

A Case for Bail

By Dan Barto



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Private Bail is Better for Defendants and Communities

The purpose of bail is to ensure defendants show up to court. Private bail does this better than any other mechanism. Private bail has always out-performed public pretrial release in terms of lower fugitive rates. Failure to Appear (FTAs) bog down the court system, drains law enforcement resources, and costs tax payers massive amounts of money.

According to a 2007 Department of Justice study of the nation's 75 largest counties:

- 18 percent of felony defendants released on surety bonds and 14 percent for those released on property bonds (private) initially failed to appear in court, compared to 26 percent of those released on their own recognizance (public) and 30 percent released on unsecured bonds (public).¹
- The same study showed that for defendants who were fugitives after 1 year, the disparity grew. From 3% and 4% of those released on surety and property bonds respectively (private), to 8% released on their own recognizance (public), to 10% for unsecured bond (public).¹

Also, these "risk-based pretrial system" methods have proved to have not helped the public pretrial release. At least one jurisdictions dropped in Texas and went back to private bail:

- Potter County, Texas, after an assessment showed the public pretrial releases had more than double the failure-to-appear rate of private bail companies.²

The repercussions of increased FTAs impose heavy financial and functional burdens on courts, police departments, taxpayers, and communities.

- In Philadelphia, "As of November 2009, Philadelphia's "count of fugitives (suspects on the run for at least a year) numbered 47,801... and in 2007 and 2008 alone, 19,000 defendants each year—nearly one in three—failed to appear in court for at 11 least one hearing." ³
- From the same report, "The total amount of bail owed to the City was estimated at nearly \$1 billion, owed by 210,000 defendants."⁴
- From Howell County, NJ,
 - "Court Administrator Rosemary O'Donnell said the bail reform law has doubled the caseload of the municipal court."⁵
 - "Before, we would only handle disorderly persons or petty disorderly persons cases. Now, we are getting remanded from the prosecutor's office and the criminal division fourth-degree and, believe it or not, a lot of third-degree cases", O'Donnell said.⁶
 - "Although unintended, the consequences of the newly enacted Bail Reform has led the police department to increase overtime by \$100,000."⁷

Why does Private Bail Work?

The advantage private bail has over public mechanisms is that at least two people or groups of people accept *financial responsibility* for the defendant's compliance with the bail terms. In the simplest situation, the bondsman and the defendant's loved ones are financially responsible for the bond. The fact that *no* other people have a vested interest in the defendant showing up to court is the easily understandable reason why pretrial services and other forms of public bail show much higher FTA rates.

Any bondsman can easily provide anecdotal examples of this:

- The father cosigned for son. The son fled to North Carolina. The other son divulged to the bondsman where his brother was and the fugitive was quickly apprehended. Another family member told the bondsman the only reason the son ratted out his brother was because he didn't want to see his father have to pay the full bond and was mad at his brother for disregarding his father.
- A brother cosigned for his brother who was arrested on felony drug charges. When the defendant skipped court, the bondsman informed cosigner. It was only several hours later that the bondsman received a call from the cosigner saying his brother had turned himself in. When the bondsman asked him what happened, he replied that he was out of town on work and his brother had stopped taking his calls. He then left a message with mutual friends that he was coming back and if his brother has not yet turned himself in, he would "kick his a__". Obviously, that was enough to convince his brother to turn himself in.

These types of self-regulating situations would never occur with public forms of bail and they cost the taxpayer nothing.

What About the Poor?

The main argument against bail is the poor are stuck in jail because the 10% fee can't be paid.

- First, for an indigent or poor defendant who is a low flight risk and can't afford the bail, I have no problem with him or her being released on a PR or unsecured bond.
- Recall the reason pretrial services was created. Its original stated mission was to provide bail to the poor, but it went beyond that to, among other things, supervise the defendants (more on this later).
- Many jurisdictions already have mechanisms for this in Virginia that work very well (PR, unsecured bonds).

Questions for thought...

1. If a defendant is a low flight risk, deemed not a danger to society, but doesn't have the means to pay the bail, should the taxpayer pay the bill and absorb the risk of bonding him or her out?
2. If a defendant has the means to pay the bail, should the taxpayer instead pay the bill and absorb the risk of bonding him or her out?

If the answer is 'yes' to question 1, understand that that was the original stated purpose of pretrial services. Pretrial Services could (and are, in fact, many times) be doing that. Originally, pretrial services was supposed to work like court-appointed lawyers: *for those who can't afford a lawyer, one will be appointed for you. For those who can't afford the bail, a pretrial administrator would get involved to determine if you can be released.* However, pretrial services largely dropped that task and instead exploits defendants by putting them on probation prior to them being found guilty.

If the answer is 'no' to question 2, understand that if the private bail industry is driven out of business, the taxpayer will be paying for any and all pretrial releases. It is taxpayer funded bail for all, which includes the wealthy defendants who are fully capable of paying their own bail.

While it may make sense to only provide this 'free bail' option to low income defendants, it is impossible to determine if a defendant has the means to pay the bail simply because it is usually the defendant's family and friends who pay the bail. For a common example, consider a college student with no income but has wealthy parents. He/she could be deemed low income even though the bail could easily be paid by the family.

The only way to accomplish this is when a bail bond is set for a defendant, allow a specified amount of time, say 24, 48, or 72 hours, for the private (and free) bail system to work. If the defendant has not bonded out when the time passes, have a pretrial services agent look at it. If the county really wanted to save money, scrap pretrial services altogether and hire bail bondsmen to assess the flight risk of defendants since they're familiar with it. It would work the same way as court-appointed attorneys.

Why Pretrial Services is a Bad Alternative to Bail

There are two primary reasons why pretrial services is a bad solution. The first is how it's implemented. The second is that it presents a conflict of interest for local government.

A fundamental flaw with pretrial services is that its' implementation into our criminal justice system has effectively put an end to the principle of 'innocent until proven guilty'. When defendants are assigned to pretrial services, they are effectively on probation prior to being tried and with no findings or admission of guilt. Under pretrial services, defendants frequently are required to perform one or more of the following:

- report to a pretrial services agent,
- submit to drug or alcohol tests,
- attend educational courses,
- wear a GPS device
- wear a SCRAM bracelet.

Warrants are issued and additional charges brought forth for defendants who fail to comply with any of the set requirements.

It's also noteworthy that educational courses, GPS devices, and SCRAM bracelets are not free. If any of these conditions are required to be performed, the poor will not be able to participate and in some cases will not be released because of it.

Showing how a defendant's case can play out under pretrial services, assume a defendant cooperates and does not incur any additional charges, and is found not guilty or the case is dismissed. If the case is without merit then why did the defendant have to go through all the time and expense of pretrial probation?

Now suppose the defendant accrues at least one additional charge from pretrial services. These additional charges brought by pretrial services are now part of the defendant's record and have to be reconciled as any other charge. They are purely a fabrication of pretrial services, and it's especially unfair when the original charge was bogus and gets a dismissed or not guilty verdict. Pretrial services slaps criminal records on people who are often not criminals at all.

It's understandable there is so much cynicism about our court system and law enforcement when cases are handled in such a manner. The perception of many of our clients is pretrial services was created to keep people in the system, and who can blame them. They refer to it as "pre-conviction probation."

Secondly, it financially incentivizes pretrial services to recommend more defendants to pretrial services to (1) obtain more revenue, and (2) justify their agency and more funding for their agency. Having a government agency (pretrial services) deciding the pretrial recommendation for defendants would be like allowing bail bondsmen in charge of setting the bonds for defendants.

Government agencies annually have to justify their existence and their budgets, and the only way pretrial services could be justified would be to have more defendants assigned to pretrial services,

regardless of the defendants' circumstances. This is having the wolf in charge of the henhouse. It's not allowed in the private sector and should not be allowed in the public sector.

Why the Pretrial Risk Assessment Science is Bogus

For some time now, many anti-bail advocates have been referring to an “evidence-based” or “risk-based” scientific method of evaluating the risk of defendants. After understanding what it really is, it’s quite laughable that many are calling this science. It’s really just empty buzzwords.

According to the Pretrial Justice Institute’s “STATE OF THE SCIENCE OF PRETRIAL RISK ASSESSMENT”, there are six risk factors used to evaluate defendants.⁸ They are:

- prior FTAs,
- prior convictions,
- felony charges,
- employment,
- drug user / history, and
- any other pending cases.

Bail bondsmen collect this information (at a minimum) prior to bailing defendants out of jail. There is no science to this; it’s just common sense. To hear administrators and others speak of this as some complex scientific tool adds to the cynicism towards government programs.

An item of note is that the pretrial services institute left out a very important factor. That is where the defendant resides. Was the defendant born and raised in the locality and maybe have children attending school, or was he or she passing through Virginia from New York to Florida? How could such learned scientists overlook such a thing?

Many of Virginia’s Pretrial Services agencies have implemented this type of tool, which is called VPRAI (Virginia Pretrial Risk Assessment Instrument) and VPRAI-Revised.⁹ In researching and looking at the different reports and presentations about how these risk assessment tools perform, what I have seen is that the FTAs fare better with the implementation of these tools. For example,

- “Praxis supervision level outcomes... [yield] » 1.3 times less likely to fail to appear”¹⁰.

Aside from the report not backing up the ‘1.3 times less likely to fail to appear’, what it doesn’t say is 1.3 times less likely than what? Less likely than if you just let them go on a PR bond? I’m assuming that it’s less likely than if the tool was not used by Pretrial Services. Recall that Pretrial Services and public forms of bail performed almost twice as bad as private bail in terms of FTAs. That’s kind of like the team who finished last two years in a row bragging that they scored more points in the second year. Who cares? They still suck.

Why Am I Fighting for Bail?

It's understandable that those outside of the industry would look at this issue and believe that bail bondsmen are just fighting for their livelihoods and perhaps they should get out of the way of progress.

I can only speak for myself. I work as a bondsman part time, so if the bail industry goes away, I'll be fine. I won't deny I do it for the added income, but I also take a great deal of pride in the service that I perform. I see first-hand the importance of it.

The reason I'm fighting this is because I believe that I am on the right side of this issue. Private bail helps communities and more importantly, people. It has been proven to be an important part of criminal justice, assisting courts and law enforcement in many ways. Most of all, it helps defendants and their families through the stress of being arrested in ways that government agencies can't. We are free to deal with people on a personal and professional level.

Pretrial services, however, is a corruptive influence on criminal justice, exploiting defendants and their families. It continues to extinguish the notion of 'innocent until proven guilty' and while the rank-and-file of those who go through and understand the system clearly see this, it is mind-boggling how many judges, bureaucrats, and politicians cannot see it.

If I were to really believe that pretrial services is better than private bail, I would gladly step aside in the name of progress. Advancing pretrial services in place of bail is not only wrong, but immoral.

Endnotes

¹ U.S. Bureau of Justice Statistics, Pretrial Release of Felony Defendants in State Courts, 1990–2004, November 2007, NCJ 214994, Table 7, p. 9.

<https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>

² Judy Maples. “Bail Bond Systems Works Well for Potter County.” *Amarillo Globe–News*, July, 2016. Web. 25Oct.2017

<http://m.amarillo.com/opinion/opinion-columnist/guest-columnist/2016-04-09/maples-bail-bond-systems-works-well-potter#>

³ Report of the Advisory Committee on the Criminal Justice System in Philadelphia, January 2013, Page 19.

<http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2013-290-SR%20344%20Report%20-%20Final.pdf>

⁴ Ibid.

⁵ Karen Wall. “Bail Reform Expected To Cost Extra \$100,000 In Police OT: Howell Chief.” *Patch.com*, April, 2017. Web. 25Oct2017

⁶ Ibid.

⁷ Ibid.

⁸ Cynthia A. Mamalian, “State of the Science of Pretrial Risk Assessment” *Pretrial Justice Institute*, March, 2011, p. 9, Web. 26Oct2017

https://www.bja.gov/publications/pji_pretrialriskassessment.pdf

⁹ Kenneth Rose, “Pretrial Services Agencies: Risk-Informed Pretrial Decision Making in the Commonwealth of Virginia”, November 10, 2016, 27Oct2017

<http://vscc.virginia.gov/Virginia%20Pretrial%20Services%20Presentation-1.pdf>

¹⁰ Ibid.