is heavily discouraged. As one might expect, the bail industry balked. So far, though, the statute has survived legal challenges.

Determined not to be left out, liberal-minded California recently enacted an even more sweeping measure that, as of October 2019, does away with bail altogether. Other than under exceptional circumstances, persons arrested for misdemeanors will be summarily released. Like in New Jersey, arrestees charged with more serious crimes would be evaluated by pretrial services, which could release those who pose a low-to-moderate risk to public safety or of nonappearance. Other defendants could thereafter be released by the courts, which could impose only non-monetary conditions. Characters who seems so likely to flee, or pose such an extreme threat to public safety that releasing them under any conditions seems unwise, would be subject to preventive detention. As one would expect, this involves substantial due-process safeguards, including a hearing. Other states (e.g., New Jersey, Massachusetts) have similar provisions.

One might think that minimizing the use of bail or, as in California, eliminating it altogether would satisfy activists. But according to a recent article in *Politico* one would

be wrong: “Social justice advocates that had once championed the initiative to abolish cash bail mobilized against the final iteration of the [California] bill, which they saw as having morphed from righteous to dangerous.” What’s so “dangerous” about risk assessment and, as a last resort, preventive detention? Given the presumption of innocence, apparently everything: “In critics’ eyes, that means California will continue to give local judges the sweeping authority to keep people incarcerated before they’re convicted of anything.” Similar concerns have arisen in New Jersey and elsewhere.

Law enforcement officers must deal with the consequences of poor release decisions, so they usually favor a short leash. Four months after New Jersey’s provisions took effect, Jules Black, an ex-con, was arrested for having a gun. Assessed as low-risk, he was released without bail. Within hours Black allegedly cornered one of his enemies and shot him dead. According to a local jailer (he’s also president of the police union) career criminals are taking advantage of the reforms: “I’m seeing the same exact people every week. I’m just seeing them come in with new charges. It’s more work for officers. It’s a lot more work for them.” Concerns that the new procedures were proving too lax were seconded in an NorthJersey.com editorial:

> In particular, officers say the new law’s risk assessment, or Public Safety Assessment, leaves too much to chance and is allowing, in some instances, violent-prone individuals to be back out on the street shortly after their court appearances. This, they say, is also bringing more pressure and stress to officers on patrol.

Is assessment a solution? Newfangled protocols supposedly let authorities assign applicants for release to the appropriate risk pool. To be sure, paying specialists to make distinctions will produce...distinctions. But whether these yield groups with markedly different, real-world propensities to engage in misconduct is something else altogether.

Neither is bail a guarantor of good outcomes. “Googling” instantly turned up a recent, troubling anecdote. On May 13, a Wisconsin man with an extensive criminal record that includes “bail jumping” was out on $7,500 cash bond for a string of crimes when an officer tried to pull him over for a traffic violation. After a pursuit (a cop wound up getting dragged a short distance by the suspect’s car) the man was arrested on multiple charges.

This time he was detained without bail, right? Wrong. Cash bond was set at $1,000.

Pre-trial release, on bail and otherwise, is ubiquitous and surprisingly permissive. A recent study of eleven major California counties tracked more than one and one-half million bookings (1,563,837) between October 2011 and October 2015. Forty-one

percent of the arrestees were released before trial, split about 60/40 percent between misdemeanors and felonies. Of these, a bit more than a quarter (27.8 percent) had to post bail, most often for a felony offense. About seven percent of the bookings (112,445) were for FTA on a prior charge. Thirty-eight percent of these defendants (43,029) were again let go. A previous study, of persons released from Dallas County jail in 2008, suggested that failure to appear is frequent. Including misdemeanors and felonies, the rate ranged from 23 percent of those released on bail to 39 percent of those who were simply cleared by pretrial services (N=29,416). Another, "An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court," about individuals released on misdemeanor charges in Nebraska during 2009-10, yielded a control group FTA rate of 12.6 percent (N=7,865).

FTA isn't the only issue. Released persons must often comply with other conditions; for example, wear an ankle monitor, keep away from certain persons and places, and so on. But public safety agencies have limited resources, and their practitioners can only do so much. Whether it's old-fashioned cash bail or a newfangled assessment, the sheer magnitude of pre-trial release, the uncertainties of evaluating applicants, and the frailties of human nature inevitably create error, and along with it a substantial threat to the public and police. At a certain point – and from the flub-ups, we've probably reached it – trying to fine-tune outcomes becomes an exercise in wishful thinking. Release more, and there will be more news headlines and more cause for essays like this. That's the one certainty we'll never escape.