Statement to the U.S. Commission on Civil Rights

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The Civil Rights Implications of Cash Bail

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A New Yorker's Perspective on a Public Safety-Minded Approach to Bail Reform

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About the Author

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Written Statement

I'd like to start by thanking the Commissioners for the invitation to speak and submit written testimony. The issue of bail reform, like most issues of criminal justice, is an important one with major implications for both individual liberty and public safety. Drawing in part on my coverage of the bail reform debate in New York, this statement will make three points:

1. Pretrial justice systems that rely heavily on monetary conditions on release—i.e., cash bail—can, and sometimes do, place undue burdens on individual liberty, highlighting the need for reform;
2. Reform in this space should be approached with an eye toward mitigating the risks associated with eroding the incapacitation benefits that can be attributed to pretrial detention—particularly with respect to high-risk, high-rate offenders; and
3. Because much of the concern surrounding the issue of bail reform is rooted in the amount of time presumably innocent defendants stand to spend in pretrial detention (which, in turn, is almost entirely a question of resources), the federal government should consider providing financial assistance aimed at facilitating the quicker, more efficient processing of criminal cases at the state and local level—including the hiring of more judges, prosecutors, and public defenders, as well as the funding of research efforts aimed at developing and refining algorithmic risk assessment tools.

Typically, when an individual is arrested and charged with a crime, he is brought before a judge who will, among other things, decide whether and, if so, under what conditions the defendant will be released while his case runs its course. In jurisdictions that allow for the imposition of cash bail, the judge can, at least in some cases, require said defendant to post "a security such as cash or a bond… required by a court for the release of a prisoner who must appear in court at a future time."[1] Depending on the jurisdiction, that requirement can be based on the judge's assessment of the risk that the defendant will fail to appear for his next court date, or that he will reoffend during the pretrial period.

When a judge imposes bail, the defendant can either pay the court in cash—which is then held in escrow and returned upon the defendant's return to court—or secure a bail bond by paying a bondsman a percentage of the bail amount.[2] Basic economics teaches us that raising the price of anything will, at least in theory, price some people out of the particular market in question. Bail is no different. As such, in jurisdictions in which judges can impose financial conditions on a given defendant's release, there will inevitably be cases in which some defendants will be financially unable to post bail or secure a bail bond. Unless the bail amount is lowered to the point of affordability, or someone else fronts the money, defendants who are financially unable to satisfy monetary conditions on their release will remain in pretrial detention. This is where the concerns animating so many proponents of bail reform begin to arise.

[1] Bryan A Garner, ed., *Black's Law Dictionary*, 9th ed. (St. Paul: West, 2009), p. 160.

[2] A bail bond is essentially a guarantee to return the defendant to court made by a defendant's surety, backed by the surety's assumption of financial liability to the court should the defendant fail to appear. See ibid., p. 200.

One of the most persuasive arguments against pretrial justice systems that relies heavily on cash bail is that such systems would allow for a dangerous-but-well-off defendant to secure his release, while a poor-but-harmless defendant remains in pretrial detention for an extended period of time. In other words, the problem with relying heavily on cash bail is that it makes the question of pretrial release one of means rather than one of risk.[3] Such outcomes are unjust; and avoiding them is a proper aim of a bail reform effort.[4]

However, as with almost any public policy decision, bail reform involves tradeoffs. On one side of the scale, you have the defendant's liberty interests. On the other, you have the public's safety. Expanding pretrial release for its own sake inherently raises the risks to the public's safety, just as restricting pretrial release for its own sake raises the risks to the liberty interests of criminal defendants. Because so much concern and attention has been directed toward mitigating the latter risk, I'd like to focus a bit on the former.

One thing the research on bail reform seems to pretty convincingly show is that an increase in the percentage of pretrial defendants released pending trial will translate to more crimes committed by that population. One study by researchers at Princeton, Harvard, and Stanford Universities, found that pretrial release increases the likelihood of rearrest prior to case disposition by more than 37%[5]—it also increased the likelihood of a defendant failing to appear

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[3] See, e.g., "Addressing the Poverty Penalty and Bail Reform," Fair and Just Prosecution: "The money bail system… often means that wealthier defendants get released while poor defendants have to stay in jail"; "Moving Beyond Money: A Primer on Bail Reform," Criminal Justice Policy Program at Harvard Law School, October 2016: "The core critique of money bail is that it causes individuals to be jailed simply because they lack the financial means to post a bail payment."

[4] Such outcomes are more prevalent in some jurisdictions than others. In New York City—where I've resided most of my life—prolonged pretrial detentions have not been typical for some time. In 2018 (before the state enacted a sweeping bail reform measure that took effect on January 1, 2020), less than 14% of the more than 250,000 individuals arrested by New York City Police had bail set in their cases. Approximately 10% entered a city jail due to a failure to make bail after their initial court appearance. Of that 10% almost half made bail within two days, 70% did so within a week, and another 17% did so within a month. (See, "Jail: Who is in on Bail?" New York City Mayor's Office of Criminal Justice, May 2019, which found that of the more than 257,865 individuals whose arrests were captured by this report, 43% (110,915) of defendants were released on their own recognizance at their initial hearing, and 1.8% (4,720) were released under supervision. Another 42.7% (110,110) of the total had their cases resolved (either through dismissal or a plea) soon after their arrests (prior to the opportunity to have bail set); and 1.5% (3,940) of defendants made bail at their initial appearance. Of the remaining 11% (28,180)—representing defendants who entered jail—0.7% (1,830) were ordered held without bail; and 10.3% (26,350) entered jail as a result of not making bail at their initial court appearance.)

The thing to keep in mind about New York, which makes it unique, is that judges are prohibited from considering the danger a given defendant poses to the community at every stage and in every aspect of pretrial release decisions. (See, Rafael A. Mangual, *Reforming New York's Bail Reform: A Public Safety-Minded Proposal*, MANH. INST. FOR POL'Y RES. ISSUE BRIEF (March 2020), pp. 6—8.). This is important because not every defendant detained pretrial on account of his inability to make bail should or would have been released if New York judges were allowed to consider public safety when making release decisions.

[5] Dobbie, Goldin & Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, AM. ECON. REV., Vol. 108, No. 2 (Feb. 2018).

in court by 124%, which adds to the burden of police officers tasked with returning absconders to court. Two other studies analyzing the recent bail reform effort in Chicago, IL also found increases in the number of crimes committed by pretrial defendants in that jurisdiction.[6] In a study of violent felons convicted in large urban counties between 1990—2002, the Bureau of Justice Statistics (BJS) found that 12% of those felons were out on pretrial release at the time of their arrests.[7]

To put a finer point on the public safety stakes of this debate, consider the story of 16-year-old Kahlik Grier, who was shot and killed last month in the Bronx, New York while in the stairwell of his own apartment building.[8] One of the people charged with his murder is a 19 year-old suspect named Desire Louree, who, according to news reports, had been released from jail after making bail a month prior to the shooting. At the time of Grier's death, reports state that Louree had open cases for gun possession and attempted murder—the former from 2019, and the latter stemming from a shooting in Brooklyn last year.[9] Consider also the case of Arjun Tyler, another New York City defendant who allegedly attempted to rape a woman in Brooklyn not long after being released from pretrial detention pursuant to New York's relatively recent bail reform.[10]

These victims also have liberty interests that should be given due consideration in debates about bail reform. Minimizing the risks faced by those with the highest likelihood of being victimized by pretrial defendants who reoffend is as worthy a cause as protecting the liberty interests of the accused.

How to balance those interests is not an easy question.

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[6] See, Paul Cassell & Richard Fowles, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, Utah Law Faculty Scholarship, 194 (2020) (finding that, "Properly measured and estimated, after more generous release procedures were put in place, the number of released defendants charged with committing new crimes increased by 45%. And, more concerning, the number of pretrial releasees charged with committing new violent crimes increased by an estimated 33%."); and Don Stemen & David Olson, *Dollars and Sense in Cook County: Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release, and Crime*, SAFETY AND JUSTICE CHALLENGE RESEARCH CONSORTIUM (Nov. 2020)(finding that, (1) pretrial releasees reoffended at the same rate prior to and after the bail reform went into effect, and (2) during the study period, approximately 500 additional pretrial defendants were released pursuant to the reform effort. As my Manhattan Institute colleague, Charles Fain Lehman pointed out in a recent piece (*Yes, Bail Reform in Chicago Has Increased Crime,* CITY JOURNAL (Feb. 10, 2021)), "the 9,200 individuals released following reform committed roughly 1,573 crimes and 294 violent crimes. If only 8,700 offenders had been released, they'd have committed 1,488 new crimes and 278 violent crimes. In other words, the release of just 500 people led to roughly 85 additional crimes, including 16 additional violent crimes.").

[7] Brian A. Reaves, *Violent Felons in Large Urban Counties, State Court Processing Statistics, 1990-2002*, Bureau of Justice Statistics (July 2006), p. 1.

[8] Edgar Sandoval, *A Teenager Went 3 Floors Down to Play Video Games. He Never Came Home.*, THE NEW YORK TIMES (Jan. 21, 2021).

[9] See, e.g., Graham Raymon & Thomas Tracy, *Cops arrest man who set up shooting that killed innocent NYC teen; victim's brother separately charged with gun possession*, NEW YORK DAILY NEWS (Jan. 15, 2021).

[10] See, Rocco Parascandola & Thomas Tracy, *Suspect Busted in Brooklyn Subway Station Assault Was Freed Trhough State's New Bail Reform Laws,* NEW YORK DAILY NEWS (Feb. 2, 2020).

Maintaining cash bail would minimize some of the risks associated with expansions of pretrial release, because some subset of those detained as a result of their inability to pay would have reoffended. But this is both an inefficient and unjust way to approach mitigating the risks associated with expansions of pretrial release.

In my estimation, a better approach is to structure reforms in such a way that empowers judges to remand dangerous, or high-risk offenders to pretrial detention, irrespective of the charges they face. Many presume that the offenses with which a defendant is charged in the instant case are a reliable indicator of the risk that he or she poses to the public during the pretrial period. They're not. According to a study by the New York City Criminal Justice Agency, "the likelihood of (a failure to appear) and/or re-arrest for a violent offense was lower among defendants initially arrested for felony-level violent and property offenses" than it was "among defendants initially arrested for all types of misdemeanor or lesser offenses."[11] While this may seem counterintuitive to some, many high-risk offenders often engage in a broad range of misconduct; so, it's not only possible, but likely, for a high-risk offender to be arrested for what would generally be regarded as a low-level offense.[12]

A fairer and more accurate way for judges to assess a given defendant's risk is through a validated algorithmic risk assessment tool (RAT), which calculates risk based on attaching weights to a variety of factors like criminal history and age. A recent study by the Center for Court Innovation illustrated the predictive accuracy of such a tool—even across racial groups, a crucial criterion, given the opposition of some reformers who claim that racial bias is built into the algorithms.[13] It's worth noting, however, that in New York City, courts have been using an algorithmic RAT to assess flight risk for years—a practice that was left undisturbed by the 2020 reform and the 2021 amendment. Also, in jurisdictions that recently enacted bail reforms (such as New Jersey), the use of RATs hasn't materially changed the racial composition of the jail population. Now, to be clear, it is possible, because of how heavily many RATs weigh criminal history, that an assessment of "erroneous"[14] classifications would reveal that black defendants

[11] See, Qudsia Siddiqi, *Predicting the Likelihood of Pretrial Failure to Appear and/or Re-Arrest for a Violent Offense Among New York City Defendants: An Analysis of the 2001 Dataset*, New York City Criminal Justice Agency (Jan. 2009).

[12] See, e.g., George Kelling, *Community Policing, Rightly Understood*, City Journal (Winter 2019) (noting that "Responding to the subway disorder had early and unexpected benefits. Transit police found that one out of every seven fare-evaders was wanted on a warrant, while one out of 21 was carrying a weapon. Cops called it the 'Cracker Jack box' effect. Kids would buy a box of the caramel-covered popcorn snack for the toy inside as much as for the popcorn itself; when it came to enforcing laws against fare evasion, the 'toy'—the thing that made the effort even more worthwhile, for both the cops and the public—was the weapon or wanted criminal taken off the street. By making what turned out to be important arrests through the enforcement of what was (and is still today) regarded as a minor offense, transit cops began seeing their role as preventing more serious crime through order maintenance; previously, the sense among the rank and file was that they were there primarily to protect the city's revenue stream.").

[13] See, Picard, et al., *Beyond the Algorithm: Pretrial Reform, Risk Assessment, and Racial Fairness*, Center for Court Innovation (July 2019).

[14] Two illustrations of "erroneous" classifications would be: a defendant classified as low-risk is rearrested during the observation period; and a defendant classified as high-risk makes it through the observation period without

(who tend to have more extensive criminal histories compared with white defendants)[15]—when misclassified—are more likely to be misclassified as high-risk than defendants of other races. Nevertheless, implementing an algorithmic RAT to inform judicial assessments of the dangers that defendants pose to their communities will provide judges with an objective framework to aid them in their pretrial release decisions—one that is far preferable to having them set bail with the hope that dangerous defendants can't come up with the money.

RATs do not have to be the be-all, end-all of the pretrial release decision. Judges should maintain the discretion to consider case-specific evidence that both the prosecution and the defense bring to light, particularly if that evidence can contextualize the risk assessment before them. For example, consider this hypothetical: a defendant who, due to his age and criminal history, scored quite high on an algorithmic RAT was recently paralyzed in a car accident. Judges should probably not be constrained to remand pursuant to the RAT, given the defendant's incapacitating injury. In other words, RATs should be considered highly probative pieces of a bigger body of evidence that ought to be considered in its totality.

Some critics, not unreasonably, highlight the tension between the presumption of innocence and the pretrial detention of a defendant who has not yet been convicted. That tension is very real. However, I would be remiss not to note, that the Constitution does not require forbidding the latter to serve the former.[16] Minimizing that tension is a public policy problem that, unlike most policy issues, is almost purely a matter of resource allocation.

Simply put, a better-funded criminal-justice system can afford more prosecutors, public defenders, investigators, and judges. This is the most direct route to shortening pretrial detention periods, as well as to ensuring that the Constitution's guarantee of a speedy trial is fulfilled in all cases. Notably, the state of New Jersey's bail reform capped the pretrial detention period at 180 days and set aside funding for 20 new superior-court judgeships to help move cases along.[17] A real effort to assess how much capacity needs to be added to speed up the resolution of cases is the first step toward a long-term solution to many of the issues surrounding criminal prosecutions. Here is where the federal government may be able to play the role of facilitator by directing funds to states and localities whose criminal justice systems are most severely underfunded so that defendants in those jurisdictions stand to spend as little time in pretrial detention as possible.

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being rearrested. With respect to the latter, it is important to keep in mind that the absence of an arrest does not necessarily mean that the defendant did not reoffend, given the reality that many offenses go unreported or do not result in arrest due to lack of detection.

[15] See, Pricard, et al., *supra* note 12.

[16] See, e.g., *U.S. v. Salerno*, 481 U.S. 739 (1987) (holding that the presumption of innocence is not violated by a defendant's pretrial detention on public safety grounds).

[17] Glenn A. Grant, "Criminal Justice Reform Report to the Governor and the Legislature for Calendar Year 2017," New Jersey Judiciary, February 2018.

Conclusion

Like many public policy issues, bail reform is complex. Those who have supported and pushed for reforms (as well as those who continue to do so) are trying to address real problems worthy of serious consideration and our best efforts. Addressing those problems, however, involves trade-offs and requires a balancing of legitimate concerns about justice with equally legitimate concerns about public safety. While I have tried to propose a better way forward, it should be understood that neither of the two competing concerns at issue in this debate will ever be fully eliminated. After all, opening a door to the pretrial detention of a dangerous defendant does not guarantee that his judge will walk through it, as we've seen from some of the terrible stories out of Chicago[18], whose bail reform does allow judges to do just that.

My hope is that this statement along with my remarks on February 26th help the Commission better understand the issues and interests at stake, and that they provide some support for the approach outlined therein. Thank you.

****Note to the Commission: This written statement reflects an earnest attempt to balance the competing goals of thoroughness and concision. As such, it is quite possible that the Commission may desire more information on the points laid out above. Should further questions arise, please do not hesitate to contact me, as I would be more than happy to supplement the materials I've submitted.*

[18] David Jackson, et al., *Two charities have bailed scores of felony defendants out of Cook County Jail. Some were soon charged with new crimes.*, Chicago Tribune (Apr. 29, 2020).