Bail Reform in North Carolina—Why the Interest?

Author : Jessica Smith

Categories : Procedure, Uncategorized

Tagged as : bail, bond, policy, pretrial release, reform

Date : February 14, 2019

Bail reform is a hot topic in North Carolina. It was recommended by Chief Justice Mark Martin's North Carolina Commission on the Administration of Law and Justice (report here) and jurisdictions across the state are embarking on reform. In this post I discuss some of the reasons why stakeholders are interested in the issue. In a companion post, I discuss reforms that they are implementing and evaluating.

Public Safety

One reason for the interest in bail reform is a concern that the current system undermines public safety. Although North Carolina law provides for five different conditions of pretrial release, the most commonly imposed condition is the secured bond. Because a secured bond requires money to obtain release, money plays a significant role in North Carolina's pretrial justice system. As a result, wealthy but high-risk defendants can "buy" their way out of jail. Consider the drug trafficking defendant who receives a $2 million secured bond. If that defendant has financial resources he can post the bond himself or pay a bondsman to secure it. Either way the defendant walks out of jail and the bond is not forfeited if he engages in further drug crimes or kills or intimidates witnesses so that he can't be brought to trial on the original charges. Because the bond only is forfeited if the defendant fails to appear in court, nothing inherent in the bond protects the public. It is argued that this type of under-supervision of dangerous defendants undermines public safety. Moreover, some assert that the system undermines public safety by over-supervising low risk defendants, by for example requiring them to report in or submit to drug testing. Some research shows that low risk defendants perform better on release--meaning fewer rearrests--when they are released without conditions. Thus, it is argued, placing conditions of release on these defendants undermines public safety. Additionally, some evidence shows that pretrial detention creates crime. A lot of people sit in jail pretrial for some period of time because they can't pay their secured bonds. A number of studies show that low risk individuals who are detained pretrial are more likely to commit new crimes following release. For example, a recent study of almost 400,000 misdemeanor cases in Harris County, Texas (the third largest county in the nation) found that although detention reduced criminal activity in the short-term through incapacitation, by 18 months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stanford Law Review 711, 718 (2017) [hereinafter *Downstream Consequences*]. These differences persisted even after fully controlling for the initial bail amount, offense, demographic information, and criminal history characteristics. *Id.* at 717-18 Studies like this have amplified concerns about the negative impact pretrial detention has for public safety.

Costs

Another reason for interest in bail reform is cost. One aspect of cost is providing jail beds for defendants who are detained pretrial. On any given day US jails house nearly 500,000 pretrial detainees at a cost of about $14 billion a year. If these pretrial detention costs were necessary for public safety, few would object to them—for example if the evidence showed that jails were filled with the highest risk defendants who cannot safely be released into the community. The evidence however shows that we are detaining surprisingly high numbers of defendants charged with low level crimes. The Texas study noted above found that more than half of all misdemeanor defendants are detained pretrial. Researchers report similar numbers in other jurisdictions. Thus, advocates for reform argue: we are spending

enormous sums of money detaining the wrong people. One alternative to pretrial detention is release or release with supervision. Even when the cost of pretrial supervision is considered, significant savings can be achieved by reducing incarceration of low-risk defendants. Additionally, as noted, research shows that pretrial detention of low-risk defendants causes crime. That crime has costs too--to victims, law enforcement, and the justice system.

Fairness

Another reason for interest in pretrial justice reform is fairness. For decades researchers confirmed the prominent role of wealth in the pretrial system, specifically, that whether a person is detained pretrial depends largely on whether he or she can afford to pay the bond imposed. This appears to be true even when relatively low amounts are required to secure release. For example one study found that in Philadelphia almost half of defendants who only needed to post a $500 deposit to obtain release failed to do so within three days of the bail hearing. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Affects Case Outcomes*, Journal of Law, Economics & Organization (forthcoming) (manuscript at 10-11) [hereinafter *Distortion of Justice*]. That researcher noted that while a percentage may prefer to stay in jail, it is reasonable to infer that many would post bail if they could afford it. Additionally, the Texas study noted above found that only about 30% of defendants from the wealthiest ZIP codes were detained pretrial versus 60-70% of defendants from the poorest ones. *Downstream Consequences* at 737. As the United States Court of Appeals for the Fifth Circuit stated in a case declaring the bail system in Harris County, Texas unconstitutional: The system causes "[a] . . . basic injustice: poor arrestees . . . are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond." ODonnell v. Harris County, 892 F.3d 147, 162 (5th Cir. 2018). Additionally, research suggests that pretrial detention increases the likelihood of conviction, of receiving a sentence to prison or jail, and the length of sentence to prison or jail. For example, the Texas study found that compared to similarly situated defendants who are released, misdemeanor defendants who are detained are 25% more likely to be convicted; 43% more likely to be sentenced to jail; and on average their sentences are nine days longer, more than double that of similar defendants who were released pretrial. *Downstream Consequences* at 717. Similarly, a Philadelphia study found that pretrial detention leads to a 13% increase in the likelihood of being convicted and 42% increase in the length of sentence. *Distortion of Justice* at 3. These studies are consistent with other research finding substantial correlations between pretrial detention and these negative case outcomes. Additionally, there are concerns about coerced pleas. Research as early as 1964 shows that pretrial detention increases the likelihood that a defendant will plead guilty. The Texas study found that pretrial detention increases the likelihood of pleading guilty by 25% for no reason relevant to guilt. *Downstream Consequences* at 771.

Racial & Ethnic Disparities

Another reason to engage in pretrial justice reform is to address racial and ethnic disparities. Nationwide, Black defendants make up 35% of the pretrial detainee population despite constituting only 13% of the US population. In fact, racial and ethnic disparities in pretrial outcomes have been well documented.

Litigation Risk

A final reason for interest in pretrial justice reform is litigation risk. Opponents of money-based bail systems have successfully brought litigation throughout the country. For example, last June the Fifth Circuit held unconstitutional the bail system in Harris County, Texas, finding that it violated indigent arrestees' right to equal protection. It explained:

"[T]he 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. Cases like this have amplified concerns about money-based bail systems.

Having presented this outline of why stakeholders are interested in pretrial reform, in my next post I'll discuss the types of pretrial reforms that stakeholders are implementing and evaluating.